The Racial Discrimination Act sections 18C/D are unconstitutional

A White Paper

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1 Introduction and background

The general background to this paper will be known to most Australian readers: the Racial Discrimination Act contains a section, 18C, making unlawful any public act "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" when "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." Recently some cases have come into prominence highlighting severe problems with this formulation; we shall investigate some of these below.

I intend to present four main arguments:

- one, that 18C does not achieve its objective of prohibiting all racist speech.
- two reasons why 18C is unconstitutional:
  - the limitations of its scope in 18D grant discriminatory rights based on intelligence, education, and power;
  - it effectively bans, or makes too expensive to risk, any speech at all (good, bad, or indifferent) that relates to race and is not covered by an exemption in 18D. Due to the discriminatory nature of 18D, this amounts to an effective total ban (from a combination of actual law and fear of state retribution) on speech about race by certain classes of person.
- and, since neither of the two arguments against 18C depends upon whether one's behaviour might "offend", "insult", "humiliate" or "intimidate" (or, indeed, any other "bad effect" verb that might be suggested to replace any of these), it follows that removing or altering some of these words will not fix either of the two problems I have identified.

Before I get to these arguments, there are some general issues that need to be discussed. These include:

- A preliminary discussion of the concept of "race"; this will be referred to in the arguments that follow.
- A short discussion about the sections of the Act preceding the troublesome 18C: what is right, and what is wrong, with these sections. This is necessary in order to see why, in the main arguments, the superficially similar wording of 18C to the preceding sections has such different consequences.

1.1 Important Proviso: I am not a lawyer

This is necessary because (in general and especially on politically sensitive topics) far too much discussion is tainted by attacks on the arguer rather than the argument: *I am not a lawyer – constitutional or otherwise*. Further:

> This is not intended to be a legal brief.

Perhaps a lawyer could make it into one, but it is not one; it is a discussion about, and a claim for, our fundamental rights as free citizens of a free country. Our laws, however much they get hedged about with legalisms, should respect those rights; the rights must not be sacrificed to legalism. This Act, according to its plain reading, violates our right to free speech.

As I write, the decision in the disgraceful case against the three QUT students has just been handed down. It contains the right outcome, of course; but only because the students' statements were so harmless that they fitted through an extremely narrow window, and because the judge was extremely careful to limit the interpretation of the Act; we can expect others in future to be much more wary, and thus effectively silenced. We the people are entitled to much better: the laws themselves should be just and afford us our rights, just as they are written. For this reason, I shall in places ignore the legal hedges as I make my case. Some of these I shall discuss in closing, but some, I regard as defects in the legal system, which need correcting.

1.2 Background: What is "race"?

If we want to prohibit certain acts based on discrimination according to "race", we need to first be clear what we are talking about. At minimum, this is an ill-defined concept. Many writers have questioned the very concept of race itself. For example, Michael Hadjiargyrou, Chair of the Department of Life Sciences, New York Institute of Technology, writes:

> "Despite notions to the contrary, there is only one human race. … data show that the DNA of any two human beings is 99.9 percent identical, and we all share the same set of genes, scientifically validating the existence of a single biological human race and one origin for all human beings. In short, we are all brothers and sisters." - http://www.livescience.com/47627-race-is-not-a-science-concept.html

At minimum, "race" is an ill-defined concept.

1.2.1 What can we do with an ill-defined concept?

1. We can, certainly, prohibit the use of that mistaken concept as a basis for discrimination: we can, for example, prohibit someone giving unfavourable employment opportunities to a person on the basis of their (mistaken) belief that this person fits within a rigid, well-defined, racial boundary.
2. But we can *not* with consistency include exceptions in our laws for persons of a specific "race" because (obviously) the exception itself is ill-defined, as it relies upon an ill-defined concept. Framing it more vaguely as "certain groups", for example, does not fix the problem unless a precise definition of the group concerned exists, of such clarity that it is unambiguous whether a person belongs to the group.

   It will, I believe, usually be found that, if this is done, persons will be included in the exception despite the reason for the exception not applying to them, and others excluded, for whom the reason would have applied. That is, the use of "race" or any pseudonym or euphemism for it, results in stereotyping. We shall see that exactly this situation occurs with regard to the Act in general and 18C in particular.

However, I do not invoke such considerations in criticism of 18C.

- Firstly, as discussed above, many people do regard race as a valid way to divide people. It is not. The Act (except 18C and possibly 18A) is an attempt to fight real injustices perpetrated by those who mistakenly see some reason to treat others badly based on 0.1% of their genetic code (which they cannot choose or alter). Using "race" as a shorthand for this set of muddled beliefs does make sense; the earlier sections prohibit some discrimination based on these muddled reasons.
- Secondly, to base public policy on questions of how similar others are to us would seem to be the opposite of the fine considerations underlying the pre-18C sections of this Act.
- Thirdly, 18C's problems are so bad and so extensive that they swamp any subtleties that might be based on this question of terminology.

1.3 Background: The relevant legal cases

The following will discuss three actions under 18C:

- The successful action against Andrew Bolt,
- the unsuccessful action against the QUT students,
- the withdrawn action against Bill Leak for his cartoon.

1.3.1 The Bolt verdict

Since the successful action in this case has made the articles under discussion unlawful, it is impossible to give anything except a sketch of the case: Bolt wrote two humorous articles poking fun

at certain "white Aboriginals" for taking awards and such-like which, I believe Bolt felt, were intended for disadvantaged Aboriginals from remote communities. The judge's verdict (discussed later) is one significant reason there can be no hope whatever for fixing the Act by tinkering with the words "offend, insult, humiliate or intimidate".

1.3.2 The "QUT students" case

Three white students were evicted from Queensland University of Technology (QUT)'s indigenous-only computer laboratory, and shortly after made certain comments on social media critical of QUT, and making no criticism of Aboriginals, nor of the University employee who evicted them. Afterwards the employee sued the students under 18C, and this case has just now been dismissed as baseless. Some remarks by QUT administrators, including the Vice Chancellor, are discussed below.

1.3.3 The action against Bill Leak

Leak's cartoon (http://www.theaustralian.com.au/business/media/bill-leak-cartoon-reviewed-for-racial-hatred/news-story/687803550b49792faaaae85c220b83f5) appeared in The Australian on August 4, depicting a conscientious black police officer taking a delinquent black youth to his father, saying "You'll have to sit down and talk with your son about personal responsibility" to which the youth's father replies "Yeah righto what's his name then?"

Despite the fact that the cartoon depicts one responsible and caring black adult and one irresponsible black adult, outrage erupted that the cartoon "stereotyped" blacks. A complaint was lodged, Leak had to engage legal counsel, and then the complaint was dropped. Two other complaints were solicited by an Aboriginal legal service.

2 General discussion of the Act sections pre-18C

Section 18C differs radically in logical structure from the preceding sections, despite being worded similarly. 18D is a "proviso" to 18C. I leave 18C and 18D until my specific discussion of them.

2.1 Good design pre-18C: Each issue is judged on its merits

(From https://www.legislation.gov.au/Details/C2016C00089) I use Section 10 as an example of the sound structure of all the pre-18C sections:

> 10 Rights to equality before the law
>
> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

This section ensures that persons of all races, even whites, enjoy all the same rights as any other (but see the "main deficiency" later). This section does not allow the kind of sophistry practised by some political groups, who argue that, because whites supposedly have "privilege", discrimination against them is justified to "even the balance". But this section says: "enjoy a right" - "A" right. Each right is assessed on its own without regard to other supposed privileges. Get the issue under discussion correct, now; and then, if other things are wrong, fix them too. But don't leave this case wrong on the allegation that something else is wrong in the other direction.

In this case, the Act comes down on the correct side of a hugely important issue.

2.2 The Act limits expansionary readings by being specific

This one occurs multiple times in the legislation, with slightly varying wording:

> It is unlawful … by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

One expansionary reading of great concern is the notion that religion amounts to race, or that discrimination due to religion is equivalent to racism. A careful reading of this wording removes any such arguments from having effect due to this legislation.

The members of a religion are sometimes portrayed as a race. Accusations that critics of Islam are "racists" are now commonplace. But a race is an unchangeable feature of one's ancestry, whereas a religion is (or should be) a freely chosen belief system. It is contemptible to criticise someone for their genes, which they cannot alter, but it often is very reasonable, even desirable, to criticise a free choice of a bad belief system. This law protects against such confusion with its express stipulation that race etc. must be the reason. For example:

> **Chris Chan**: I am worried about Moslem immigration because of sharia law.
>
> **Lief Tist**: You are a racist, because most Moslems are middle easterners, so you are selectively opposing immigration by a racial group.
>
> **Chris Chan**: I do not consider myself a racist, but if you do, too bad, because my **reason** for disquiet is sharia law, pure and simple. My **reason** has precisely nothing to do with middle easterners. I do not worry a jot about Jews, Christians, Zoroastrians, Hindus, Yazidis, Buddhists, or atheists, regardless of their race, and I am concerned about Moslems equally if they are middle eastern or pure white. Hence, you are free to denounce me for what you consider my racism, and I am free to defend myself; but you can not use this Act to silence me, because it is quite clear: race must be the **reason**, not some other consideration that got tangled up in the discussion somehow.

This is an important bulwark against expansive readings of the law taking away more and more of our rights.

To remove a possible confusion here, the Act makes clear that if race is any part of the reason, it is considered to be "the reason". So If Chris Chan had said "I am only a little bit worried about having so many brown skinned people here, but a huge lot worried about sharia law", then this Act would probably bite him.

Just as my own personal opinion, I found nothing to object to in the text of the various protections of the Act itself prior to section 18. 18A imposes vicarious liability on an employer for acts of an employee, which might be reasonable if the employer made some policy, such as "Don't hire blacks", but it seems a stretch if, unknown to the employer, in the chaos of peak hour the employee is serving whites first, or some such. Perhaps some tinkering is in order here.

2.3 Proviso: "Special measures": The main deficiency in the Act

The trouble is in what the Act does *not* say, in what it fobs off to another place: the International Convention on the Elimination of All Forms of Racial Discrimination. The Act says:

> 8 Exceptions
>
> > (1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3)

and the Convention says:

> 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the

> maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

There is a radical flaw in this stipulation, related to the difficulties with the concept of "race" itself. It assumes without proof (and, indeed, in the face of a myriad disproofs), that there exists any such thing as "racial or ethnic groups" that can be precisely identified, "requiring... etc." The first step that should be required of anyone advancing such a justification for racially discriminatory provision of services should be to establish:

i. such a group can be identified; and

ii. any counterbalancing advantage conferred upon them by the discriminatory action does not, in fact, grant all or some of them with superior rights to others from other groups who, indeed, as individuals (instead of as representatives of their "privileged" race), might face even greater hurdles than many of the members of the "disadvantaged" race.

This writer believes that if administrators were required to spell out in detail their answers to these two questions, almost no "special measure" would ever be found that does not "lead to the maintenance of separate rights for different racial groups."

2.3.1 The racist "victim" hierarchy

Let us also candidly admit that there is one absolutely excluded race on the politically correct standard of victimhood, namely whites, for whom a "special measure" will, anywhere, be difficult or impossible to obtain. Also, other races, such as Chinese, are ranked strictly lower on an implicit scale of victimhood than other races, such as Aboriginals, and similar disadvantages apply to those groups in their relations with those higher on the "victim" scale.

It can be reliably predicted that a great many defenders of this law will assume that complaints of anti-white and anti-"less victimised group" racism are inherently biassed and may be dismissed without consideration or reasoning. The corollary of this is that "special measures" will be adopted without justification or reasoning.

The QUT case provides an example. We shall discuss this in the context of the case shortly, but here we note that the cause of the whole mess was a remark by one student opposing QUT's discriminatory 'indigenous-only' computer lab.

In the reaction afterwards, when QUT was apparently in damage control, the "special measures" provision was asserted without any evidence for any particular disability and without referral to any kind of checking. In the words of the Vice Chancellor himself:

> A week after the 2013 incident, QUT vice-chancellor Peter Coaldrake issued a notice in support of the Oodgeroo Unit, saying it was an integral part of QUT's policy approach to reconciliation, equal opportunity and anti-racism. ...," he had said.
>
> (from http://www.theaustralian.com.au/higher-education/qut-staffer-invited-to-identify-offenders/news-story/5a5dddfe2c75a224b1c92826835a0a63)

Let us take the three considerations mentioned here:

- Reconciliation:

  What on earth can he be thinking? Maybe "We're upset" - "OK, here's some goodies"? Worse than any speculation about his reasoning, this is an additional purpose to the "sole" permitted "purpose" quoted above, namely adequate advancement etc. Coaldrake has explained to us that the indigenous computer lab. is illegal.

- Equal opportunity:

  We are simply expected to "all agree" that Aboriginals—such as the plaintiff in the Leak case, who is reportedly on a European tour, or Queensland Minister for Housing and Public Works and Minister for Science and Innovation, Leeanne Enoch—are intrinsically disadvantaged relative to all whites, even the most disadvantaged.

> As for the assumption that whites cannot be disadvantaged relative to other groups, Britain provides a counter-example. In that country it has been found that the absolute worst socio-economic attainment was by poor white boys (https://www.equalityhumanrights.com/-en/britain-fairer/britain-fairer-report – full report p. 24). It appears that there are no "special measures" for these whites.

- Anti-racism:

  > Another racist stereotype? If another race has to be separated out to avoid racism, how is this *not* an accusation of racism against the races who must be kept away from the "special measures" group?
  >
  > That this is the correct analysis of the Vice-chancellor's comment is betrayed by other remarks from QUT, such as this one about the accused students:
  >
  > The university's equity director, Ms Kelly, who reviewed the matter soon afterwards, ... told Ms Prior: "...They were just being nasty..." (http://www.theaustralian.com.au/higher-education/-racial-stoush-erupts-over-qut-computer-lab/news-story/-b80de339339f2d5588839ac06f3c8909)
  >
  > Being nasty? For objecting to discriminatory provision of facilities? It would seem that prejudices are so ingrained that it is "nasty" to object to being treated less favourably than others on racial grounds—but only if one happens to be white.
  >
  > And, of course, this is a second additional purpose to the "sole purpose" permitted by the Act.

In other words, it is hard to see the Vice-chancellor's comments as based on anything other than racist stereotyping and thoughtless waffle. But this nonsense certainly created an impression that the students (entirely innocent, I stress again) had done something bad. Would such careless verbiage be tolerated if directed at any other group than whites? The question answers itself.

2.3.2 Special measures based on subjectivity and stereotyping

Also, regarding "purpose of securing adequate advancement...", someone's "purpose" is subjective and usually impossible to disprove; and objectives can be adapted as events require to ensure that they never are in fact "achieved". One might expect that when some organisation wishes to implement a "special exception", they would first need to get it approved by some impartial process. But no. All that such a racist has to do is claim that the discrimination is a "special measure", and bingo! the Act fails in its purpose entirely.

A "special measure" assumes all members of a racial group have the same challenges, based on the characteristics of only some. Even if it applies to most, is the very kind of attitude that is at the heart of racism itself. And the QUT students might well ask why children of, say, Linda Burney, Aboriginal MHR on a base salary of $195,130, should receive superior support facilities than a white student from a poor dysfunctional family. Perhaps, even, the white student was addicted to heroin at birth due to his mother's drug taking, and can only pursue (heroically) his studies in between drug rehabilitation treatments, and in those few hours the only unused computers were in the empty indigenous students lab. It seems indisputable that the very notion of "special measures" will unfairly disadvantage some against other less deserving persons from a more highly-regarded race.

The very concept of "special measure" is both of:

1. a racist stereotype that results in some less needy persons being privileged over more needy persons; and
2. a false claim that races really are in disjoint rungs on a privilege ladder: that there is no such thing as a white person less privileged than the most privileged non-white person. This is all the more odious when we remember the weaknesses in the concept of "race" itself.

The inclusion of reference to this troubled Convention in the Act seems to be for the sole purpose of completely eviscerating the Act's protections for whites, and lowly-regarded "victims" such as Chinese being treated in a racist manner in relation to a highly regarded victim group such as Aborigines.

We now move on to 18C itself.

3 Apart from its infringement of free speech, 18C does not even achieve its anti-racism purpose

Note: In these discussions I shall discuss some hypothetical situations involving racism or the lack of it, with Aboriginals as the criticised race and a white person as the criticiser, in the main because the real cases under discussion (Bolt, QUT students, Leak cartoon) all involve the same combination.

3.1 Because 18C has an illogical structure, it cannot work in all circumstances

Many supporters of 18C do so because of a belief that it stops racist speech. Limitations on our right to free speech are, many believe, necessary to stop racists causing hurt and distress.

Before moving on to why I believe 18C is an intolerable infringement of human rights, it is worth a digression to show that even this supposed benefit is illusory.

18C doesn't work, and it doesn't work because it is nonsensical. Nonsense can often get past our defences if it is made to look superficially like something else that is not nonsense. This is the case with 18C's close verbal similarity to preceding sections, and it is dangerous because nonsense can be used to prohibit reasonable, or even good, things, and it can also be used to excuse bad things. Before coming to the unconstitutionality arguments, we can gain some insight into this matter by looking at where it fails to protect.

Compared with the careful, rights-preserving wording that precedes it, 18C comes as a rude shock. As I shall show, it is poorly worded, dangerous nonsense. Here it is:

> 18C Offensive behaviour because of race, colour or national or ethnic origin
>
> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

The public commentary I have seen concerns where this Act goes too far in banning reasonable speech; but it also does *not* ban at least some actual, outright racist speech. Here is the worst kind of racist in full flow. (I use a minimal racist statement in this example for reasons of avoiding needless unpleasantness, but all the reasoning below works the same for a lot of much more outrageous and damaging material.):

> **Ray Cyst**: I hate aboriginals!
>
> **Dee Cent**: That is appalling! You can't possibly justify that!

Let's interrupt the racist and the decent person for a moment, and consider some possible continuations of this discussion. But first, we note for sure that a great many good and caring people will be offended, and the Aboriginals amongst them may well be (and justly so) insulted and humiliated. And if Ray Cyst hold any kind of power or authority, they might also be intimidated.

But despite this, it is hard to see how a strict reading of this section gives any kind of case against this obvious racist.

The problem is that clause (b), which makes so much sense in the earlier section, doesn't make sense here, as I shall explain shortly.

Let us imagine one possible continuation:

> **Ray Cyst (version 1)**: I certainly can justify my opinion: Their feet's too big!

(With apologies to Fats Waller https://www.youtube.com/watch?v=lzu0hG9qr5k)

Upon hearing this, Dee Cent would, of course, be horrified. Quite a few objections would probably occur, such as:

1. It isn't true, or not generally true, or at least, no more true than for any other group;
2. It's a horrible reason for hating someone;
3. Even if it were true, you shouldn't hate people for things outside their control;
4. It's just a made-up excuse;
5. You're just trying to stir up trouble;
6. No one can be blamed for the size of their feet;
7. Are you some sort of "comedian"?
8. and so on.

There is, however, a problem with all these objections: not one of them causes Cyst's statement to fall foul of section 18C. Whether people should be allowed to say dreadful things that sane people disagree with is a separate question, but the fact is, not one of these analyses of Cyst's hateful statement (with a possible exception for (4)) causes it to fall under 18C's stipulation that "the act is done because of ... race, colour or national or ethnic origin...". Plenty of whites have big feet.

Now two possibilities here: upon further digging, Dee Cent discovers that Cyst's objection to Aboriginals really is his belief that they have oversized feet; he just as much hates whites, or Chinese, or anyone else whose feet do not meet his smallness standards. That, of course, seals the issue: section 18C does not prohibit Cyst's statement; nor would it prohibit even worse and more threatening statements that ultimately derive from his uniform objection to large feet.

So let us assume that further digging discovers a racial reason for Cyst's statement, or that, simply, Cyst gives it up-front as his reason:

> **Ray Cyst (version 2)**: I certainly can justify my opinion: They are aboriginals.

Here is where the Act's stipulation that "the act is done because of ..." misfires in a way that it does not do in the previous sections. In summary, the previous sections prohibit restrictions on all of the following if done because of race (where I use "race" as a summary of "race, colour or national or ethnic origin"):

1. equal exercise of fundamental rights (section 9);
2. extends all laws to all equally (section 10);
3. grants equal access to public places (section 11);
4. extends equal access to land, housing and other accommodation (section 12);
5. equal enjoyment of goods and services (section 13);
6. equal right to join trade unions (section 14);
7. equal treatment in employment (section 15);

and also prohibits advertisements implying that any of these rights will be infringed (section 16).

The key point here is:

> *All of these preceding sections concern practical, specific areas of concern where a person's ability to live equally in society might be infringed in well-specified ways.*

To say, for example, "You don't get to enter the park because I don't like Aboriginals" can be (and should be) banned because not liking Aboriginals is an odious, clearly wrong and offensive, reason for blocking entrance to the park. But the problem with 18C is that this kind of clear thinking cannot in general be carried through. Cyst, in the second version of his argument above, is essentially saying:

> **Ray Cyst (version 3)**: I don't like aboriginals because they are aboriginals.

Unlike the park situation, this is wrecked upon the shoals of bad logic. Expanding the logic somewhat, we have:

> **Ray Cyst (version 4)**: I don't like persons belonging to the set "aboriginal" because persons belonging to the set "aboriginal" belong to the set "aboriginal" .

But the part after "because" is a necessary truth. Logicians would simply replace it with "**true**":

> **Ray Cyst (version 5)**: I don't like persons belonging to the set "aboriginal" because **true**.

Two things:

1. **true** can form no reason or part of a reason to believe anything, because **true** is (obviously) always true. (This is why no one ever says, and it looks absurd, to say "because true.") If it can never be a reason, it cannot be the "because of" referred to in 18C(1)(b); Cyst version 5 is exactly equivalent to 'I don't like persons belonging to the set "aboriginal" for no reason at all';
2. despite its misleading appearance in Cyst versions 2, 3 and 4 above, Cyst's non-reason has nothing to do with Aboriginals. It looks as if it does because it includes the word "Aboriginal" - but it does not, it is simply a confusing way to write the universal (and useless) logical predicate, **true**.

Point (2) still might not be obvious. To see it more clearly, suppose Cyst had said:

> **Ray Cyst (version 6)**: I don't like aboriginals because water is wet.

It should be very clear that in version 6, the reason after "because" is no reason at all for what precedes it.

*And yet, in version 6, "water is wet" is more of a reason than **true** can ever be, because it is not a necessary truth.* Water might, in some universe, not be wet (like mercury) or at some temperatures in this universe it is not wet (rock hard extremely cold ice, and very hot non-condensing steam). Something that need not logically be true might, however unlikely, end up being relevant; but a logical necessity can never be, and thus can never be a reason for any conclusion whatever.

The cause of this malfunction in 18C is that, whereas, in the sections prior to 18C, the reason is a claim, belief, or assertion used to justify an *action*, in 18C the reason can be, in some cases, a claim, belief, or assertion used to justify a *claim, belief, or assertion*. This opens the way for reasons to collapse into **true** and thus disappear, and also for circular arguments, which I shall not specifically discuss.

Another way to explain this is that the word "reason" has at least two interpretations:

1. The *reason* for some assertion must be *reasoning*; for example, I believe water is wet because I have seen liquid water sticking to things, getting embedded in clothes in a rain storm, etc. This is the case in some applications of 18C;
2. but an action in the preceding sections is limited to discriminatory behaviour, which is always action with regard to specific persons. The reason for an action in a specific case may well be (and this is not circular reasoning): "because I don't like people of that race."

Now in the case (2), there may well be other reasoning behind that dislike, and that reasoning might be subject to all the problems discussed above. But once that conclusion has been reached (for whatever reason), using it as a *selector* for choosing who is to be disadvantaged is prohibited by the Act prior to section 18C. Using a belief or a feeling about a race as a selector for discriminatory action is prohibited in sections prior to 18C, and this is in no way subject to the logical problems that arise when trying to prohibit beliefs on the basis of reasoning.

One might object: "Come now, you are simply being obtuse—even *unreasonable*—applying such abstract logical analysis to all this; blanket denunciations of a race should be illegal."

To that I answer: Maybe, maybe not—I personally would prefer to subject such morally-challenged persons to the full scorn of public opinion—but regardless of the merit of prohibiting such speech, *18C does not do so*. To reinterpret it so as to ban things that its text simply does not ban is to establish a precedent that any law may be rewritten on the fly by any judge (or worse, a star chamber "commissioner").

The effect is to destroy the rule of law entirely.

18C is fundamentally flawed for reasons of pure logic. The reason why it goes on from *not* prohibiting a lot of extremely bad speech to prohibiting *all* perfectly reasonable speech on certain topics by certain non-privileged classes of persons is due to even more bad design on top of the fault we have already identified.

3.1.1 Objection

There is an objection to my argument above that someone is sure to raise: "It is not," it might be claimed, "that 'I don't like Aboriginals' is being used as the reason for not liking Aboriginals, but rather, that it is being used as the reason for *saying* 'I don't like Aboriginals'."

Very well. If that is what 18C degenerates into, consider the resulting high farce:

Ray Cyst has said "I don't like Aboriginals." If he said it because he doesn't like Aboriginals, he has broken the law, as in:

> **Ray Cyst**: I don't like Aboriginals. My parents brainwashed me with racism. It will never change.

Obviously, this is an explanation, maybe even an apology, from a deeply troubled person. Nevertheless, it might offend or insult someone, perhaps even, if Cyst is large and beefy enough, intimidate them. Also the reason for the statement is Cyst's dislike of a particular race, and, unless some sympathetic judge can fish something in his favour out of 18D, is therefore illegal.

On the other hand:

> **Ray Cyst**: I hate Aboriginals!
>
> (later, in private) **Dee Cent**: Why did you say that disgusting thing in public?
>
> **Ray Cyst**: Heh heh, I've got nothing against Aboriginals, I just like to see the horrified looks on everyone's faces. The whole crowd shocked and in fear of a racist riot, or maybe in fear of action by the HRC. Wonderful stuff!

In this case, of course, the far worse behaviour does not contravene 18C. It might break other, more reasonable, laws, but if so, that is evidence that the nonsensical 18C, as well as being damaging, is superfluous. If we 'buy' this objection to my argument, we see that there are a whole raft of assumptions behind 18C that do not always apply and, in some cases where they misapply, they do so in a damaging way.

If we prevent the logical breakdown described above by interpreting this section as prohibiting the mere *saying of words*, rather than *expressing an opinion*, then we are left with the farcical result that the saying is prohibited, *only if the speaker is telling the truth.*

If we 'buy' this objection, then, as far as 18C is concerned, a malicious, dishonest speaker intent on general mayhem may say whatever harmful racist words they please, because race is not their reason (in the sense of motivation).

4 18C/D are unconstitutional (1): Differing protections for different classes

This is the first of my two main arguments against 18C. Its supporting section, 18D, discriminates.

Section 18D states:

> 18D Exemptions
>
> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

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

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

- Section 18D(a) grants to creators of artistic work a right not enjoyed by creators of other works.
    - One example, crafts: Most artists and crafts people I have asked clearly distinguish their field from the other; crafts are not protected. At minimum, this is vague and leaves open the prospect of discrimination.
    - Another example: computer programmers. A programmer distributes an "app" for telling the user when to apply sunscreen; a dark-skinned person is offended that the programmer has ignored their needs (since only fair-skinned people will need the sunscreen app). (Note that the "reasonably" in 18C does not challenge any unreasonableness in the offence-taking at issue, for reasons we shall examine under the second argument below.)
- Section 18D(b) privileges persons with sufficient educational, artistic, or professional standing to frame within the given parameters an argument that might be the same in substance as an argument from a non-academic, non-artistic, and non-scientific person. This is not cured by the "any other genuine purpose in the public interest" proviso, as this still privileges those with the capacity to formulate their vaguely held feelings and ideas into a sufficiently coherent account to be of public interest. This clause is, in effect, an intelligence qualification; of two persons with identical messages, one will be capable of formulating it to pass this test, another will not.

  Of two persons with identical opinions for identical reasons, one will have the education and intelligence to set up a university seminar to express that opinion, the other will gripe about it over a beer in the local pub, lacking any other recourse at all to object to the problem at issue. One is breaking the law, one is not. Equal protection is not granted to all.

5 18C/D are unconstitutional (2): effective prohibition of all speech on affected topics

My second argument is the over-reach inherent in 18C (and not curable by any tinkering with the terminology, as we shall see). Section 18C prohibits in practice, even if perhaps not in strict law, *any speech at all* on race, which is not excluded by some part of 18D.

5.1 Firstly, 18D is not much help

Contrary to common assumptions, 18D does not protect one against 18C.

Before considering an example of legitimate speech and showing why 18C bans it, we first note that 18D is as riddled with uncertainty as 18C. Cold hard experience shows us that it offers no protection at all against completely baseless legal attack. In the famous case of the QUT students, the "offence" in one student's case consisted entirely of the remark "fighting segregation with segregation." The case has now been rightly dismissed, but this does not make mention of it moot, because of the uncertainties we shall see shortly.

The remark was made in response to what any reasonable, untutored person might assume to be illegal activity of QUT in denying some students equal access to facilities on the basis of race. From the Act:

> 13 Provision of goods and services
>
> It is unlawful for a person who supplies goods or services to the public or to any section of the public:
>
> (a) to refuse or fail on demand to supply those goods or services to another person; or
>
> (b) to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon or subject to which he or she would otherwise supply those goods or services;
>
> by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

Education is a service, which was (and is) provided by QUT on less favourable terms to non-Aboriginals than to Aboriginals.

Objecting to this racism would seem to be of the very essence of freedom of speech.

But this obvious fact, relied upon by the QUT students, was ignored by QUT and the HRC. As we have seen, this entirely reasonable action was deemed "nasty" by a University officer. Also, the Vice-chancellor, continuing the section quoted earlier, said:

> "All staff and students have the right to go about their business without being offended by ill-informed remarks in the public domain, and knowing that they will be treated with respect and courtesy," he had said.

Further, from Ms Kelly again:

> Ms Kelly also advised Ms Prior and two other indigenous staffers of the unit: "I have emailed **the offenders** and instructed them to remove the posts." [bolding mine]

By calling them "the offenders", QUT prejudged the case (wrongly). And, I note in passing, instructing them to do anything at all with their words is itself infringement of their rights to free speech.

The behaviour of QUT seems to have been entirely centred on defending itself against allegations under 18C, by stressing its intolerance and disapproval of the (now found to be entirely reasonable) comments of the students. Given the typical "psychology" of institutions in general, such a reaction would likely be expected from many and varied companies, universities, and other organisations. This failure to defend the students and explain to the plaintiff their legitimate rights may well be one reason they were ultimately subjected to the distressing legal attack. Such institutional behaviour will likely be repeated in future cases.

It is clear that 18D's protections offered no help to the students at the time of the incident; they were assumed to be at fault (although not necessarily guilty) by two key officials at QUT.

And what was the extent of the student's "offending"? He may have been wrong in assuming that the Act protected him, as a white, as much as it would protect anyone else, against discrimination. Regardless, the QUT students were and are entitled to argue that QUT has violated the law, and/or that it still tries to remove segregation by segregating, and/or any number of other reasonable propositions. However, the only possible aid they might have found in 18D would be if their being thrown out of the lab were ultimately found to be a "matter of public interest". And clearly the QUT Vice-chancellor thought it was not ("ill-informed remarks") as did his officer Ms Kelly ("offenders", "just being nasty").

Who, other than a person of considerable means, would ever advance their opinion if it risked years of legal trouble and life-ruining expense, all hinging on a judge's opinion on whether the matter concerned was of "public interest"?

The concrete history of this saga shows that 18D provided no protection whatsoever, as the process has turned out to be the punishment (and other students were induced to part with monies to avoid being subject to the same process). It is strange indeed that so many cannot see that:

- the process parallels trial by ordeal—rightly condemned to the scrapheap of history some 1,000 years ago; and
- the secrecy parallels the operation of the Star Chamber under Charles I.

If at least one of these student's arguments cannot be counted upon to trigger immediate dismissal of this frivolous complaint (not dismissal after years of emotional strain and financial costs), then nothing in 18D can be relied on. Justice delayed is justice denied—as is justice too expensive to afford. The section is useless. It is further condemned by its administration by a secret chamber, in which cases are not subject to the disinfectant of public exposure in a court. A biassed judge can be reported upon and criticised in public; secret star chamber proceedings, administered by persons of arguably great bias, can go on for decades without exposure. (And, it would appear, they have.)

But nonetheless, the following demonstration of overreach by 18C will not depend on anything doubtful about passing the tests in 18D.

5.2 18C violates our right to free speech (1) by misplacing the "reasonableness" requirement

One part of my argument is:

> because the wrong person is required to be reasonable.

Summarised, it says:

> It is unlawful for a person to do a [public] act [because of the race etc. of the target], if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people.

The person who must be reasonable is *not* the offence-taker. *The offence-taking does not have to be reasonable.* The onus is placed on the speaker. What must be reasonable is *not* the content of their speech, but an assessment of its effect upon members of the group being discussed. Now there are all sorts of "hedging about" in 18C and 18D to try to restrict this only to "reasonable" cases. So, let us grant *all* of the mitigations in 18D. Let us assume that a speech is made that violates every hedge: not in the public interest, not fair or accurate, not artistic, blurted out by a drunk in the pub rather than an academic in a scholarly debate, done because of the race, and so on. Assume the *everything that can be wrong about it is wrong*.

Despite all this, it is easy to find examples of speech that are clearly within the bounds of decent, non-racist behaviour. However, under 18C, the speech will be unlawful if the speaker should have made a "reasonable" assessment that the speech is likely to offend [an individual or group].

Example:

> **Pub Drunk**: These Aboriginals! Love 'em! Bin here since the creation of the world! Give 'em the whole bloody country I say!

Let's look at it:

- the whole country? Definitely not in the public interest;
- not artistic;
- a "performance" maybe, but not the kind referenced in the legislation;
- not a "report", fair or otherwise;
- not accurate: been here 60-odd thousand years, not 4.5 billion;
- not a genuine belief—let us assume the drunk noticed the head of the Human Rights Commission sitting nearby taking notes;
- no genuine academic, artistic, scientific, or other purpose.

Like the drunk or not, approve of their behaviour or not, consider their words vulgar or not, the fact remains that the only thing this drunk has done is make a positive comment about Aboriginals. For those who wish to make much of the non-genuine nature of the comment, we can also assume that this drunk really does have a positive disposition towards Aboriginals, but in their drunken state they exaggerated to the point of absurdity out of fear of a certain onlooker.

> Despite this drunk's friendship with Aboriginals, despite his positive beliefs and the fact that his statement about them is positive, a reasonable person must surely assume that this statement is "likely to offend" *someone*.

Why? Because groups of people are almost certain to contain unreasonable people, and nothing in the wording of this legislation requires that the offence-taking be reasonable, only that it be reasonably likely that someone—for whatever fantastic reason—will be offended.

And indeed, we might easily imagine that another person in the pub, Tim Somethingorother, looks about for the darkest skinned person he can find and begs him: "You hear that! That sarcastic tone, that obvious insincerity! Please, please bung in a complaint with the HRC—I am sure (wink wink) they will take it very seriously!"

If you find the "Tim" scenario far-fetched, remember that a very large proportion of human beings do not like being patronised. The drunk's over-the-top comments do patronise. Reasonably, he should have expected that some unreasonable person would be at least one of offended, insulted, humiliated or intimidated.

[Aside: If you *still* think this scenario too unlikely, consider how unlikely it would have seemed, in the actual QUT case, to someone making a 'smart Alec' remark, obviously in jest, about the "white supremacist computer lab", to imagine that someone actually would "[fear] physical assault and a KKK presence in the university." (http://www.theaustralian.com.au/business/legal-affairs/-doctor-casts-doubts-on-qut-employees-18c-racism-claim/news-story/-acef2c0721cee62b98c564f837bdbeac)]

Further, the effect on the Aboriginal listener might, indeed, *not* be unreasonable! The listener might be aware that in that same pub, listening to the nonsense, was a group of real racists, who would be incensed at the idea of giving Aboriginals the "whole bloody country". The Aboriginal might be genuinely intimidated, and perhaps even actually beaten up upon leaving the pub. So let us have no objection on the basis of Judge Jarrett's comments in his ruling in the QUT case, where he argued that 18C does not cover trivial matters (30(o)):

> "to "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights: Creek v Cairns Post at [16]; Clarke v Nationwide News at [65]-[76]; Eatock v Bolt at [268] "

The drunk should well have been reasonably aware that, however few their number may be, the population does contain racists, and any comment (positive, negative, or neutral) might, or actually will, trigger some of these into action. The more public the speech, the more likely such an outcome will be. If the pub contains a dozen people, the drunk might have been reasonable in assuming a bad outcome was unlikely. But if a comment is made in, say a cartoon in a national newspaper, then for sure it will be read by some racists. These racists may even be spurred into action by the reaction *against* said cartoon.

Under the dystopian rule of 18C, the cartoonist, all his critics, and all his defenders, have fallen afoul of 18C.

But sticking with our pub drunk, again, the description "reasonably likely" places another intelligence test upon the speaker. This is not at all the same as, say, a road rule that says we should not drive in a manner reasonably likely to cause an accident. Such a rule should be capable of being met by any driver; and if not, the person should not have a licence. A law against reckless endangerment of life, again, imposes a reasonability test. But again, the scope of the law is concrete actions. Throwing daggers into a crowd would, in any normal person's view, be likely to kill or seriously injure, and someone who cannot see that, who continues to go around throwing daggers, must be removed for the protection of society.

This is not the case with our foolish pub drunk. Speech is an area where we need to be able to test assertions that are at the limits of our own understanding. In my own field, I often hear incorrect remarks about quantum mechanics from non-scientists. They are doing their best; I do not call for them to be prosecuted, I explain the facts. So let us say that the drunk knew there were Aboriginal listeners, and knew there were white racist listeners, and his foolish blather was, in his muddled mind, some kind of attempt at being nice and bringing people together. But anyone else in the pub with even a glimmer of common sense, who knew the other listeners (as we assume the drunk also did) would have predicted that this rubbish would have the opposite effect and cause a race riot.

The reasonability test comes down against the drunk in this case, yet all his actions were understandable, given his limited understanding. If one wishes to object that I am making my case with a drunk, and he should bear some responsibility for getting drunk in the first place, then just replace the drunk with a sober person with Down syndrome, and try arguing that he should be at a legal disadvantage in expressing his beliefs, purely because he is intellectually challenged.

> Speech is not like driving, not like throwing daggers, and not like barring people from entering parks, or telling them to sit at the back of the bus; it is fundamental to being human.

As we have seen, 18D is of no use in having confidence *in advance* against any 18C action. The case of Andrew Bolt, a man committed to speaking in good faith, should put paid to that. Despite his complete belief in his case, his surety that the subject is in the public interest, and his willingness, even now, to defend his statements (although, as he often reminds us, it is now unlawful for him to do so), all the bulwarks in 18D were breached and debate on a matter of genuine public interest was closed down. And as the case of the drunk shows us, there is speech that breaks all the 18D protections, but which (one hopes) no reasonable person could think should be illegal, even if it is unwise.

5.3 18C violates our right to free speech (2) by requiring omniscience in the speaker

Again, the text of 18C:

> It is unlawful … to do [a public] act, if the act is reasonably likely, in all the circumstances, to…

In the case of speech, it is absolutely necessary that a speaker should be able to say anything that he or she (or even a "reasonable person") judges *at the time* to be not mischievous. For example, other laws prohibit inciting violence, defamation, yelling "fire"in the theatre, reporting state secrets to Moscow, etc. And yes, someone might "get it wrong", get sued, and lose. Yet in every case, it is within the bounds of realism that they could have seen at the time that there was something wrong with their statements. But this law raises the standard to an impossible level. As the Bolt case, especially, has shown us, an article that was purely ridicule, and thus reasonably likely to offend, was judged, after months of legal wrangling, and consideration of distant consequences, to also be intimidatory.

We see, therefore, from the intricacy of the judgement in the Bolt case, that the "reasonably likely" in this law does not refer to what a speaker could reasonably predict at the time, it refers to what months or years of expert legal consideration will think about the speech in retrospect, informed by all manner of additional facts or claims put forward in legal pleadings.

In some cases, this is reasonable: someone barring entry of Aboriginals to the park might have what they think is a good reason, yet after a court case, they are told "No, the park must be open to all." Again, the difference between the earlier sections of the Act and 18C comes into play. Any reasonable person should be able to see *at the time* the wrongness of selecting, on the basis of race, who is to enter the park. Indeed, the law says in black and white that it is not legal.

Such clarity is not available in 18C. Predicting how "reasonably likely," interpreted as in the Bolt case, will impact any statement at all is strictly beyond the capacity of the human mind. To be sure of not breaking this law, every speaker must do the impossible. Since conviction at law and legal costs follow from making a mistake in this regard, the law places an impossible hurdle in the path of every speaker who cannot afford the luxury of lawyers, no matter how innocent their remarks may be.

The correct legal principle simply has to be, not merely that outcomes are right in the end, but also that unacceptable burdens are not placed upon obtaining those outcomes. Imagine a law that said "Anyone advocating an Australian republic shall be charged with defamation against the Queen." If we accept that "she'll be right in the end" makes a law reasonable, then the same would apply with this foolish law. Case after case would be dismissed after republican after republican was dragged through the courts at great personal cost. I suspect that such an anti-republican law would be summarily tossed out as an outrageous infringement of free speech. For the same reason, so should 18C.

5.4 But earlier you said...

Earlier I argued that 18C permits some genuinely racist commentary. That argument boiled down to *either:*

1. If the prohibition is against the arguing the *argument itself*, then in some cases the racist "reason" is equivalent to a tautology and logically disappears; *or*
2. if the prohibition is against the *saying of* the argument, then it will happen that truthful speakers are breaking the law, whilst liars saying the exact same thing are not.

The point was, of course, that, regardless of whether one believes that racist speech should be banned (as opposed to denounced by right-thinking people), the fact is that 18C is capricious and often ineffective.

But now I am arguing that, in effect, speech on entire categories of topics is prohibited or too dangerous for the average person to engage in, regardless of its content. How can these two arguments both be correct?

Recall my explanation of why 18C does not conform to the (much better) logical structure of the earlier sections, despite its similar wording: in the earlier sections the "reason" was used as a *selector* for the targets of discriminatory action, but in 18C, the action was, in itself, speech. When not used as a selector, when used as advocacy of a truth, if there is no content except the racist sentiment itself, that sentiment disappears from the reasoning. However, in any serious discussion, there will be propositions that are not universal truths.

In our example above, Pub Drunk said, firstly:

> "These Aboriginals! Love 'em!"

So far, so good. If he had left it at that, nothing but his sentiment about Aboriginals would have been present, and my previous argument about the ineffectiveness of 18C would have saved him. But he went on to say:

> "Bin here since the creation of the world! Give 'em the whole bloody country I say!"

By introducing a contingent proposition ("Bin here since the creation of the world!"), his argument became dependent upon the race of the people he was talking about, since it is only Aboriginals about whom this claim was made.

> 18C catches our drunk, not because of his sentiments about Aboriginals (although that would likely be the reason a person might lodge a complaint about him), but because he made a colourless historical comment.

But be very clear: it is irrelevant that the historical comment was incorrect. All of the following are equally ensnared by 18C:

- Aboriginals have been in Australia for 4.5 billion years;
- Aboriginals have been in Australia for 60,000 years;
- Aboriginals have been in Australia for 40,000 years;
- Aboriginals behaved with hospitality and friendship to Captain Cook;
- Aboriginals are the traditional custodians of the land;

- Aboriginals have always lived in Peru and never in Australia;
- I can prove it: I have an Aboriginal friend who speaks Spanish.

The incongruousness of this list highlights the unsatisfactory deep "logic" of the wording of 18C. In short, 18C endangers all *useful* discussion of any racial problem. Of the arguments that pass through its net (arguments based solely on necessary truths), even the best of them, the correctly argued ones, are almost always: (1) true, (2) trivial, and (3) useless for guiding any practical action to fix problems. All the useful arguments are either unlawful, or at risk of ruinous cost should they ever be expressed.

5.5 The fundamental defect in 18C/D

The defect is really a single one, but best explained as having many facets:

- Justice delayed (or unaffordable) is justice denied;
- the process is the punishment;
- certainty of immunity when making any statement at all (no matter how well intentioned, true, reasoned, or in the public interest) is unobtainable;
- the speaker knows in advance that the case will first be tried in a secret chamber operated by persons who, a great many reasonable people are convinced, are appallingly biassed;
- reasonable persons should expect unreasonable reactions (to anything at all), and so they are left to hope for a reasonable judge such as Judge Jarrett, rather than an unreasonable one, who shall remain nameless;
- and in any case, speech must be made in the moment or the opportunity lost forever, whereas reasonableness, in 18C, is decided in light of years of legal consideration and extra evidence, which the person in the moment does not and cannot possess;
- all this is facilitated and exacerbated by the fatal defect that 18C, in the case of some speech, reduces to irrational nonsense;

The end point of all this is that 18C creates an atmosphere in which reasonable people can have no confidence that their lives will not be blighted should they make any statement at all remotely concerned with any race-related topic. 18C creates this uncertainty regardless of any strictly legal interpretation. We can, I think, be assured that, regardless of the good outcome for the QUT students, had they known at the outset what the unreasonable reaction would be, they would have self-silenced themselves. Elites in academic or political ivory towers may well consider that irrelevant; ordinary people, with their reputation and the security of their job or their job prospects at stake, will simply shut up.

6 No tinkering with the wording "offend, insult, humiliate or intimidate" can fix either of the two defects discussed above

Some proposals for fixing 18C suggest removing some of the four prohibited anticipated outcomes (usually "insult" and "offend", leaving "humiliate" and "intimidate"). Unfortunately 18C cannot be fixed by such a limited amendment.

As the Bolt verdict has shown, these four categories are porous: if someone did not offend you, recast your argument as "being humiliated" or inflate the scariness of the situation (as undoubtedly happened in the QUT case) and claim "intimidation".

The porousness of these terms can be seen in a few excerpts from the Bolt verdict:

> "83 Ms Cole found the first article very upsetting. She had calls from her aunties asking her "why are they saying that about us?" In her view, the article affected the whole Aboriginal community and Mr Bolt's words "offended and hurt everyone". The reference in both the first and second articles to her exhibition offended Ms Cole. She perceived Mr Bolt to be deriding her and giving no artistic reference to what she was trying to convey.

> She found his use of the phrase "distressingly white face" insulting, humiliating and offensive. She was intimidated by the Articles."

I think many untutored observers might imagine that "intimidate" means what it used to mean: to make threats, or display the possibility of using power to harm, or imply bad consequences. But all Bolt did was poke fun at his targets. That did not stop the plaintiff from conjuring intimidation out of, either nothing, because nothing Bolt wrote was remotely intimidating in any traditional sense of the word, or else her imagined ideas of how others might react upon reading Bolt's articles. So even if all the other three causes were removed, leaving only the worst, "intimidate", every speaker would have to consider, not only the intimidatory capacity of their own words, but how any possible hearer might anticipate how others might react to them upon hearing the original speech.

What is to stop this process regressing indefinitely? ("You should have anticipated that he would anticipate that she would anticipate that they, anticipating trouble from ..., would feel intimidated, which would intimidate them into intimidating her into intimidating him.") Indefinitely nested trouble.

Silly? Well the verdict goes on to say exactly the above:

> "295 It is also reasonably likely that she will be humiliated and intimidated by her perception of the capacity of the Newspaper Articles to generate negative or confronting attitudes to her from others – work colleagues and acquaintances who seemingly pause to study her appearance as she passes and others to whom she is introduced as an Aboriginal person. She will have a **heightened fear** of experiencing unpleasantness of the kind **experienced by** Mr McMillan when he **perceived that** he was being asked to justify or confirm his identity by his University and to the Australian American Fulbright Commission." [emphasis RH]

That's two levels of indirect intimidation right there. Why not a third, fourth, ... or twenty-fifth? If you tell me I am a poseur (an insult), is it not always possible that I might think "If people think I am a poseur, perhaps I will be attacked some night in a dark alley" (intimidation)? If intimidation is allowed to be transitive (and it *is)*, everything, even compliments, becomes intimidation.

So, removing just some of these causes of action would give a false sense of security. Each of the two main arguments shows a reason why 18C (regardless of "protection" by 18D) is an unacceptable infringement upon our liberty. The existence of any curtailment of speech structured in the manner of 18C will have dangerous consequences, given the importance of many of the issues we need to discuss openly. It is not at all like a law banning the yelling of "fire" in a crowded theatre.

The verdict against Andrew Bolt showed that second-level (or more) inferences (that is, the person offended or insulted is in fear because of inferences about what others might think or do as a result of the insult or offence) *are* taken into account in determining the categories that the original speech contravenes.

> Every statement that someone takes issue with can be recast—with the blessing of the ruling in the Bolt case—into intimidation, and from now on, almost certainly will be.

Only complete annulment of 18C/D will fix it.

7 Conclusion

7.1 Summary

I have argued that there is an essential difference between:

1. actions taken using race (etc.) as a *selector*; that is, using race to choose who is or is not to receive a benefit or a disadvantage, and
2. arguments made using some proposition or claim about race (etc.) as an axiom in reaching a conclusion.

In the former case, which applies in the pre-18C parts of the Act (as in "Aborigines may not enter the park"), decisions are based on prior judgements about one or more races. "The reason" for the action is that the person victimised belongs to a race disliked by the perpetrator. It is hard to see how this is anything other than racism: treating people differently based on their genetic ancestry.

But in the latter case, which applies to speech in 18C/D, such a neat analysis fails when subjected to deeper logical scrutiny, as I have done above, because "the reason" is, now, a logical reason, an axiom in a logical argument, not a selector in a practical action. And we have seen that the argument, in addition to any racial axioms, *either* involves only necessary truths, *or* it includes contingent propositions.

- If it involves only necessary truths, it ultimately becomes itself: the racial axiom restated, perhaps in a differently-worded form, but ultimately just the same racial proposition. In this case it cannot be "the reason" for itself; all such propositions would (if judges were as logical as mathematicians) pass unscathed through 18C.
- If it involves *any contingent proposition* then the racial statement can be "part of" the reason for the end conclusion. This creates a conundrum: hearers will typically judge the speech on its racial content, whereas it is the presence of (but not the content of) the contingent proposition(s) that ensnare the speech in the spider's web of 18C/D. Logically, then, there will be admirable things said that are actionable under 18C, and terrible things said that are not actionable. In order to make some semblance of sense out of this mess, judges can, I believe, be predicted to try to "be reasonable". Unfortunately, no mortal human can be expected to correctly guess what will seem "reasonable" to a judge at some future time. The law is, I claim, contrary to natural justice due to its inherent nuttiness. In practice, it imposes a speech-chilling danger upon any speech whatever that, in order to be useful, includes contingent propositions. Worse, it doesn't matter whether the contingent propositions are true or false; if anything, being truthful likely involves the greater danger.

7.2 Supporters need to think again

Against arguments for removing 18C/D, it is common to hear fears expressed that all sorts of racism will be unleashed if "racist" speech is permitted. However, 18C/D does not do this, as I have argued above. But I suspect that many a supporter of 18C will feel "Yes, these arguments against it might be right, but it is better to have some sort of threat to keep people in line, even if the threat is based on a badly-written law."

But this bad section undoes the previous good sections of the Act. We have seen how the QUT students were embroiled in a legal quagmire for non-racist comments about what they felt was racism against them. Now, in the wake of the dismissal of this terrible case, an argument has been made that the statement "stopping segregation with segregation" is itself illegal:

> The appeal documents assert that Judge Jarrett "failed to consider, or demonstrate any consideration of, the effect upon the self-esteem or dignity of members of the (indigenous) group" who read Facebook comments suggesting "they should not be entitled to the benefit of the provision of a computer laboratory". The Australian http://www.theaustralian.com.au/national-affairs/indigenous/lawyers-for-cindy-prior-late-with-18c-appeal-bid-papers/news-story/651cc169df288c72fe39d81f34ea974a

Consider what is actually being said here: the student, believing that he was treated in a way that contravened section 13 (Provision of goods and services), complained—and that complaint, it is alleged, contravenes 18C! To complain about violations of pre-18C contravenes 18C! Will that argument win in a court of law? Be honest: who knows? The very fact that we cannot predict the outcome, we have no clue, shows, in itself, that this law is capricious and (because it is nonsensical) can be interpreted however the political feelings (or even the breakfast) of the ruling judge might dictate on the day of the decision.

But supporters of the law need more. Let's see how effective this law was against deliberately racist speech. ALP parliamentarian Linda Burney said about critics of 18C:

> "(They are) basically white men of a certain age who have never experienced racial discrimination in their life," The Australian http://www.theaustralian.com.au/national-affairs/white-men-18c-slur-blasted-by-ian-goodenough/news-story/2e1b2d5e0a0d60f40cfd6d55e85fa217

Compare this with the QUT student's comment. This is racist, pure and simple. The allegation that white men of a certain age have all never experienced discrimination, is certainly and demonstrably false. The statement was obviously made to offend and insult. What was the outcome? No outcome needed. Linda Burney tweeted:

> (Laughter emoji) Honestly. http://www.sbs.com.au/news/article/2016/11/11/white-men-file-complaint-claiming-indigenous-mp-linda-burney-has-been-racist-them

Burney is in no doubt: She, as a non-white, is in no danger of 18C being used against her, although her behaviour was altogether worse than that of the hounded students.

18C is used capriciously, as desired by the enforcers in the HRC, who clearly happen, at this time, to be anti-white.

So to those defenders of 18C, I ask: What if the infesters of the HRC rats' nest, at some future time, are anti-someone else? 18C can be used to enforce any ideological position whatever, as it is nonsensical. Therefore its meaning can simply be made up on the spot by a commissioner or a judge. What if a future commissioner is an anti-semite, or anti-Aboriginal, or hates Chinese or Indians?

Capricious interpretation of nonsense is the antithesis of the rule of law, but the rule of law is what protects us all. Defenders of 18C, be careful what you wish for.

And also...

If (supporters of 18C) your reaction to the above is "So what? That will never happen," you have just shown that you do not really believe Australia is full of white racists.

7.3 The bottom line

A law so dangerous as to create this outcome violates our fundamental human right to free speech.

It is unconstitutional.

But that is the least of its problems. The right to speak transcends race, politics, nations, constitutions, and even goes beyond our place in the universe as a species with the ability to question our own existence and our behaviours.

Even the cow entering the slaughterhouse has the right to scream in fear.

Appendix: note regarding the QUT judgement

I am hesitant to critique the words of a good judge—good in both the practical sense of making the right judgement, and in the moral sense of caring enough to get it right. But one point has to be addressed, as it will likely lead to more bad thinking in future.

18C prohibits speech that is likely to offend, insult, humiliate or intimidate ... a group of people. It is obvious that no speech, even the most outrageous, will offend an entire race, so how does one ever offend a race? To save the Act from being nullified at the outset, one might think that the legal system would have invented some concept such as, offending the generality of the race, without requiring that every last member be offended. That is, something that offends most members could reasonably be said to offend a race. But Judge Jarrett writes (30(i)):

> "The assessment as to the likelihood of people within a group being offended by an act directed at them in a general sense, is to be made by reference to a representative member or members of the group.": Eatock v Bolt at [251].

Then (40, 41, 37):

> "...Mr Powell argues that the absence of evidence that anyone was actually offended, insulted, humiliated or intimidated is "a compelling reason to assume that this was not a "reasonably likely" outcome".
>
> "...evidence that someone was offended, insulted, humiliated, or intimidated by the relevant conduct is entirely unnecessary: Eatock v Bolt (above) at [241] and authorities there cited. In my view, the absence of evidence to that effect cannot be, either as a matter of law, "a compelling reason to assume that [the proscribed effect] was not a "reasonably likely" outcome".
>
> "...the conduct should be analysed from the point of view of a hypothetical representative of the group of people..."

That noise you hear is the greats of statistics such as Ronald Fisher turning in their graves. The claim has been made that an entire race of many thousands has been offended etc. Yet not a single person can be found of that race who is prepared to say that they were indeed offended.

This is not evidence that the race is not offended?

Imagine a huge barrel with thousands of marbles. Someone says "pretty much all the marbles are white". So we pull out a marble and it is red. Another: also red. And so on, never finding a white marble. But instead of trusting this as casting doubt that the group consists mainly of white marbles, we "analyse from the point of view of a hypothetical marble in the barrel."

Further, in any case where the plaintiff belongs to the race concerned, he or she would have personal knowledge of a great many other members of the group, and could metaphorically actually look into the barrel to try to find a white marble, and yet could not find one. If someone, in advance, believed that this would be the outcome, the fact is: they were correct. Their correct assessment is powerful presumptive evidence that they were reasonable in their assessment. Anyone thinking that offence to the *entire group* was likely has miscalculated somehow if absolutely no one in the group was offended. We are asked to accept that:

- hypothetical imagining by legal experts should take precedence over a correct judgement by the person involved—and not only that, but the correct assessment carries *no weight at all*; and
- the reasonings of legal experts (usually not of the race concerned) about a race trumps the actual opinions of members of that race; this is surely a most patronising exercise in the very racism this law is supposed to be fighting.

The legal system has brought itself into disrepute with this pernicious nonsense. Just another bad effect of trying to put sense into a nonsensical, tyrannical law.