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Uncovering threats to freedom of speech and personal liberty: a program of the Institute of Public Affairs

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Section 18C of the *Racial Discrimination Act 1975*

A restriction on freedom of speech

In November 1994, the Keating government introduced the *Racial Hatred Bill*. The bill included a number of clauses, including the proposed insertion of section 18C and section 18D into the *Racial Discrimination Act 1975*. These clauses were agreed to by the parliament in September 1995.

Section 18C makes it unlawful to say or do anything that is "reasonably likely" to "offend, insult, humiliate or intimidate" a person because of the person's "race, colour or national or ethnic origin".

Exemptions to conduct caught by section 18C are provided for in section 18D. Exemptions apply to artistic work, academic or scientific debate, fair and accurate reports and fair comments, if said or done "reasonably and in good faith".

Section 18C is a significant restriction on freedom of speech and thought.

On 6 August 2012, then opposition leader Tony Abbott promised at a speech to the Institute of Public Affairs in Sydney: "So let me assure you, the Coalition will repeal section 18C in its current form."

Eatock v Bolt [2011] Federal Court of Australia:

- In 2011, journalist Andrew Bolt was taken to court under section 18C for two articles he wrote on a matter of public policy.
- The judge in *Eatock v Bolt* found that Bolt's conduct had breached section 18C.
- The judge also held that the "fair comment" exemption did not apply to Bolt's conduct because his articles contained "gratuitous asides", and he used a sarcastic tone.

Where section 18C covers conduct that 'offends', 'insults' or 'humiliates' it limits freedom of speech

- Making unlawful conduct that 'offends', 'insults' or 'humiliates' a person restricts the fundamental human right to freedom of speech.

Where section 18C covers conduct that 'intimidates' it is superfluous

- **Every Australian jurisdiction has laws against intimidation. For example, it is against the law to:**
  - urge violence against groups based on race, religion, nationality or ethnic origin or political opinion under section 80.2A of the *Commonwealth Criminal Code*;
  - intimidate or annoy by violence under section 545B of the New South Wales *Crimes Act*;
  - use obscene, indecent, threatening language and behaviour in public under section 17 of the Victorian *Summary Offences Act*;
  - threaten violence under section 75 of the Queensland *Criminal Code*;
  - intimidate another person under section 338E of the Western Australian *Criminal Code Act Compilation Act*;
  - make unlawful threats under section 19 of the South Australian *Criminal Law Consolidation Act*;
  - cause an apprehension of fear under section 192 of the Tasmanian *Criminal Code*;
  - threaten violence under section 35A of the Australian Capital Territory *Crimes Act*;
  - make threats under section 200 of the Northern Territory *Criminal Code Act*.

Section 18D does not protect free speech

- Section 18D purportedly provides exemptions for conduct caught by section 18C, including an exemption for "fair comment".
- However, *Eatock v Bolt* demonstrated that these exemptions do not provide an adequate defence for free speech. The judge in that case held that the use of "gratuitous asides" and a cynical, mocking, sarcastic tone meant that Bolt's articles were not "fair comment" protected by section 18D.
- **Truth is no defence:** The judge in *Eatock v Bolt* held that section 18D will not necessarily apply even to statements that are true.

Complete repeal of section 18C is necessary

- The judge in *Eatock v Bolt* held that Andrew Bolt's conduct met the threshold established by all four words in section 18C – according to the judge, Bolt "offended", "insulted", "humiliated" and "intimidated" the plaintiffs.
- The only way to ensure that another Bolt case never happens again is to repeal section 18C in its entirety.

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