

**BILL LEAK, ANDREW BOLT AND SECTION 18C:
FREEDOM OF SPEECH AND THE LIMITS OF
POLITICAL CRITICISM IN AUSTRALIA**

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ABSTRACT

The Bill Leak affair, and prior to that the Andrew Bolt affair, have rendered freedom of speech a contentious political topic in Australia. It has also become an issue of significant parliamentary activity, with both the Abbott Government, and later the Turnbull Government, seeking to make amendments to s 18C of the Racial Discrimination Act 1975 (Cth), in part in response to each of these affairs. This article focuses on both the Leak and Bolt affairs, and their implications for freedom of speech in Australia. It also investigates why affairs such as these often give rise to such unresolved (and unresolvable) disagreement.

This article seeks to defend the importance of freedom of speech within Australian political culture, particularly in the context of political criticism. To this end it focuses on the question of the appropriate limits of political criticism. Such a purpose requires, among other matters discussed in this article, a close consideration of ss 18C and 18D of the *Racial Discrimination Act 1975 (Cth)* ('RDA'), and in particular a focus on the most recent high profile Australian free speech controversies wherein each of these legal provisions were invoked – the Bill Leak and Andrew Bolt affairs.

The article considers the legal, political and philosophical concerns that have arisen in relation to these free speech matters. It begins by focusing on the Leak and Bolt affairs, outlining their basic details, and then considers the Turnbull and Abbott governments' response to these affairs. These responses include an unsuccessful attempt, by each government, to amend s 18C, in order to widen the legal scope for freedom of speech in the public sphere. It also includes a successful effort by the Turnbull Government to reform certain aspects of the Australian Human Rights Commission ('Commission') in its handling of s 18C complaints.

The article then focuses on the terms of ss 18C and 18D themselves, their purpose within the RDA, and the various views concerning their propriety or need for reform. It then focuses on what is often an inextricable connection between ‘criticism’ and ‘offense’, in free speech matters, and considers the differing views of those who question whether, if we are to affirm one of these, in political debate within a polity, we must then tolerate the other. It also considers the difficulties this raises for conventional philosophical frameworks centred on resolving such disagreement, such as the liberal model of ‘public reason’.

The article then seeks to highlight the reason why free speech controversies, such as the Bolt and Leak affairs, generate such heated, unresolved, and (often) unresolvable disagreement. It explains this in terms of the ‘underdetermined’ status of reason in such circumstances, which arises, in part, from the fact that key terms, employed in these debates, although at times a meaningful way to describe a set of circumstances, are nevertheless ‘non-neutral’, which means that their application to these circumstances is potentially subject to ongoing (and irresolvable) contestation.

The article then focuses on Federal Court judgments concerning s 18C, in particular the Bolt ruling, as evidence of the ‘underdetermined’ status of reason in such contexts. Indeed, it will be argued that the Federal Court’s reasoning in the Bolt case produced a number of inconsistencies, and at times contradictions, in its understanding of the respective status of, and relationship between, ss 18C and 18D of the RDA, which deeply affected its judgment in this case.

The article then looks at the use of the term ‘racism’ in Australian public debate, and does so by focusing on the Bill Leak affair. Although it acknowledges that in many cases the use of this term is a meaningful way to describe a set of circumstances, it points out that, like other key evaluative terms discussed in this article, it is also ‘non-neutral’, with all the ‘underdetermined’ and (often) irresolvable contestation that arises from this. The article also points to the powerful consequences that, in some circumstances, the use of this term can have in limiting the scope of acceptable political criticism within the public sphere, not least in terms of the ‘silence’ it can impose on those aspects of public debate it successfully designates as ‘illegitimate’.

I ANDREW BOLT AND SECTION 18C

In recent years, and for the first time in decades, freedom of speech is a high profile political topic in Australia. Its re-ascendancy began nine years ago with a series of events involving the journalist, Andrew Bolt. ‘The Bolt Affair’, as it came to be called, was initiated by two of Bolt’s newspaper articles published in the *Herald Sun* on 15 April 2009 and 21 August 2009.¹ These articles publicly criticised light-skinned individuals who, in claiming Aboriginal heritage, applied for, and received, publicly funded awards reserved for indigenous applicants. Bolt argued that for such individuals to identify with one small element of their racial heritage and so qualify for such awards was unacceptable, and he referred to such individuals as ‘white aboriginals’ and ‘political aboriginals’.²

These newspaper publications elicited a formal complaint to the Australian Human Rights Commission, alleging that, within them, Bolt had contravened s 18C of the RDA. The ultimate result was a Federal Court ruling against Bolt in 2011, declaring that his publications had indeed contravened s 18C.³ The penalty was that a ‘corrective notice’ accompany the articles when they appeared on the *Herald Sun* website and that the articles not be republished.⁴ However an additional Court order declared that the articles could remain available for ‘historical and archival’ purposes, which means they can still be accessed online.⁵ Tony Abbott, as Opposition leader, was openly critical of the Federal Court judgment and this eventuated in the Abbott Government’s unsuccessful attempt, in 2014, to amend s 18C.⁶

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¹ Andrew Bolt, ‘It’s so hip to be black’, *Herald Sun* (online), 15 April 2009 <http://www.abc.net.au/mediawatch/transcripts/1109_heraldsun09.pdf>; Andrew Bolt, ‘White fellas in the black’, *Herald Sun* (online) 21 August, 2009 <<http://www.heraldsun.com.au/news/opinion/white-fellas-in-the-black/story-e6frfiffo-1225764532947>>. For further discussion of the Bolt Affair, see John William Tate, ‘Free Speech, Toleration and Equal Respect: The Bolt Affair in Context’ (2016) 51 (1) *Australian Journal of Political Science* 34.

² Bolt, above n 1 (15 April 2009); Bolt, above n 1 (21 August 2009).

³ *Eatoock v Bolt* [2011] FCA 1103 (Summary) [17]; *Eatoock v Bolt* [2011] FCA 1103 [8], [452]-[453].

⁴ *Eatoock v Bolt* [2011] FCA 1103 (Summary) [29].

⁵ Adrienne Stone, ‘The Ironic Aftermath of *Eatoock v Bolt*’ (2015) 38(3) *Melbourne University Law Review* 938.

⁶ See Tony Abbott, ‘Freedom Wars’, *Institute of Public Affairs* (2012) <https://ipa.org.au/portal/uploads/Abbott_FreedomWars.pdf>; Tony Abbott, ‘Joint Press Conference’, Parliament House (2014), <<http://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>>. See also n 32 below.

II BILL LEAK AND SECTION 18C

Yet matters did not rest there. The focus on free speech and s 18C has continued with the controversy surrounding the recently deceased cartoonist Bill Leak, and one of his cartoons, published in *The Australian* newspaper, on 4 August 2016, which was National Aboriginal and Torres Strait Islander Children's Day.⁷ This cartoon was Leak's response to the *Four Corners* program, *Australia's Shame*, focusing on treatment of juvenile (particularly indigenous) inmates at the Don Dale Youth Detention Centre in the Northern Territory, which aired on ABC television on 25 July 2016.⁸ The cartoon shows an indigenous policeman holding a poorly clothed indigenous youth by the scruff of the neck and telling the boy's poorly clothed and beer-swilling indigenous father: 'You'll have to sit down and talk to your son about personal responsibility'. To which the father replies: 'Yeah righto. What's his name then?'⁹ Leak explained that the point he was seeking to make was that, in his view, the preponderance of young indigenous offenders within the Don Dale Youth Detention Centre was, at least in part, a consequence of a breakdown in parental responsibility among some indigenous parents in remote Aboriginal communities.¹⁰

Leak's cartoon provoked furore in a wide variety of quarters. New South Wales Aboriginal Land Council chairman, Roy Ah-See, declared the cartoon 'absolutely disgraceful', insisting that it 'stokes the fire of racism', and concluded that 'I can't believe *The Australian*, a national newspaper, would be so insulting to us as Aboriginal people'.¹¹ The leader of the Australian Greens, federal Senator Richard Di Natale, insisted: 'We think there is no place

⁷ ABC, 'Bill Leak Cartoon in The Australian an Attack on Aboriginal People, Indigenous Leader Says', *ABC News* (online), 4 August 2016 <<http://www.abc.net.au/news/2016-08-04/cartoon-an-attack-on-aboriginal-people,-indigenous-leader-says/7689248>>.

⁸ Bill Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', 8 December 2016 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Submissions>; Bill Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', *ABC News*, 20 October 2016, <<http://www.abc.net.au/news/2016-10-20/interview:-bill-leak,-cartoonist-for-the/7952634>>; Bill Leak, 'Bill Leak Cartoon: What Are You Tweeting About?', *The Australian*, 5 August 2016, <<http://www.theaustralian.com.au/opinion/another-twitter-feed-tantrum-about-my-cartoons/news-story/e4a2db48aa81424c6daf54a4497330e6>>; Parliamentary Joint Committee on Human Rights, 'Freedom of Speech in Australia', *Official Committee Hansard*, 1 February 2017, 84, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2Fbf6877ca-d923-4b09-b0bc-30d78d59f9db%2F0014;query=Id%3A%22committees%2Fcommjnt%2Fbf6877ca-d923-4b09-b0bc-30d78d59f9db%2F0000%22>>.

⁹ Paul Whittaker, 'The Australian Defends Bill Leak Indigenous Cartoon', *The Australian* (online), 4 August 2016 <<http://www.theaustralian.com.au/business/media/the-australian-defends-bill-leak-indigenous-cartoon/news-story/ac8807a5040be29d3d890d3646cc9ef2>>.

¹⁰ Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', above n 8, 1-2; Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', above n 8; Leak, 'Bill Leak Cartoon: What Are You Tweeting About?', above n 8; Parliamentary Joint Committee on Human Rights, 'Freedom of Speech in Australia', above n 8, 85.

¹¹ ABC, above n 7.

for that in modern Australia. This is a cartoon that takes us back to the worst days of white Australia', and declared that the editors of *The Australian* should 'apologise to the Aboriginal people who have been deeply offended by this publication'.¹² The Chief Executive of the Victorian Aboriginal Child Care Agency, Muriel Bamblett, saw the cartoon as part of a wider process of public vilification of Aboriginal people in the media:

In the media, I think they have a public responsibility. That's obviously one of the opportunities to get good messaging about Aboriginal people. But if you're constantly stereotyping us as second class then it's about profiling us as second-class citizens in our own country.¹³

The most high-profile individual to advance the view that Leak's cartoon was 'racist' was federal Indigenous Affairs Minister, Nigel Scullion. In a media release, entitled 'No Place for Racist Cartoon', published on the same day as Leak's cartoon, he declared:

Although Australian cartoonists have a rich tradition of irreverent satire, there is absolutely no place for depicting racist stereotypes. ... I am heartened that various voices from across the political and social spectrum have come out and strongly condemned the cartoon. I would urge the *Australian* to be more aware of the impact cartoons like the one published today can have on Indigenous communities.¹⁴

Joining Scullion in his view that the cartoon was 'racist' were '173 media and communication professionals' who signed an open letter condemning the Leak cartoon in these terms:

We are journalists, writers, photographers, artists, publishers and others who work in the media and communications industries. Signatories also include journalism, media and communications researchers and academics.

We condemn The Australian's publication of Bill Leak's racist cartoon. Racism damages the health and wellbeing of those it targets.

¹² Ibid.

¹³ Ibid.

¹⁴ Nigel Scullion, 'No Place for Racist Cartoon', Press Release, 4 August 2016 <<http://www.nigelscullion.com/media+hub/No+place+for+racist+cartoon>>.

We acknowledge that the media industry has a long history of perpetuating harmful and racist stereotypes of Aboriginal and Torres Strait Islander people, and that it is well past time that this stops.¹⁵

On the other hand, the editor-in-chief of *The Australian*, Paul Whittaker, on the day of the publication of Leak's cartoon, issued a statement in its defence, declaring:

The Australian is proud of its long-standing and detailed contribution to our national debate over the crucial issues in Indigenous affairs. The current controversy over juvenile detention in the Northern Territory has lifted these matters to the forefront of national attention again ... Bill Leak's confronting and insightful cartoons force people to examine the core issues in a way that sometimes reporting and analysis can fail to do.¹⁶

According to the timeline provided by the Commission, on 4 October 2016, it wrote to the lawyers for *Nationwide News Pty Ltd* ('Nationwide News'), the publishers of *The Australian*, advising them that it had received a complaint about Leak's cartoon, identifying those sections of the RDA that would 'appear to be relevant to the complaint' (including s 18C, which relates to public 'acts' which 'offend', 'insult', 'humiliate' or 'discriminate' on the basis of 'race, colour or national or ethnic origin', and also s 18D which exempts such 'acts' from being unlawful if they are engaged in 'reasonably and good faith' and fulfil some specified aspect of the 'public interest') and asking them to respond by 28 October 2016.¹⁷ The lawyers for both Nationwide News and Bill Leak responded on 21 October 2016, asking that the Commission 'take no further part in any inquiry into, or any attempt to conciliate' the complaint on the grounds that a 'reasonable apprehension of bias' exists, and that until this issue was resolved, the lawyers and their clients had 'nothing further to say'.¹⁸ The response also contained a schedule which stated that once the 'apprehended bias' issue was resolved, 'a public hearing in relation to the complaints' made by the complainant ought to be conducted.¹⁹

On 1 November 2016, the President of the Commission, Professor Gillian Triggs, wrote to the lawyers notifying them of the decision of the Commission to reject the 'allegations of

¹⁵ New Matilda, 'Journalists, Writers, Academics Sign Open Letter Condemning Bill Leak Cartoon', *The Insider* (online), 9 August 2016 <<https://newmatilda.com/2016/08/09/media-workers-sign-open-letter-condemning-racist-bill-leak-cartoon/>>.

¹⁶ Whittaker, above n 9.

¹⁷ AHRC, 'Commission Reveals Details of 18C Complaints', *Australian Human Rights Commission*, 21 February 2017 <<https://www.humanrights.gov.au/news/stories/commission-reveals-details-18c-complaints>>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

apprehended bias'.²⁰ On the same day the Commission wrote to the lawyers confirming that it would continue the investigation into the complaint, and asking again that they provide a justification of Leak's cartoon under the terms of s 18D by 15 November 2016.²¹ The Commission received a response from the lawyers on 8 November 2016 but it did not 'contain any submission in relation to section 18D'.²²

On 11 November 2016, the complainant withdrew her complaint and the Commission sent a letter to the lawyers for Nationwide News and Leak advising them of this and 'closing' its file on the complaint.²³ According to *The Australian*, an additional complaint to the Commission concerning the cartoon was closed by the Commission on 13 December 2016, on the grounds that the Commission was satisfied that the complainant wished to withdraw their complaint.²⁴

The Australian Human Rights Commission President, Gillian Triggs, appearing before a Senate estimates committee in February 2017, stated that, in her opinion, Leak's cartoon fell within the protection of s 18D of the RDA.²⁵ However, she also stated that, as President of the Commission, she was unable to initiate proceedings to determine if the complaint against the cartoon could be terminated on these grounds because Leak's lawyers had not responded to the request from the Commission to provide a statement defending the cartoon under the terms of s 18D.²⁶ Bill Leak died on 10 March 2017.

III THE TURNBULL GOVERNMENT AND SECTION 18C

The debate over freedom of speech intensified in the wake of the publication of Leak's cartoon and its investigation by the Commission, with conservative members within the Turnbull Coalition Government calling (as they did during the Abbott Government) for the amendment of s 18C. The catalyst for these demands was a belief, among these members, that the legal application of s 18C had resulted, in some cases, in excessive infringements on

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Paige Taylor, 'HRC Drops Third Complaint About Bill Leak Cartoon', *The Australian* (online), 14 December 2016 <<https://www.theaustralian.com.au/national-affairs/indigenous/hrc-drops-third-complaint-about-bill-leak-cartoon/news-story/103c00668bec8ecf5c47ced4054f2bfb>>.

²⁵ Paul Karp, 'Bill Leak could have ended 18C complaint earlier, says Gillian Triggs', *The Guardian* (online), 28 February 2017 <<https://www.theguardian.com/australia-news/2017/feb/28/bill-leak-could-have-ended-18c-complaint-earlier-says-gillian-triggs>>.

²⁶ Ibid.

freedom of speech, with the result that s 18C, in the words of then Liberal MP, Cory Bernardi, had been ‘misused’.²⁷ The Prime Minister, Malcolm Turnbull, specifically referred, as two examples of such ‘misuse’, to the subsection of Bill Leak’s cartoon to investigation by the Commission, as well as the (ultimately unsuccessful) s 18C judicial hearing, in 2016, involving three Queensland University of Technology (‘QUT’) students, arising from a complaint made to the Commission concerning their Facebook comments critical of their ejection from an indigenous-only computer lab at their university.²⁸ The Prime Minister insisted that these were actions under s 18C that ‘should not have happened’ and declared that it was his government’s intention to ‘strike the right balance, defending freedom of speech so that cartoonists will not be hauled up and accused of racism, so that university students won’t be dragged through the courts and have hundreds of thousands of dollars of legal costs imposed on them over spurious claims of racism’.²⁹

Such were the Prime Minister’s comments when, on 21 March 2017, he announced his government’s intention to introduce into Parliament legislative reforms to s 18C. The prelude to this was a parliamentary inquiry into freedom of speech in Australia, initiated by the Turnbull Government in November 2016, and conducted by the Parliamentary Joint Committee on Human Rights (‘Committee’). The Final Report of the Committee, entitled *Freedom of Speech in Australia*, was tabled in Parliament on 28 February 2017.

Most of the recommendations of the Committee concerned reform to the Commission and its handling of complaints under s 18C, including the need to ‘prevent frivolous claims’.³⁰ However on reform to s 18C itself, the Committee was divided, with proposals ranging from no change to the current legislation, to the Turnbull government’s preferred option of replacing the words ‘offend’, ‘insult’ and ‘humiliate’ in s 18C with the word ‘harass’.³¹

The tabling of the Committee’s report in Parliament was followed by the legislative action promised by Malcolm Turnbull above. On 30 March 2017, legislation was introduced into the federal Senate to remove the words ‘offend’, ‘humiliate’ and ‘insult’ from s 18C, substituting

²⁷ Jane Norman, ‘Cory Bernardi Leads Coalition Backbench Senators in Push to Dilute Racial Discrimination Act’, *ABC News* (online), 30 August 2016 <<http://www.abc.net.au/news/2016-08-30/cory-bernadi-leads-coalition-push-to-change-18c-race-hate-laws/7796356>>.

²⁸ Malcolm Turnbull, ‘Press Conference with the Attorney-General’, 21 March 2017 <<https://www.pm.gov.au/media/2017-03-21/press-conference-attorney-general>>.

²⁹ *Ibid.*

³⁰ Parliament of Australia, ‘Report: Freedom of Speech in Australia’, Parliamentary Joint Committee on Human Rights, 28 February 2017 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report>, rec. 11. See also *ibid* rec 4-9, 12-19, 20-21.

³¹ *Ibid* rec. 3.

them with the word ‘harass’, and retaining the word ‘intimidate’.³² The legislation was defeated the same evening by an alliance of Labor, Green and cross-bench Senators.³³

IV AUSTRALIAN HUMAN RIGHTS COMMISSION REFORM

However although it failed to amend s 18C, the Turnbull Government did manage to legislatively implement some of the other recommendations of the Committee concerning reform of the Commission. To this end, the Government secured the passage of the *Human Rights Legislation Amendment Act 2017* (Cth) which amended some of the sections of the *Australian Human Rights Commission Act 1986* (Cth) (‘AHRC Act’) relating to the operations and procedures of the Commission. The amendments primarily related to Part IIB of the AHRC Act which deals with ‘redress for unlawful discrimination’.

Section 46PH of the AHRC Act already had in place a series of provisions which allowed the President of the Commission, upon specific grounds, to terminate a complaint prior to a resolution between the parties. These included circumstances in which ‘the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination’ or ‘the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance’.³⁴

But as Prime Minister Turnbull’s comments at note 29 above make clear, the Government clearly did not believe that these legislative powers, accorded within the AHRC Act to the President, were sufficient to avoid instances such as the Leak and QUT cases which, the Prime Minister insisted above, ‘should not have happened’. After all, s 46PH left it to the discretion of the President to determine whether a complaint should be terminated upon any of the grounds listed in the Act.³⁵ The Turnbull Government therefore sought to remove some

³² James Massola, ‘Coalition Party Room Agrees to Push 18C Changes, Despite Warnings from Barnaby Joyce’, *Sydney Morning Herald* (online), 21 March 2017 <<http://www.smh.com.au/federal-politics/political-news/coalition-party-room-agrees-to-push-18c-changes-despite-warnings-from-barnaby-joyce-20170320-gv2ofd.html>>. By contrast, the Abbott Government sought, from April 2014, to retain ‘intimidate’ within s 18C but replace ‘insult’, ‘offend’ and ‘humiliate’ with ‘vilify’ (Attorney-General’s Department, *Freedom of speech (Repeal of S. 18C) Bill 2014* (2014, <<https://www.ag.gov.au/Consultations/Documents/Attachment%20A.pdf>>). They ultimately abandoned this attempt, prior to introducing legislation into Parliament, in August 2014 (see Abbott (2014) above n 6).

³³ Michael Koziol and Latika Bourke, ‘Senate Kills Off Turnbull Government’s Changes to 18C Race Discrimination Law’, *Sydney Morning Herald* (online), 30 March 2017 <<http://www.smh.com.au/federal-politics/political-news/senate-kills-off-turnbull-governments-changes-to-18c-race-discrimination-law-20170330-gvadad.html>>.

³⁴ AHRC Act s 46PH 1(a), (c).

³⁵ Such discretion is evident in the fact that the Act states: ‘The President *may* terminate a complaint on any of the following grounds’ (ibid s 46PH(1) (emphasis added)).

of this discretion from the President by ensuring that termination of a complaint by the President would, in some circumstances, be ‘mandatory’. The result is that the amended s 46PH now distinguishes between ‘discretionary termination of a complaint’ and ‘mandatory termination of a complaint’. The relevant section of s 46PH relating to the latter is as follows:

Mandatory termination of complaint

(1B) The President must terminate a complaint if the President is satisfied that:

- (a) the complaint is trivial, vexatious, misconceived or lacking in substance; or
- (b) there is no reasonable prospect of the matter being settled by conciliation.

(1C) The President must terminate a complaint if the President is satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.

(1D) A complaint may be terminated under subsection (1B) or (1C) at any time, even if an inquiry into the complaint has begun.³⁶

The Government also introduced other amendments to the Act. These included the requirement that ‘[t]he Commission must act *fairly* in the performance of the functions referred to in paragraph 11(1)(f).³⁷ These functions authorise the Commission to:

- (i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and
- (ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry.³⁸

The Government also amended s 46PF of the AHRC Act, incorporating provisions that require the President of the Commission to notify the respondent to a complaint ‘as soon as the President has decided to inquire into the complaint’, ‘unless the President is satisfied that notification would be likely to prejudice the safety of a person’.³⁹ The amendments also provide for the more expeditious handling of cases by the Commission. They state:

³⁶ Ibid s 46PH 1(B)-1(D).

³⁷ Ibid s 20(9) (emphasis added).

³⁸ Ibid s 11(1)(f).

³⁹ Ibid s 46PF (7)(a) and 8(a).

The President:

(a) must, having regard to:

(i) the nature of the complaint; and

(ii) the needs of the complainant or complainants; and

(iii) the needs of the respondent;

(iv) act expeditiously in dealing with the complaint in accordance with this section; and

(b) must use the President's best endeavours to finish dealing with the complaint within 12 months after the complaint was referred to the President under section 46PD.⁴⁰

Upon securing passage of these amendments, the Turnbull Government, in quite triumphalist tones, identified the impetus for these changes as the Leak and QUT cases, and argued that the amendments expanded the scope for freedom of speech in Australia and ensured that such cases as these would not arise again:

The Government has today passed the most significant reforms to the Australian Human Rights Commission in almost 20 years.

These reforms will improve the complaints handling processes of the Commission and ensure that the recent cases of the students at QUT, and the complaint against the late great cartoonist Bill Leak do not happen again.

The Government acted swiftly to respond to community concern about the abuse and the misuse of the Commission's processes, highlighted in the recent Parliamentary Joint Committee on Human Rights (PJCHR) Inquiry into Freedom of Speech.

It has been clear that the Commission's model for resolving complaints has not operated as effectively as it should.

The Commission will now have the powers it needs to terminate unmeritorious complaints as soon as possible. It will also be required to act fairly and expeditiously in dealing with complaints, and to notify respondents about a complaint ...

While the Government is disappointed that the Senate voted against strengthening section 18C of the *Racial Discrimination Act 1975*, the procedural changes agreed to today will ensure that

⁴⁰ Ibid s 46PF(10).

the Human Rights Commission will never again be able to be used to prosecute ordinary Australians who merely want to express their right to free speech.⁴¹

V SECTIONS 18C AND 18D

In both the Leak and the Bolt Affairs, what was at the centre of debate was the legitimate scope of freedom of speech and, in particular, political criticism, within Australia. Political criticism is a narrower concept than freedom of speech because its subject matter is more specific. The question of what constitutes ‘legitimate’ political criticism in Australia is inevitably informed by the terms of ss 18C and 18D of the RDA, as determined by their judicial application, since these are among the relevant statutory provisions which shape the lawful limits of freedom of speech in Australia. Section 18C(1) states:

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.⁴²

Some free speech advocates have argued that s 18C should not exist at all, and that the provisions within it that limit free speech are unjustified.⁴³ Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, for instance, argue that s 18C ‘impermissibly infringes’ the implied constitutional freedom of political communication, affirmed by the High Court of Australia in 1992, and also fails to adequately reflect the ‘spirit and letter’ of the United Nations’ *Convention on the Elimination of All Forms of Racial Discrimination*, which the RDA was originally intended to implement.⁴⁴ Others, such as the members of the Abbott and

⁴¹ George Brandis, ‘Government Passes Major Reform to the Australian Human Rights Commission’, *Media Release*, 31 March 2017 <<https://www.liberal.org.au/latest-news/2017/03/31/government-passes-major-reform-australian-human-rights-commission>>.

⁴² RDA s 18C.

⁴³ See Chris Berg, Simon Breheny, Morgan Begg, Andrew Bushnell and Sebastian Reinehr, ‘The Case for the Repeal of s. 18C’, *Institute of Public Affairs* (2016) <https://ipa.org.au/wp-content/uploads/2016/12/IPA_Submission_The_Case_for_the_Repeal_of_Section_18C_09122016.pdf>; Leak, ‘Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia’, above n 8, 3; Parliamentary Joint Committee on Human Rights, above n 8, 85.

⁴⁴ Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended. Why 18C is Wrong* (Connor Court Publishing, 2016) 8, 213-14. The Australian High Court, in two landmark judicial rulings in 1992, declared that freedom of political communication (a narrower concept than freedom of speech) is an implied freedom within the Australian Constitution (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106). The reasoning of some of the

Turnbull Governments, have sought to retain the basic legislative framework of s 18C, but have sought to alter its content so as to raise the threshold before limits on speech apply, thereby expanding the legal scope for freedom of expression within the Australian public sphere.⁴⁵ Most involved in the debate have conceded that even when speech contravenes the limits identified by s 18C, there are some circumstances wherein such speech should still be considered lawful, such contravention notwithstanding.

Indeed, s 18D of the RDA seeks to ensure precisely this, qualifying the operation of s 18C by identifying circumstances in which public ‘acts’ ought to be permitted, irrespective of the ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ on the basis of ‘race, colour or national or ethnic origin’ to which they give rise. As Bromberg J put it in the Bolt case: ‘Section 18D of the RDA provides that s 18C does not render unlawful anything said or done “reasonably and in good faith”, if done in furtherance of one or other of the pursuits identified in paragraphs (a)-(c) of s 18D.’⁴⁶ These ‘pursuits’ include ‘anything said or done reasonably and in good faith’ in ‘the performance, exhibition or distribution of an artistic work; or ... 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 ... in making or publishing ... a fair and accurate report of any event or matter of public interest; or ... 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’.⁴⁷

Justice Bromberg, delivering his judgment in the Bolt case, described s 18D as ‘a provision which, broadly speaking, seeks to balance the objectives of s 18C with the need to protect justifiable freedom of expression’.⁴⁸ In this way, he said, s 18C and s 18D ‘seek to find a balance between freedom of expression and freedom from racial prejudice and intolerance based on race’.⁴⁹ Precisely where such ‘balance’ should lie, in any particular instance is, we shall see, a matter of individual judgment, with the result that individuals can reasonably differ on whether s 18C or s 18D ought to have priority in any specific set of circumstances.

justices, leading to this conclusion, was similar to James Madison’s, at n 51 below, and concerned the necessity of freedom of political communication within a democracy to hold democratic representatives accountable. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138-39 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72-74 (Deane and Toohey JJ).

⁴⁵ See the discussion of the Abbott and Turnbull governments’ attempts to reform s 18C at above n 32.

⁴⁶ *Eatock v Bolt* [2011] FCA 1103 [340], [351].

⁴⁷ RDA s 18D (a)-(c).

⁴⁸ *Eatock v Bolt* [2011] FCA 1103 [6].

⁴⁹ *Eatock v Bolt* [2011] FCA 1103 (Summary) [14]. See also *Eatock v Bolt* [2011] FCA 1103 [210].

VI SPEECH AND OFFENCE

Such legislation as ss 18C and 18D, seeking to regulate public speech, arises precisely because such speech can have consequences. As John Stuart Mill tells us, it can give rise to violence.⁵⁰ As s 18C makes clear, it can also give rise to ‘offence’. This is particularly the case with political criticism which, if it is particularly robust, might be offensive to some individuals. Indeed, there is a reciprocal relationship between critical speech and offence. All critical speech is potentially offensive, particularly to those at the sharp end of such criticism. Conversely, all offensive speech is likely to contain an element of criticism. The result is that, in many cases, criticism and offense are inextricably bound together, so much so that, in some instances, it is not possible to have one without the other.

James Madison identified the close, at times inextricable, connection between political criticism (particularly as it is manifest in a free press) and offence, insisting that our desire to ensure freedom for the former meant that we had to put up with the latter:

Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression ... ?⁵¹

This intimate connection between criticism and offence has also been recognised by those in Australia wishing to defend what they perceive to be free speech principles. Tony Abbott, when Opposition leader, advanced a position similar to Madison above, insisting that ‘offence’ is the ‘price’ we ‘pay’ for ‘free speech’. He did so in 2012, as part of his wider criticism of the Federal Court’s ruling against Andrew Bolt the year before:

⁵⁰ John Stuart Mill, ‘On Liberty’, in J S Mill, *Utilitarianism, Liberty, Representative Government* (Everyman’s Library, 1971) 114.

⁵¹ James Madison, ‘Report on the Virginia Resolutions (1800)’, in *The Founders’ Constitution: Amendment I (Speech and Press)* <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html>.

The price of free speech – which we must be prepared to pay – is that offence will be given, facts will be misrepresented and lies will be told ... Speech that has to be inoffensive would be unerringly politically correct but it would not be free.⁵²

Of course, many would question the inclusive ‘we’ to which Abbott resorts in the statement above. They might point out that often, in the public exercise of speech, those who ‘pay’ the ‘price’ for such speech, in terms of its ‘offense’, are not those engaging in it, and therefore enjoying the freedoms of it, but rather those who are the subject of such speech, or to whom such speech is directed, particularly when such individuals are in a position of unequal power relative to those advancing the speech, and the speech involves vilification, denigration, or other negative processes. Katharine Gelber has identified ‘hate speech’ in such terms, and explained the persuasive force which it, at times, is able to acquire within liberal democratic polities, very much in terms of these unequal circumstances:

Racist hate-speech-acts constitute discursive acts of racial discrimination against a target group, acts which reproduce and reinforce inequality on the grounds of race, and which simultaneously appeal to norms and values which legitimate such inequality ... [H]ate-speech-acts of hate speakers are capable of inhibiting the ability to speak of its victims. This occurs when an utterance is made which raises ‘truth’ claims of an objective world characterised by inequality, and where the hate speaker is in a position of power relative to the hearer.⁵³

Consequently, as concerns regarding ‘hate speech’ make clear, the speech that is most likely to be subject to demands for legal proscription is the speech that is perceived to result in some sort of ‘harm’. After all, we all agree with free speech for speech that we agree with. It is speech that is widely perceived as noxious, irresponsible, unequal, erroneous or offensive that is most likely to be subject to demands for proscription. As John Dunn put it:

There is ... only a need for freedom of expression where what is to be expressed is likely or certain to wound or outrage the feelings of fellow human beings.⁵⁴

VII CRITICISM AND OFFENCE

Yet Dunn’s statement, although true as a declaration of fact, falls short as a statement of principle. This is because although it is often the case that the speech that will most likely be

⁵² Abbott (2012), above n 6.

⁵³ Katharine Gelber, *Speaking Back. The Free Speech versus Hate Speech Debate* (John Benjamins Publishing Company, 2002) 87, 117-118.

⁵⁴ John Dunn, ‘What is Living and What is Dead in the Political Theory of John Locke’, in John Dunn, *Interpreting Political Responsibility: Essays 1981-1989* (Polity Press, 1990) 20.

subject to proscription, and therefore possibly give rise to demands for protection, is speech that ‘is likely or certain to wound or outrage the feelings of fellow human beings’, this does not tell us which speech, that falls into this category, *ought* to be protected from proscription, the offence it causes notwithstanding, and which speech, having these same consequences, *ought* to be proscribed. After all, unless we wish to say that *all* speech that ‘is likely or certain to wound or outrage the feelings of fellow human beings’ *ought* to be protected, or *ought* to be proscribed, we need some basis for deciding, in any particular instance, which speech acts, involving what type or level of offence, *ought* to be subject to one of these outcomes rather than the other.

The key competing considerations, therefore, in determining the appropriate limits of political criticism, are these. If criticism and offence are at times inextricable, at what points, in acts of public speech, does the import of one outweigh the other, so that either:

1. The speech is deemed permissible because of the weight of its critical content, the offence it causes notwithstanding?
Or:
2. The offence (and therefore harm) that the speech carries is of such gravity that, irrespective of its critical content, it can no longer be defended as a legitimate contribution to public debate, and so ought to be proscribed?

It is precisely these questions that arise in any evaluation of the respective claims of s 18C and s 18D, since each of these provisions embodies one of these competing considerations, and each can be enlisted to claim a priority over the other in the context of specific circumstances.

VIII PUBLIC REASON

A person who places immense importance on ensuring a society in which individuals are not subject to ‘offence’, ‘insult’, ‘humiliation’, or ‘intimidation’ will arrive at very different conclusions, concerning such competing considerations, than individuals like James Madison or Tony Abbott who, as we saw above, insist on the profound importance of freedom of speech in liberal democracies (particularly when manifested in a free press) and insist that the ‘price’ we ‘pay’ for such freedom is often ‘noxious’ outcomes. The result is that individuals within liberal democracies will often disagree on the respective weight that ought to be accorded to these competing considerations, often from the sincerest motives.

It might be argued that such disagreement can be resolved, within such polities, if we adopt a model of ‘public reason’. The idea of ‘public reason’, within the liberal tradition, has been associated with the work of John Rawls and his idea of ‘political liberalism’. Rawls’ model of ‘public reason’ is specifically designed to enable citizens, within liberal democratic polities, to reach publicly agreed conclusions on issues upon which they might otherwise be divided.

Rawls’ model of ‘public reason’ has a number of features. Rawls declared that individuals within a liberal democracy, when acting in their public capacity as citizens, have a ‘duty of civility’ towards each other.⁵⁵ One of the conditions of this ‘duty of civility’ is that when seeking to persuade each other on matters of public import, citizens should articulate their respective claims in ways that ‘can be supported by the political values of public reason’.⁵⁶ This means that when seeking to justify the public propositions they wish to advance, they ‘should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality’.⁵⁷ As such, they should not advance, as part of such justification, ideals such as the ‘will of God’, or some equally contestable concept, upon which disagreement is likely to be endemic and, in the absence of commonly agreed criteria, irresolvable.⁵⁸ According to Rawls, ‘trying to meet this condition’ of civility ‘is one of the tasks that this ideal of democratic politics asks of us’.⁵⁹

Rawls argued that such a model of ‘public reason’ must also satisfy what he calls the ‘criterion of reciprocity’. The ‘criterion of reciprocity’ is satisfied when ‘we sincerely believe that the reasons we would offer for our political actions ... are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons’.⁶⁰ This model of ‘public reason’, involving a ‘duty of civility’ and a ‘criterion of reciprocity’, is therefore meant to exclude from public debate those reasons which others might not be capable of reasonably endorsing, thereby removing ‘from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation’.⁶¹

⁵⁵ John Rawls, *Political Liberalism* (Columbia University Press, revised ed, 2005) 444.

⁵⁶ *Ibid* 217.

⁵⁷ *Ibid* 218.

⁵⁸ John Rawls, *A Theory of Justice* (Oxford University Press, 1972) 216, 217.

⁵⁹ Rawls, above n 55, 218.

⁶⁰ *Ibid* 446-47.

⁶¹ *Ibid* 157.

Rawls was aware that rival public claims concerning specific ‘truths’ (such as the ‘will of God’ referred to above) were capable of falling short of the ideal of ‘public reason’, because unable to satisfy the ‘duty of civility’ and ‘criterion of reciprocity’. He believed this was the case because individuals could reasonably have a contrary conception of such ‘truths’, with no impartial criterion to decide between such competing claims. In such circumstances, when individuals publicly insist on their own ‘truth’ in the face of the reasonable objection of others, ‘civility’ and ‘reciprocity’ (and therefore the regulative role of ‘public reason’) breaks down:

Since many doctrines are seen to be reasonable, those who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so. Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are their beliefs. But this is a claim that all equally could make; it is also a claim that cannot be made good by anyone to citizens generally. So, when we make such claims others, who are themselves reasonable, must count us unreasonable.⁶²

IX NON-NEUTRAL PRINCIPLES

As Aristotle tells us, when it comes to matters of ‘truth’, ‘what is white or straight is always the same’.⁶³ However, while our judgments are likely to concur regarding such ‘facts’, this is not always the case when questions of ‘truth’ are involved, with the result that disagreement may arise. This is because, as we saw in the case of ‘public reason’, individuals might adhere to different ‘truths’, or different ‘principles’, which they seek to apply to the same ‘facts’, or because (as in propositions concerning the ‘will of God’) they might adhere to the *same* ‘principle’ but disagree about its meaning and application to particular ‘facts’. In the latter case, although individuals might agree about the ‘truth’ of a particular ‘principle’, they may disagree about the *extent* to which it applies to a particular set of ‘facts’, or the *way* in which it applies to such ‘facts’, and therefore disagree concerning the extent to which judgments, based on this ‘principle’, are relevant to those ‘facts’. In those situations in which there is no neutral and impartial criterion capable of resolving such disagreement, incontrovertibly applying a general ‘principle’ to a particular set of ‘facts’, the ‘principle’ may be described as ‘non-neutral’. As Gerald Dworkin puts it:

⁶² Ibid 61 (emphasis added). See also Rawls, above n 58, 216-17.

⁶³ Aristotle, *The Nicomachean Ethics* (Penguin, 2004) Book VI, vii, 153.

It is important to realize that the controversy in question here is not one concerning the correctness or incorrectness, rightness or wrongness of the principle, but one concerning whether or not the controversial predicate in question applies to the particular case. Thus a principle that states that killing of redheaded people is justified is neutral in my sense, since one can tell which people are redheaded and which are not. On the other hand, one that states that killing in self-defense is legitimate is non-neutral, since parties will often differ as to when a case is one of self-defense.⁶⁴

Needless to say, any principle which is ‘non-neutral’ may not qualify as a proposition that can be advanced, in the context of public debate, in ways consistent with the norms of ‘public reason’. This is because, being ‘non-neutral’, individuals, although possibly agreeing on the broad meaning or ‘truth’ of the principle in question, may disagree as to whether it ought to be applied to a specific set of ‘facts’, or the extent or meaning of that application, and therefore on whether it is a relevant principle upon which judgment should be reached concerning such facts.

X UNDERDETERMINED REASON I

For the purposes of our discussion, the key terms identifying harm under s 18C (‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’) as well as the terms identifying a statement made in ‘good faith’ under s 18D, are ‘principles’ that must, in any particular appeal to these legislative clauses, be applied to a specific set of facts. The application of these ‘principles’ to these ‘facts’ might be one in which we are required to decide whether a particular public ‘act’ has caused ‘offence’ on the basis of ‘race, colour or national or ethnic origin’, and whether, having done so, it is nevertheless one that, being made in ‘good faith’, for one of the reasons outlined in s 18D, ought to be considered lawful.

Neither ss 18C or 18D provide any criteria concerning how the general ‘principles’ incorporated in each should be applied to particular ‘facts’, or the relative weight that each should be accorded in any ‘balancing’ process between them. In other words, all such ‘application’ and ‘balancing’ requires individual judgement which, as Charles Larmore tells us, is the ‘faculty of insight into how general rules are to be applied to particular situations’.⁶⁵

⁶⁴ Gerald Dworkin, ‘Non-Neutral Principles’ (1974) 71(14) *The Journal of Philosophy* 491, 493.

⁶⁵ Charles Larmore, *Patterns of Moral Complexity* (Cambridge University Press, 1987) ix.

What is significant for our purposes is that the ‘principles’ embodied in ss 18C and 18D are ‘non-neutral’. This is because even when individuals are able to agree on their meaning in general, they may reasonably disagree as to whether they apply to a particular set of facts, or the extent to which they apply, or the relative weight (and therefore significance) that should be accorded to each when applied to these facts. For example, while they may agree on what ‘intimidation’ means in principle, they may disagree on whether ‘intimidation’ has occurred in the specific set of circumstances that has given rise to a s 18C complaint, or if it has, whether the public ‘act’ that produced such ‘intimidation’ should nevertheless be considered lawful given the considerations of s 18D. Further, they may disagree concerning the relevant criteria to be applied to resolve such uncertainties.

In such cases of ‘non-neutrality’, individuals (as Larmore tells us above) must rely on their individual judgment. Further, as Aristotle tells us, such judgment can differ.⁶⁶ In such a context, the use of reason is ‘underdetermined’, because it is unable to reach objective, veridical conclusions upon which all can agree, while there is no commonly agreed criteria to resolve any disagreement that persists. On the other hand, the disagreement that arises in such ‘underdetermined’ contexts can still be ‘reasonable’. This is so if it is engaged in by sane persons (as defined by law) whose commitment to agreement is genuine and whose judgments, advanced in debate, arise from sincere motives. In the context of a liberal democratic polity, it is also possible to add to this conception of ‘reasonableness’ the Rawlsian criteria of ‘reciprocity’ and ‘civility’, discussed above, along with Rawls’ additional criterion that the competing individual beliefs (or what Rawls calls ‘doctrines’) that inform public debate are ‘reasonable’ if they do not ‘reject the essentials of a constitutional democratic polity’.⁶⁷

⁶⁶ For Aristotle, such judgment required *phronêsis* - *phronêsis* being the intellectual virtue of deliberating and calculating, and therefore making informed judgments, ‘with a view to some serious end’ (Aristotle above n 63, Book VI, v, 150). Such reasoning may require an evaluation of available means, and a determination of which of these means is the most effective in achieving specifically chosen ends (or ‘goods’). What we consider ‘prudent’ in these circumstances, Aristotle tells us, will ‘vary’ depending on what we think is ‘good’, and also what we consider, in specific circumstances, to be the best means to achieve this ‘good’, ‘prudence’ being concerned with such means (ibid, Book VI, v, vii, xii, 150, 153-154, 163). So whereas ‘scientific knowledge consists in forming judgements about things that are universal and necessary’, giving rise to ‘demonstrable truths’, ‘prudence’, like ‘art’, Aristotle tells us, is concerned solely with what is ‘variable’ (ibid, Book VI, vi, 151-52). ‘Prudence’, therefore, requires ‘judgment’ (*phronêsis*), not least concerning the applicability of principles to shifting empirical facts, and the relation of both to the end (‘good’) one wants to achieve. Similarly, *phronêsis* is required when seeking to apply non-neutral principles, like those we have identified in ss 18C and 18D, to the specific factual circumstances in which, it is believed, such legislative clauses apply, since such application (and the conclusions arising from this) is not self-evident, but subject to individual judgment, with the result that each individual’s conclusions on these matters may differ.

⁶⁷ Rawls, above n 55, 488.

XII THE FEDERAL COURT AND SECTION 18C

‘Non-neutrality’, referred to above, along with the ‘reasonable’ disagreement that follows, is evident if we consider the case law on s 18C. For instance, in its reference to a public ‘act’ producing ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’, s 18C(1)(a) refers to the ‘reasonable likelihood’ of these outcomes occurring, not the *actuality* of their doing so.⁶⁸ On these grounds, whether a person or group actually *was* ‘offended’, ‘insulted’, ‘humiliated’ or ‘intimidated’ as a result of a ‘public act’ is neither ‘required’ nor ‘determinative’ in any conclusion that such an act was ‘unlawful’ under s 18C. Justice Bromberg made this point as follows:

Section 18C(1)(a) requires an assessment to be made of the reasonable likelihood of a person or group of people being offended, insulted, humiliated or intimidated ... by the act of another person. That calls for an assessment of the reasonably likely reaction of the person or the people within the group concerned. It is thus the risk of a person or one or more people within a particular group of people being offended, rather than the actuality of offence, that is being assessed. Proof of actual offence for a particular person or group is neither required nor determinative, although evidence of subjective reaction is relevant to whether offence was reasonably likely ...⁶⁹

The Federal Court of Australia declared that an ‘objective test’ is necessary to determine if, as a result of a public ‘act’ subject to complaint under s 18C, ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ was a ‘reasonable likelihood’, with the result that s 18C(1)(a) has been contravened. As Justice Drummond put it in 2000:

It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?⁷⁰

⁶⁸ See above n 42.

⁶⁹ *Eatoock v Bolt* [2011] FCA 1103 [241].

⁷⁰ *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) FCA 1615 [15] (Drummond J).

The Federal Court is therefore of the view that, for the purposes of s 18C(1)(a), the question of ‘reasonable likelihood’ can be determined ‘objectively’. Similarly, Bromberg J, in the Bolt case, declared that ‘[t]he assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively’.⁷¹

However such references to ‘objectivity’ notwithstanding, the question of ‘reasonable likelihood’, referred to in Bromberg J’s passage at note 69 above, is inherently non-objective, because any judgment concerning such ‘likelihood’ will be informed by multiple variables, all of which (including their relative significances) will be subject to the choice and judgment of individuals. For instance, what individuals believe is ‘likely to offend’ a particular type of person or group of people, belonging to a specific racial, national or ethnic group, in any specific circumstance, will differ depending on each individual’s judgment of the circumstances involved, the factors they decide to consider, the relative weight they place upon them, and that individual’s own personal experiences and the capacities of empathy and understanding that these make possible.

Justice Bromberg sought to preclude such indeterminacy by citing case law that purported to determine when a consequence or outcome could be said to be ‘reasonably likely’.⁷² In particular, he quoted the view of Marks J in *Department of Agriculture and Rural Affairs v Binnie*, which declared:

The expression ‘reasonably likely’ is substantially idiomatic, its meaning not necessarily unlocked by close dissection. In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real – not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is ‘odds on’, or where between nil and certainty it should be placed. A chance which in common parlance is described as ‘reasonable’ is one that is ‘fair’, ‘sufficient’ or ‘worth noting’.⁷³

On this basis, Bromberg J concluded:

⁷¹ *Eatock v Bolt* [2011] FCA 1103 [242]. For what the Court might mean by ‘objective’, in this context, see below n 75 and 126.

⁷² See *ibid* [258]-[260].

⁷³ *Department of Agriculture and Rural Affairs v Binnie* (1989) VR 836, 842 (Marks J), quoted in *Eatock v Bolt* [2011] FCA 1103 [259].

I can see no reason why the expression ‘reasonably likely’ as utilised in s 18C(1)(a) should not be given the meaning identified in *Binnie* as speaking ‘of a chance of an event occurring or not occurring which is real – not fanciful or remote’.⁷⁴

But far from providing us with the level of precision assumed by Bromberg J’s declaration, at note 71 above, that ‘[t]he assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively’, such a definition of ‘reasonably likely’ simply compounds the potential for disagreement and contestation. This is because, like so many idiomatic expressions, while individuals might be able to agree regarding its meaning in general, any application of this definition to a particular set of circumstances (to determine if such ‘reasonable likelihood’ arises in such circumstances) will be subject to the contingency of individual judgment, with all of the multifarious and idiosyncratic factors identified above, and the reasonable disagreement which is likely to follow.

In other words, the phrase ‘reasonably likely’ is a ‘non-neutral’ term. While some might argue that there is little room for reasonable disagreement concerning whether the Bolt newspaper articles, or the Leak cartoon, were ‘reasonably likely’ to cause ‘offence’ to indigenous Australians, the fact that the phrase is a ‘non-neutral’ term, whose application to specific circumstances is subject to reasonable disagreement, means any process of reasoning at which this term is at the centre cannot be described as ‘objective’. Nor can any ‘test’ that the Court might formulate provide such ‘objectivity’. Consequently, the reference, by members of the Federal Court, to ‘objectivity’, or ‘objective tests’, in such circumstances, to determine ‘reasonable likelihood’ of ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’, is philosophically ill-informed.⁷⁵

XIII ‘REASONABLE HYPOTHETICAL MEMBER’

The Federal Courts might be said to have responded to this problem by declaring that the question of ‘reasonable likelihood’ is to be determined, within its ‘objective test’, by

⁷⁴ *Eatock v Bolt* [2011] FCA 1103 [260].

⁷⁵ Of course, it could be that when Bromberg J and others in the Federal Court use the term ‘objective’, in this context, they simply mean that the relevant judgments are not to be determined by the subjective impressions of the parties to the specific action in question. My point, however, is that irrespective of who has the authority to make the relevant judgements at issue, the judgments themselves will be just as ‘individual’, and so just as ‘subjective’, as those of the parties to the action, if ‘non-neutral’ terms are involved. Indeed, such terms inevitably *will* be involved because all judicial decisions, involving the application of general laws or legal concepts to particular facts, involve such non-neutral terms, and so involve inherently subjective judgment. While such realities are inescapable, the application of a term like ‘objective’, in such contexts, blurs this, providing a pretense to precision which is simply not available, and so the use of such a term is misleading and out of place.

appealing to the experience of ‘a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.’⁷⁶ As Bromberg J declared in his summary of the Bolt case: ‘I have concluded that the assessment is to be made by reference to an ordinary and reasonable member of the group of people concerned and the values and circumstances of those people’.⁷⁷ In this context, Bromberg J insisted, only limited account is to be taken of ‘[g]eneral community standards’.⁷⁸

Yet this criterion of appealing to ‘a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct’ to determine whether ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ is ‘reasonably likely’ to have occurred as a result of such conduct, with the result that s 18C(1)(a) is contravened, has been subject to contestation. Forrester, Finlay and Zimmermann, for instance, declare that the criterion is at odds with ‘equality before the law’. As they put it: ‘To have someone’s legal liability depend on the race, colour, ethnicity or nationality of their audience or themselves is the antithesis of equality before the law ... [This is because] someone may be legally liable in circumstances where another may not, and the *only* point of difference is the race, colour, ethnicity or nationality of the speaker or audience ...’⁷⁹

⁷⁶ Parliament of Australia 2017, above n 30, sec 2.24. Of course, the appeal to such a ‘reasonable hypothetical member’ requires some criterion of what constitutes, on the part of such a member, a ‘reasonable’ response to a public ‘act’, to determine if ‘offence’ etc. is a ‘reasonable likelihood’. Justice Bromberg affirms, on this point, Dowsett J in *National Exchange Pty Ltd v Australian Securities and Investments Commission*, who declared: ‘Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons, acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.’: *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90 [24] (Dowsett J) quoted in *Eatock v Bolt* [2011] FCA 1103 [251].

⁷⁷ *Eatock v Bolt* [2011] FCA 1103 (Summary) [15]. See also *Eatock v Bolt* [2011] FCA 1103 [250], [268]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 [16]. Bromberg J points out that s 18C(1)(a) refers to public ‘acts’ directed to both a single ‘person’ and a ‘group of people’. He declares that in those circumstances where the ‘public act’ is directed to a particular ‘person’, and ‘a personal claim’ of ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ has been made, there is no need to substitute a ‘hypothetical’ person for the ‘person’ affected by the ‘act’, in determining ‘likelihood’ of ‘offence’, but rather this ‘likelihood’ can be ‘analysed from the point of view’ of the ‘identified person’ themselves: *Eatock v Bolt* [2011] FCA 1103 [250]. Yet he insists if a ‘public act’, falling within the auspices of s 18C, is directed to a ‘group of people’, it is necessary to assess the ‘likelihood’ of ‘offence’ etc., by reference to a ‘hypothetical representative’ of the group: *ibid*.

⁷⁸ *Eatock v Bolt* [2011] FCA 1103 (Summary) [15]. Bromberg J also stated that ‘[w]hether the act in question is reasonably likely to have caused offence is to be assessed on the balance of probabilities ... The onus of proof on that, and the other elements of s 18C, rests with the applicant’: *Eatock v Bolt* [2011] FCA 1103 [261].

Needless to say, a reference to a ‘balance of probabilities’ does not make assessments of ‘reasonable likelihood’ any more ‘objective’ or the conclusions of the Federal Court’s ‘objective test’ any less controvertible. This is because each individual, with full variability of judgment, will choose what factors they believe relevant to this ‘balance’, and what relative weight and comparative significance they will place upon each factor, thereby determining the outcome in their own particular way. Once more, therefore, outcomes will reasonably differ.

⁷⁹ Forrester, Finlay and Zimmermann, above n 44, 56 (emphasis added).

Some who have sought to amend s 18C to ensure a wider scope for political criticism have insisted that, contrary to Justice Bromberg and others above, the criterion of ‘likelihood’ ought *not* to be based on ‘a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.’ For instance, the proposed Abbott Government reforms to s 18C, released by the Attorney-General, George Brandis, on 25 March 2014, included the proposal that whether an act was ‘reasonably likely to have the effect’ of ‘intimidation’ or ‘vilification’ was ‘to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community’.⁸⁰ The Parliamentary Joint Committee’s report on ‘Freedom of Speech in Australia’, referred to above, declared that this same proposal was among those that had the support of ‘at least one member of the committee’ but not majority support.⁸¹

What this shows is that, the Court’s reference to an ‘objective test’ notwithstanding, there is nothing ‘objective’ about the criterion, used within this ‘test’, to determine the ‘reasonable likelihood’ of whether unlawful action has occurred under s 18C(1)(a). Despite Justice Bromberg’s declaration that ‘[t]he emotions upon which s 18C(1)(a) turns are those of a victim and not of an aggressor’,⁸² reasonable justification is provided by others above why ‘reasonable likelihood’ might be determined not by reference to the group to which those subject to the public ‘act’ in question belong but rather by the broader criterion of ‘an ordinary reasonable member of the Australian community’ advocated by some of those seeking reform to s 18C.⁸³ The result is that, in regard to this question of criteria, reasonable

⁸⁰ Attorney-General’s Department (2014) above n 32.

⁸¹ Parliament of Australia 2017, above n 30, rec 3(e). Forrester, Finlay and Zimmermann have also advocated this reform: Forrester, Finlay and Zimmermann, above n 44, 224-25.

⁸² *Eatoock v Bolt* [2011] FCA 1103 [206].

⁸³ Bromberg J rejects this proposed reform. He insists that the wording of s 18C(1)(a) makes clear that the ‘person’ or ‘group of people’ referred to are those ‘that the conduct in question was directed at’ (ibid [246]). He declares that to substitute a ‘reasonable person’ test, reflecting general ‘community standards’, to determine the ‘likelihood’ of ‘offence’ etc, would therefore ‘result in the perspective clearly required by the words of s 18C(1)(a) to be ignored’: ibid [253]. As Bromberg J put it: ‘It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed ...’: ibid. For the purposes of the Bolt case, however, Bromberg J. insists that irrespective of the ‘test’ used he would have arrived at the same conclusions: ‘[I]f, contrary to my view, the assessment of the reaction of the ordinary representative of the group should be made by reference to the imputations conveyed to the ordinary and reasonable reader ... I would in any event have reached the same conclusions as those here expressed’: ibid [299]. He adds further that ‘to import general community standards into the test of the reasonable likelihood of offence’, as would be the case if ‘reasonable likelihood’ was determined by the above-mentioned ‘reasonable person’ test (ie ‘an ordinary reasonable member of the Australian community’), ‘runs a risk of reinforcing the prevailing level of prejudice’ which, he says, would be at odds with the wider purposes of Part IIA of the RDA: ibid [253]. He declares that these wider purposes include ensuring freedom from ‘the harm caused by the dissemination of racial prejudice’:

contestation arises, and any conclusions on the matter, far from being ‘objective’, are ‘underdetermined’.

XIV ‘PROFOUND AND SERIOUS EFFECTS’

The Federal Court of Australia has sought to provide some further clarity on this issue. They have sought to consider what magnitude of ‘effect’ or ‘consequence’ a public ‘act’ must produce in order to constitute ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ under the terms of s 18C(1)(a). To this end, Kiefel J pointed out that Part IIA of the RDA, in which s 18C appears, has a heading entitled ‘Prohibition of Offensive Behaviour Based on Racial Hatred’.⁸⁴ Given this focus on ‘racial hatred’, she therefore concluded that ‘only very serious and offensive behaviour was intended as the subject of s 18C’.⁸⁵ As she put it:

Pursuant to the section the nature or quality of the act in question is tested by the effect which it is reasonably likely to have on another person of the racial or other group ... To “*offend, insult, humiliate or intimidate*” are profound and serious effects, not to be likened to mere slights. Having said that, the court would of course be conscious of the need to consider the reaction from that person or group’s perspective.⁸⁶

Yet despite Kiefel J’s declaration that it is the Part IIA heading of the RDA, referring to ‘racial hatred’, which informs her opinion that a public ‘act’ contravening s 18C must

ibid [210]. They also include the objectives of a ‘multicultural society’, which Bromberg J insists, are the ‘promotion’ of ‘tolerance’ and the ‘protection’ against ‘intolerance’, ‘acceptance of racial and ethnic diversity’, and ‘the idea that people may identify with and express their racial or ethnic heritage free of pressure not to do so’: ibid [334]. Given that the RDA is meant to incorporate these wider purposes, Bromberg J concludes that the ‘purposes’ underwriting s 18C are ‘public’ (as distinct from ‘private’). He does so by pointing out that s 18C(1) excludes ‘private’ acts (see the reference to ‘otherwise than in private’ at n 42 above). He declares that such an exclusion ‘suggests that the section is at least primarily directed to serve public and not private purposes ... That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society’: ibid [263]. He therefore concludes: ‘In my view, “offend, insult, humiliate or intimidate” were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid.’: ibid [267]). He concedes that such ‘public consequence need not be significant. It may be slight’: ibid. Nevertheless ‘a consequence which threatens the protection of the public interest sought to be protected by Part IIA’, rather than a mere ‘personal hurt’, is, he insists, ‘a necessary element of the conduct s18C is directed against’: ibid.

⁸⁴ See *Creek v Cairns Post Pty Ltd* (2001) FCA 1007 [14] (Kiefel J). Kiefel J points out that the same legislative intent, centred on prohibiting behaviour arising from ‘racial hatred’, was also apparent in the Second Reading Speech and Explanatory Memorandum to the *Racial Hatred Bill 1994*, which, as the *Racial Hatred Act 1995* (Cth), amended the *Racial Discrimination Act 1975* (Cth) by inserting into the Act sections 18B to 18F: ibid [14]. However see n 87 below on how ‘racial hatred’, as the proposed subject matter of s 18C, did not survive the legislative process.

⁸⁵ Ibid.

⁸⁶ Ibid [16] (emphasis in original). See n 83 above where Bromberg J argues that the ‘effect’ of the public ‘act’, falling within the jurisdiction of s 18C, must also be ‘public’, affecting the wider ‘purposes’ which Part IIA of the RDA is conceived to uphold, and not a mere ‘private’ effect based on ‘personal hurt’.

constitute ‘very serious and offensive behaviour’, having ‘profound and serious effects’, she explicitly repudiates the conclusion that the public ‘act’ must arise from ‘racial hatred’ in order to contravene s 18C:

Whilst one may accept that hatred of other races is an evil spoken of in the statute, I do not consider that the heading creates a separate test - one which requires the behaviour to be shown as having its basis in actual hatred of race. Sections 18B and 18C make it plain that the prohibition will be breached if the basis for the act was the race, colour, national or ethnic origin of the other person or group. Whilst the reason for the behaviour in question may be a matter for enquiry ... the intensity of feeling of the person whose act it is, is not necessary to be considered, although in some cases it might shed light on what is otherwise inexplicable behaviour.⁸⁷

With this statement, Kiefel J makes clear that the intention of the agent, engaging in a public ‘act’, is not relevant to determining if the ‘act’ has contravened s 18C(1)(a). Such intention, however, is relevant to determining if the ‘act’ has contravened s 18C(1)(b). This is because this provision requires that the ‘act’ be done ‘because of the race, colour or national or ethnic origin’ of a person or a group of people.⁸⁸ As Kiefel J explains in the passage above, it is not necessary that such intentions include ‘racial hatred’, but, for the purposes of s 18C(1)(b), it

⁸⁷ *Creek v Cairns Post Pty Ltd.* (2001) FCA 1007 [18] (Kiefel J). Justice Bromberg also advances the view that the public ‘acts’ falling under s 18C are not those confined to acts of ‘racial hatred’. He points out that although the RDA was intended to give effect to the Commonwealth’s obligations under the United Nation’s *International Convention on the Elimination of all Forms of Racial Discrimination* (‘Convention’), it does not give effect to article 4(a) of that Convention which seeks to create a criminal offence for ‘all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof’ *Eatock v Bolt* [2011] FCA 1103 [197]). Bromberg J points out that ‘[a] proposed criminal offence proscribing the promotion of racism in the manner condemned by Art 4(a) [of the Convention] formed part of the Racial Discrimination Bill introduced in 1974 but ... was rejected by the Senate’: *ibid* [198]. The *Racial Hatred Bill 1994* (Cth), which, in its eventual form as the *Racial Hatred Act 1995* (Cth), amended the *Racial Discrimination Act* by incorporating into it Part IIA (including ss 18C and 18D), originally had a provision proposing, as in 1974, to create a range of criminal offences relating to racial hatred, intended to give effect to Article 4(a) of the Convention, and amending the *Crimes Act 1914* (Cth) to this purpose: *ibid* [199]-[201]). However, as Carr J has pointed out, that amendment was once more rejected by the Senate (*Toben v Jones* [2003] FCAFC 137 [18] (Carr J)). Consequently, although the heading of Part IIA of the RDA refers to ‘Prohibition of Offensive Behaviour Based on Racial Hatred’, the provisions of the *Racial Hatred Act 1995* (Cth), part of which became s 18C of the RDA, ‘made no reference to the incitement of racial hatred and did not require an act to intentionally inflict harm as an element of breach. Instead, the civil provisions focused upon racially offensive behaviour and (by what became s 18D) included free speech protections which were not included in the proposed criminal offence of inciting racial hatred’: *Eatock v Bolt* [2011] FCA 1103 [202]).

⁸⁸ See note 42 above. See also *Eatock v Bolt* [2011] FCA 1103 [306], [307], [309].

is necessary that they include a motivation for the public ‘act’ based on the ‘race, colour or national or ethnic origin’ of the target person or group.⁸⁹

Kiefel J’s ruling on the interpretation and application of s 18C(1)(a) (‘very serious and offensive behaviour’ having ‘profound and serious effects’) has become accepted legal precedent, being affirmed numerous times in case law.⁹⁰ However it does not remove the issue of ‘non-neutrality’ with which we began. This is because just what is to be considered, in any specific circumstance, ‘very serious and offensive behaviour’ having ‘profound and serious effects’ (and not, therefore, to be confused with ‘mere slights’) will, once again, be a matter for individual judgment, involving multiple variables, selected on the basis of numerous individual experiences, whose relative weight and significance will also be subject to this same judgment, and upon which, individuals may differ. While there will clearly be instances in which the impact of a public ‘act’ is so onerous and overt that few would disagree that the ‘act’ has had a ‘profound and serious effect’, sufficient to produce ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ under the terms of s 18C(1)(a), nevertheless in the case of lesser public ‘acts’, disagreement is likely to arise. In such circumstances, what one individual considers, in relation to a specific public ‘act’, a ‘profound and serious effect’, may not, due to the variability of individual judgment, be so perceived by another. The varying perspectives on the Leak, Bolt and QUT cases would be examples of this disagreement. ‘Profound and serious effects’ is therefore, when used in this context, a ‘non-neutral’ term, and the use of reason, by each individual, in their judgment concerning the

⁸⁹ Justice Bromberg, in the Bolt case, also makes clear this focus on ‘intention’ or ‘motivation’ in the application of s 18C(1)(b). He states that whereas s 18C(1)(a) ‘concerns the likelihood of the impugned act causing offence’, s 18C(1)(b) ‘concerns the reason for the impugned act’: *ibid* [193]. He states that ‘[s]ection 18C(1)(b) specifies the causal nexus between the act reasonably likely to offend and the racial or other characteristic or attribute of one or more of the persons reasonably likely to have been offended ... That nexus or link is concerned with the reason that the act was done’: *ibid* [303]. Bromberg J makes clear that the ‘reason’ for which the ‘act’ was done includes the ‘motivation’ of those engaging in the act: *ibid* [306]. He states that for the purposes of s 18C(1)(b), this ‘motivation’ must, at least in part, be determined by the ‘race, colour or national or ethnic origin’ of the target person or group: see *ibid* [307], [309]. As Bromberg J puts it: ‘A publication, a speech or other communication may have many parts and different parts may be motivated by different reasons’: *ibid* [304]. While it is ‘not necessary’, for the purposes of s 18(1)(b), that the ‘race, colour or national or ethnic origin’ of a person or group ‘be the dominant reason or a substantial reason for the doing of the act ... [n]evertheless, the reason will need to be an operative reason in the sense that it was involved in actuating the act’: *ibid* [306]. Concerning the specific motivations of Andrew Bolt, in the publication of his newspaper articles, Bromberg J states: ‘I have no doubt that one of the reasons which motivated Mr Bolt was his desire to convey a message about the Aboriginality and thus the race, ethnic origin and colour of the people dealt with by the imputations. I am satisfied that Mr Bolt wrote those parts of the Newspaper Articles which convey the imputations, including because of the race, ethnic [origin] ... and colour of the people who are the subject of them ... While I accept that Mr Bolt was motivated to write about what he perceived to be the identity choices made, I do not accept that race, colour and ethnic origin were not motivating reasons.’: *ibid* [322], [326].

⁹⁰ See *ibid* [268]; Parliament of Australia above n 30, sec. 2.21; Forrester, Finlay and Zimmermann above n 44, 17-18. See also n 99 below.

application of this term to specific circumstances, will therefore be ‘underdetermined’. Further, any ‘balancing’ of such s 18C considerations with s 18D, and the exemptions it purports to provide, will also be a matter of individual judgment, with the same ‘underdetermined’ consequences.

XV JUSTICE BROMBERG AND SECTIONS 18C AND 18D

Indeed, such ‘non-neutral’ terms are inevitable in legal decision-making because the contents of legislation have to be applied to particular circumstances, and because such circumstances cannot be anticipated within the legislation itself, individual judgment is required. Justice Bromberg acknowledged the inevitability of this individual judgment in the Bolt case. As part of his interpretation of Part IIA of the RDA, within which s 18C is located, he referred to ‘two foundational values’, with which, he says, the ‘purpose and policy’ of Part IIA is ‘concerned’.⁹¹ The first, he said, is freedom from ‘the harm caused by the dissemination of racial prejudice’.⁹² The second is the norm of ‘freedom of expression’, which he says, must ‘be balanced against the objective of promoting racial tolerance and proscribing inappropriate racially based behaviour’.⁹³ He points out that ‘[w]hilst to some extent’ these ‘values are complementary of each other, Part IIA puts them in contest and then seeks to identify a point of balance at which harmony between them is to be found’.⁹⁴ He states that ‘[w]hilst the terms of Part IIA provide the boundaries within which that search for harmony is to be undertaken, the search inevitably involves *evaluative judgment*’.⁹⁵ He declares that it is ‘evaluative judgments’ of this kind that ‘the Court is authorised and required by the legislature to make’.⁹⁶

Yet we have seen that such judgments, and the ‘evaluations’ they involve, are inherently individual, in the sense that they are informed by the specific, and unique, experience of those making the judgments, and further, inevitably involve the application of non-neutral principles to specific facts. We have also seen that those making these judgments will, for these reasons, often differ in their conclusions, with no neutral or impartial criterion to decide between them. Upon these grounds, we have declared that such judgments are

⁹¹ *Eatock v Bolt* [2011] FCA 1103 [195]. See also *ibid* [211].

⁹² *Ibid* [210].

⁹³ *Ibid* [210]. See also *ibid* [211], [226].

⁹⁴ *Ibid* [211].

⁹⁵ *Ibid* [211] (emphasis added).

⁹⁶ *Ibid* [211].

‘underdetermined’, with the result that their conclusions are by no means incontrovertible, and so disagreement between individuals on such matters is ‘reasonable’.

Once again, this inherent variability in individuals’ ‘evaluative judgment’ can be perceived in Justice Bromberg’s conclusions in the Bolt case. Bromberg J found that, for the following reasons, the Bolt articles constituted ‘unlawful conduct’ under the terms of s 18C:

I have determined that some of the messages (what lawyers call “the imputations”) which were conveyed by the two newspaper articles, were reasonably likely to offend, insult, humiliate or intimidate the people in question (or some of them), and that those articles were written or published by Mr Bolt and HWT including because of the race, colour or ethnic origin of those people.⁹⁷

Bromberg J declares that ‘[w]hether the act in question is reasonably likely to have caused offence is to be assessed on the balance of probabilities’.⁹⁸ Further, for the purposes of determining whether ‘offence’, ‘insult’, ‘humiliation’ or ‘intimidation’ is ‘reasonably likely’ to have occurred, Bromberg J endorses Kiefel J’s test referred to at n 86 above:

I would respectfully agree with the conclusion reached by other judges of this Court, that the conduct caught by s 18C(1)(a) will be conduct which has “profound and serious effects, not to be likened to mere slights”: *Creek* at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); or, as Branson J put it in *Jones* at [92] “real, offence”.⁹⁹

We saw that Bromberg J ruled that a determination on whether Bolt’s newspaper articles were ‘reasonably likely to offend’ ‘is to be made by reference to an ordinary and reasonable member of the group of people concerned and the values and circumstances of those people’.¹⁰⁰ On the basis of his assessment of the circumstances of the case, Bromberg J arrived at his conclusion that such a person *would* be ‘reasonably likely’ to be ‘offended’, ‘insulted’, ‘humiliated’ and ‘intimidated’ by Bolt’s newspaper articles:

I consider it reasonably likely that the ordinary person within this group would have been offended and insulted by her perception that the Newspaper Articles were challenging the legitimacy of her identity and that of others like her ... She will have been conscious that, given her appearance and her identification as an Aboriginal person, others may perceive her to have

⁹⁷ Ibid [8]. See also *ibid* [298], [452].

⁹⁸ Ibid [261]. See also n 78 above.

⁹⁹ *Eatoock v Bolt* [2011] FCA 1103 [268]. See also *ibid* [297].

¹⁰⁰ See n 77 above.

falsely chosen to identify as an Aboriginal person and done so for opportunistic or political reasons, just like those people that Mr Bolt wrote about. That will be very offensive and insulting to her because it is not true. Her Aboriginal identity is important to her. It is who she is ... 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 ... She may now think twice about asserting her Aboriginal identity in public generally or in particular public settings. That will be particularly the case, if she is young or otherwise vulnerable in relation to challenges to her Aboriginal identity.¹⁰¹

Bromberg J then explained why such outcomes pass the ‘Kiefel test’ concerning ‘profound and serious effects’:

Acts which are reasonably likely to cause offence, insult, humiliation or intimidation of that kind have “profound and serious effects” and are caught by s 18C(1)(a). That kind of likely offence is not to be likened to “mere slights”. It has a real potential to lower the pride and self-image of the person or group attacked and thereby inhibit the participatory equality in the affairs of the community which the group and its members are entitled to enjoy. Conduct with these consequences threatens the dignity assurance which all citizens are entitled to be accorded. The reactions which I have concluded were reasonably likely, are not reactions likely to be caused by the intolerance of the people affected.¹⁰²

Bromberg J then advanced a series of reasons why the newspaper articles, having these ‘profound and serious effects’, were not protected under s 18D:

I have not been satisfied that the conduct is exempted from unlawfulness by s 18D. The reasons for that conclusion have to do with the manner in which the articles were written, including that they contained erroneous facts, distortions of the truth and inflammatory and provocative language and that as a result, the conduct of Mr Bolt and HWT is not justified in the manner required by s 18D of the RDA.¹⁰³

Bromberg J denied that, for the purposes of s 18D, the Bolt newspaper articles constituted ‘fair comment’ or were written ‘reasonably’ and in ‘good faith’.¹⁰⁴ Indeed, he declared that ‘[e]ven if I had been satisfied that the s 18C conduct was capable of being fair comment, I

¹⁰¹ *Eatock v Bolt* [2011] FCA 1103 [293]-[296]. See also *ibid* [415].

¹⁰² *Ibid* [297].

¹⁰³ *Ibid* [8], [452]. See also *ibid* [414], [422], [427], [451]. Bromberg J also cited what he believes is authoritative precedent that the onus of proof ‘rests on the respondents to show, on the balance of probabilities, that his or her action falls within one of the exemptions in s 18D’: *ibid* [339].

¹⁰⁴ *Ibid* [384], [386], [398], [425], [427].

would not have been satisfied that it was said or done by Mr Bolt reasonably and in good faith'.¹⁰⁵

We saw at note 95 above that Bromberg J. conceded that any attempt to 'balance' the competing imperatives embodied in ss 18C and 18D required 'evaluative judgment'. Concerning Bromberg J's *own* judgment in the passage above, reasonable individuals might (aside from the reference to 'erroneous facts') legitimately disagree as to whether the Bolt newspaper articles contained the shortcomings to which Bromberg J refers, or if they did, whether these shortcomings were of sufficient weight to disqualify the articles for protection under s 18D, or outweigh the negative effects on free speech which, as Bromberg J admitted, such disqualification would entail.¹⁰⁶ Once again, therefore, we see how the individual 'evaluative judgment', which Bromberg J acknowledged was necessary to arrive at such conclusions, is 'underdetermined'. The result is that no conclusion concerning the relative 'balance', accorded the priorities of ss 18C and 18D in the Bolt case, is incontrovertible, and reasonable disagreement may arise.

XVI SKEWED INTERPRETATIONS

One might think that individuals would be reasonably entitled to arrive at conclusions at odds with those of Bromberg J in the Bolt case on the grounds that s 18C and s 18D uphold two distinct values or imperatives that, as Bromberg J tells us above, require 'balancing' in relation to each other – thereby allowing an individual to acknowledge the 'profound and serious effects' of a public 'act' resulting in a contravention of s 18C(1)(a), but concluding that the public 'act' ought still be to be considered 'lawful' given the independent free speech imperative, centred on statements made for specific public purposes 'reasonably and in good faith', upheld by s 18D. Bromberg J seems to affirm this idea that ss 18C and 18D are informed by quite independent imperatives in his reference above to 'two foundational values' underwriting the 'purpose and policy' of Part IIA of the RDA – these being freedom from 'the harm caused by the dissemination of racial prejudice' and the norm of 'freedom of expression'.¹⁰⁷ Indeed, he even more explicitly suggests that ss 18C and 18D are informed by quite independent (and indeed competing) imperatives with his claim that 'Part IIA' places

¹⁰⁵ Ibid [424].

¹⁰⁶ Bromberg J makes this admission as follows: 'In the balancing process, I have also taken into account the silencing consequences upon freedom of expression involved in the Court making a finding of contravention' (*Eatock v Bolt* [2011] FCA 1103 (Summary) [25]. See also n 123 below.

¹⁰⁷ See above n 91-93.

these ‘foundational values’ in ‘contest’ and then ‘seeks to identify a point of balance at which harmony between them is to be found’.¹⁰⁸ Neither the terms ‘contest’ or ‘balance’ would be meaningful to use in this context unless, underwriting such references, was the assumption that what was being referred to were quite independent and distinct values or imperatives which, being in competition, needed to be in some way accommodated in relation to each other.

But drawing on Federal Court precedent regarding the interpretation of ss 18C and 18D, Bromberg J contradicts all of these assumptions. He does so in his ruling that the statutory meaning of s 18D cannot be interpreted independently of the imperatives of s 18C, but rather, internal to our understanding of the key phrase that frames s 18D (‘reasonably and in good faith’) ought to be an assumption that a public ‘act’ is not engaged in ‘reasonably and in good faith’ unless there is a genuine effort, on the part of those engaged in the ‘act’, not to contravene s 18C. In other words, far from embodying ‘two foundational values’ which, in their rigorous independence, must be ‘balanced’ against each other, such an assumption supposes that internal to s 18D is a requirement to uphold the imperatives of s 18C.

Such a view was advanced by Lee J, in *Bropho v Human Rights and Equal Opportunity Commission*,¹⁰⁹ where he argued that the phrase ‘in good faith’, at the centre of s 18D, be interpreted not simply within its own semantic limits as meaning absence of ‘dishonesty’, ‘fraud’ or ‘malice’, but rather that our very understanding of the meaning of this term, for the purposes of s 18D, include a requirement to exercise ‘due care’ to ‘avoid’ or ‘minimize’ any contravention of s 18C:

The words ‘good faith’ as used in s 18D involve more than the absence of bad faith, dishonesty, fraud or malice. Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the degree of harm reasonably likely to result. In short...[t]he words ‘in good faith’ as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.¹¹⁰

¹⁰⁸ See above n 94.

¹⁰⁹ [2004] FCAFC 16 (‘*Bropho*’).

¹¹⁰ *Ibid* [144] (Lee J). See also *Eatock v Bolt* [2011] FCA 1103 [426]. Bromberg J endorses the above-cited opinion of Lee J in *Bropho* at *ibid* [345].

Bromberg J endorses this view of Lee J, and quotes French J in *Bropho* to the same effect, insisting that internal to our understanding of the meaning of ‘in good faith’, in s 18D, is a requirement to be ‘faithful’ to the norms upheld by s 18C:

As Part IIA condemns racial vilification of the defined kind but protects freedom of speech and expression, the good faith exercise of that freedom ‘will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s. 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict’.¹¹¹

Bromberg J provides his own interpretation of what French J meant, in the passage above, by ‘minimisation’ of ‘harm’, and its relation to freedom of speech. Once more, this interpretation entailed an obligation to minimise any contravention of s 18C:

In *Bropho* ... French J recognised that freedom of speech is not limited to expression which is polite or inoffensive. However, the minimisation of harm which French J spoke of involves a restraint upon unnecessarily inflammatory and provocative language and gratuitous insults. The language utilised should have a legitimate purpose in the communication of a point of view and not simply be directed to disparaging those to whom offence has been caused ...¹¹²

Bromberg J then concludes, in rigorously circular (and therefore question-begging) terms, that the reason why we can import into the meaning of s 18D’s ‘reasonably and in good faith’ a requirement to uphold the imperatives of s 18C, is because any public ‘act’ which seeks to pursue the sort of ‘academic’, ‘artistic’, ‘scientific’ or journalistic imperatives referred to in s 18D, but does so in the absence of such ‘good faith’, could potentially lead to the violation of the imperatives of s 18C:

The minimisation of harm by reference to the objectives of s 18C is, I think, imported into the words ‘reasonably and in good faith’ because non-compliance with that requirement (in the pursuit of an activity described by paragraphs (a), (b) or (c) of s 18D) is a basis for the impairment of the rights or freedoms protected by s 18C.¹¹³

¹¹¹ *Bropho v Human Rights and Equal Opportunity Commission* (2004) FCAFC 16, [95], (French J), quoted in *Eatoock v Bolt* [2011] FCA 1103 [343].

¹¹² *Eatoock v Bolt* [2011] FCA 1103 [411]. Bromberg J declares elsewhere in his judgment that ‘[a] conscientious approach to freedom of expression is required by s 18D’, but he defines such ‘conscientiousness’ as ‘honouring the values asserted by the [RDA]’: *ibid* [390]. Once again, therefore, the free speech clauses of s 18D are defined, in regard to their internal requirements, in terms of an obligation to uphold the imperatives endorsed elsewhere in the Act.

¹¹³ *Ibid* [349]. See also *ibid* [427].

To insist that internal to the meaning of the key phrase framing s 18D ('reasonably and in good faith') is an obligation to act in ways that seek not to contravene s 18C, is to undermine any categorical independence between the respective imperatives underwriting ss 18C and 18D, and therefore any purported 'balance' between them. Far from ss 18C and 18D upholding (as Bromberg J claims above) 'two foundational values', in 'contest' with each other, in relation to which a 'balance' is required, arrived at on the basis of individual 'evaluative judgment', the meaning of one of these provisions has been made *conditional* upon the other. Far from a 'contest' arising between the two, with the possibility that s 18D might provide a genuine (because independent) exemption for public 'acts' considered 'unlawful' under s 18C, the interpretation of s 18D offered above by Justices Bromberg, Lee and French, skews the very import of s 18D in such a way that, internal to its meaning, is a norm of non-contravention regarding s 18C.

To conceive the extent to which such an outcome undermines any idea that s 18D 'balances' s 18C, or provides a genuine exemption from the injunctions of the latter, consider the following analogy concerning 'fair comment' and the law of defamation. Bromberg J points out that '[a]t common law, fair comment exists as a defence to a defamatory comment in order to facilitate freedom of expression on matters of public interest'.¹¹⁴ 'Fair comment' therefore seeks to provide an 'exemption' from the 'unlawfulness' which might otherwise be ascribed to a statement that is found to be defamatory.

Bromberg J identifies some of the key prerequisites that the common law recognises for the effective exercise of the defence of 'fair comment' in relation to defamation. These include that 'the comment must be based on facts which are true or protected by privilege.'¹¹⁵ They also include the condition that '[t]he fair comment defence only applies to a comment as distinct from a statement of fact', meaning that '[t]he comment must be recognisable as comment and the fact upon which the comment is based must be expressly stated, referred to or notorious'.¹¹⁶ They also include the requirement that the 'report or comment' claiming to constitute 'fair comment' 'be on an event or matter of public interest'.¹¹⁷ Finally, they include the requirement of 'honesty' – that the 'maker of the comment genuinely believe the

¹¹⁴ Ibid [353]. Indeed, Bromberg J insists that this common law concept is internal to s 18D, declaring that 'by using the phrase 'fair comment' in s 18D(c)(ii), Parliament intended to invoke the requirements of the common law defamation defence of fair comment': *ibid* [358].

¹¹⁵ Ibid [354].

¹¹⁶ Ibid [355].

¹¹⁷ Ibid [428].

comment made’ – and ‘beyond’ the requirement of ‘honesty’, that both the ‘maker’ and ‘the publisher of the defamatory statements demonstrate that reasonable measures were taken to adhere to the value of truth and the protection of reputation’ by ‘having taken reasonable steps to verify the accuracy of statements made and where practicable and necessary, seek responses from those whose reputations are at stake’.¹¹⁸

But imagine if one of the prerequisites of the common law defence of ‘fair comment’ was that the ‘maker of the comment’ earnestly sought, in the context of such ‘comment’, not to make any statement which diminishes the reputation of another, or arouses adverse public reaction to them? In such a circumstance, any independence of the defence of ‘fair comment’, relative to defamation, would be undermined, because internal to our very understanding of what constitutes ‘fair comment’ would be an obligation not to engage in the defamation for which ‘fair comment’ purports to provide an exemption.

It is precisely this phenomenon which occurs in the context of Justices Bromberg, Lee and French’s interpretation of ‘reasonably and in good faith’ within the framework of s 18D. We saw that Bromberg J described s 18D as ‘a provision which, broadly speaking, seeks to balance the objectives of s 18C with the need to protect justifiable freedom of expression’.¹¹⁹ However no ‘balance’ between these competing ‘objectives’ occurs if the meaning of one is defined, in part, in terms of the non-contravention of the other. Far from embodying ‘two foundational values’, independent of each other, in which a priority placed on one provides a possible exemption from the ‘unlawfulness’ arising from the other, internal to the key phrase which defines s 18D (‘reasonably and in good faith’) is a requirement not to contravene the imperatives of the very provision (s 18C) to which s 18D purports to provide an exemption.

Bromberg J seems to fall short of perceiving these consequences arising from the interpretation of ‘reasonably and in good faith’, advanced by Lee J and French J, which he himself has endorsed. This is evident in his appeal to the ‘test’ of ‘proportionality’ to assist in the process of ‘balancing’ that he refers to in relation to ss 18D and 18C. Bromberg J tells us that such a ‘test’ is required when competing ‘rights’ are in ‘conflict’, such ‘conflict’ being apparent in those circumstances where the advancement of one right ‘impairs’ the other.¹²⁰

¹¹⁸ Ibid [357], [387], [388], [398]. On Bromberg J’s declaration that such concern for the accuracy of ‘facts’ is also integral to the s 18D concept of ‘reasonably and in good faith’, see *ibid* [399].

¹¹⁹ See n 48 above.

¹²⁰ *Eatock v Bolt* [2011] FCA 1103 [349]. See also *ibid* [427]. Bromberg J describes the ‘test’ of ‘proportionality’ as follows: ‘Where rights and freedoms are in conflict, the impairment of one right by the

But such a ‘test’ only makes sense if the ‘objectives’ of ss 18C and 18D are genuinely independent of each other, in ‘contest’ with each other, and therefore capable of placing a potential limit upon each other, because only then can the relative ‘impairment’, for which the ‘test’ of ‘proportionality’ purports to provide a solution, apply.¹²¹

But we have seen that the interpretation of s 18D offered by Justices French, Lee and Bromberg ensures that it possesses no genuine independence from s 18C – an independence in which the advancement of one of these provisions might ‘impair’ the other. On the contrary, we have seen that public ‘acts’ that are held to be ‘reasonable and in good faith’, thereby falling within the jurisdiction of s 18D, are interpreted as being so, in part, because they have upheld an obligation to abide by the imperatives of s 18C.

We can see the same failure, on Bromberg J’s part, to recognise the full implications of this interpretation of s 18D in his refutation of the Bolt and *Herald and Weekly Times*’ rival interpretation of this provision, which he recounts in the passage below. In this passage, Bromberg J insists on perceiving ss 18C and 18D as upholding two ‘competing’ and ‘conflicting’ ‘rights’, between which a genuine ‘balance’ is required, with the result that ‘[e]ach must to some extent give way to the other’. He therefore rejects the respondents’ claim that the interpretation of s 18D, advanced by Lee J and French J (and endorsed by himself), ‘subjugates’ the norms of s 18D to those of s 18C:

Mr Bolt and HWT contended that the approach of French J in construing a requirement of proportionality, had the effect of prioritising the norms sought to be protected by s 18C over those protected by s 18D, so that s 18D was effectively subjugated to the norms of s 18C. Mr Bolt and HWT are right to say that Parliament intended a balancing of the competing rights and not the subjugation of one over the other. However, Mr Bolt is wrong to suggest that a balance is not achieved by the construction which French J (and Lee J) adopted. On that construction, neither of the competing rights is supreme or unbending. Each must to some extent give way to the other. The right to be free of offence gives way to the reasonable and good faith exercise of freedom of expression. The right to freedom of expression is limited to its reasonable and good faith exercise having regard to the right of others to be free of offence. The requirement of

exercise of another is often subjected to a test of proportionality. Proportionality, in the sense that the measures adopted are rationally connected to the objective of the competing right, and that the means used to impair the protected right is no more than is necessary to achieve the objective of the competing right’: *ibid* [349].

¹²¹ *Ibid* [349]. That Bromberg J conceives of ss 18C and 18D, in this context, as embodying two ‘conflicting’ and ‘competing’ ‘rights’, sufficiently independent that they are capable of ‘impairing’ each other, and therefore requiring a ‘balancing’ process, such as that assisted by the ‘test’ of ‘proportionality’, is evident in his conclusion that ‘I can see no reason why a requirement of proportionality is not apt in the context of the balancing exercise involved in s 18D.’: *ibid* [349].

proportionality does not involve the subjugation of one right over the other and is consistent with achieving a balanced compromise between the two.¹²²

But contrary to Bromberg J's claims in the passage above, we have seen (at notes 110-13 above) that it is precisely such a 'subjugation' of s 18D relative to s 18C that occurs because, under the terms of Lee J and French J's construction of s 18D, '[t]he right to freedom of expression is limited to its reasonable and good faith exercise', but an 'act' is only deemed 'reasonable' and exercised in 'good faith' if it has 'regard to the right of others', under the terms of s 18C, 'to be free of offence'. The result is that, contrary to Bromberg J's suggestion in the passage above, there is no genuinely equal and reciprocal 'balance' between ss 18C and 18D, where '[e]ach must to some extent give way to the other', because it is *only* s 18D which is interpreted in a manner such that it ought to 'give way' to s 18C. Section 18C, by contrast, is not interpreted as incorporating, as part of its internal meaning, a commitment to the non-contravention of s 18D. For this reason, Bromberg J's response to Bolt and Herald and Weekly Times, in the passage above, which presupposes a genuine independence between, and a genuine 'balancing' of, the respective imperatives of ss 18D and 18C, lacks plausibility and therefore credibility.

At one other point in his judgment, Bromberg J shifted position, once again contradicting much that had gone before. At this point, instead of claiming (as in the passage above) that ss 18C and 18D embody 'competing' and 'conflicting' 'rights' (thereby requiring a 'balance' between them) – a position which, we have seen, is contradicted at other points in his judgment - he subverts this idea and instead suggests that what is at stake in the Bolt case is two rival claims (under ss 18C and 18D respectively) to the *same* 'right' – this 'right' being the right to freedom of expression:

I have taken into account the value of freedom of expression and the silencing consequences of a finding of contravention against Mr Bolt and [Herald & Weekly Times]. Given the seriousness of the conduct involved, the silencing consequence appears to me to be justified ... Additionally, I take into account that the conduct was directed at an expression of identity. An expression of identity is itself an expression that freedom of expression serves to protect. That expression also deserves to be considered and valued. Identity has a strong connection to one of the pillars of freedom of expression – 'self-autonomy stems in large part from one's ability to

¹²² Ibid [350].

articulate and nurture an identity derived from membership in a cultural or religious group’
...¹²³

In other words, according to this interpretation, not only was Bolt seeking freedom of expression for his newspaper articles, but so were the applicants in seeking to express their indigenous identity. While Bolt might appeal to s 18D as protection of *his* right to freedom of expression, Bromberg J, in the passage above, is interpreting s 18C as a source of the *same* protection for the applicants.

XVII NON-NEUTRALITY REVISITED

Earlier we saw that ‘non-neutrality’ arose in those instances where individuals could agree on the meaning of a term or principle but disagreed concerning its application to specific circumstances. What we have seen above, in the context of the interpretation of s 18D offered by Lee J, French J and Bromberg J, is a situation where there may be disagreement over the very meaning of key terms or principles themselves (in the case of the contradictory statements offered by Bromberg J, by the *same* judge within the space of the *same* judgment).

There is nothing intrinsic to the phrase ‘reasonably and in good faith’, within s 18D, that makes it inevitable or incontrovertible that this phrase be understood in such a way that it incorporates a commitment to uphold the imperatives of s 18C. On the contrary, we found that other parts of Bromberg J’s discourse centred on the relationship between ss 18C and 18D, not least the idea that each incorporated ‘two foundational values’ which, in their ‘conflict’, potentially ‘impaired’ each other, and therefore needed to be ‘balanced’ against each other, suggested a very different understanding, one that didn’t subordinate the internal requirements of one of these clauses to the obligations of the other. Indeed, we saw that such a subordination vitiated the status of s 18D as an ‘exemption’ to s 18C, and we utilised the analogy of the defence of ‘fair comment’ in the common law tort of defamation to show this.

For this reason, it is highly plausible for a person to arrive at a definition of the phrase ‘reasonable and in good faith’, as it applies to s 18D, which does not subordinate its requirements to s 18C. They might, instead, interpret the meaning of the phrase in relation to imperatives entirely resident within s 18D, not least its reference to ‘public interest’ and ‘fair comment’.¹²⁴ Bromberg J identifies ‘public interest’ with ‘public benefit’.¹²⁵ However as

¹²³ Ibid [423].

¹²⁴ See n 47 above

‘public interest’ (or for that matter ‘public benefit’), when applied to particular circumstances, is as ‘non-neutral’ as any other term we have discussed thus far, Bromberg J, in the following passage, is mistaken to assume an ‘objective’ determination is possible concerning whether a public ‘act’ is ‘genuinely in the public interest’:

The ‘genuine purpose’ to which s 18D(b) refers does not appear to me to be a reference to the subjective purpose of the maker or publisher. What the provision calls for is the pursuance through a statement, publication, discussion or debate of a purpose which is genuinely in the public interest. That calls for an objective consideration of whether the purpose is genuinely in the public interest.¹²⁶

It would be possible (and, given the purposes of s 18D, plausible) to interpret the legal meaning and requirement of ‘reasonably and in good faith’ in terms of whether the public ‘act’ falling within the auspices of s 18C is ‘rationally related’ to a matter of ‘public interest’.¹²⁷ In this way, no reference is made, regarding the interpretation of ‘reasonably and in good faith’, to s 18C whatsoever. Bolt and his legal counsel advanced such a position but it was rejected by Bromberg J in the passage below. His reason for this rejection was once more the very demand that we have placed in question - that the meaning and application of s 18D be interpreted in terms of the obligations arising under s 18C, and (in this case) the wider objectives (identified at note 83 above) of the RDA:

Mr Bolt and [Herald & Weekly Times] contended that the requirements of reasonableness and genuine purpose were satisfied because the Newspaper Articles were rationally related to the matter of public interest sought to be advanced by Mr Bolt.....The issue of rationality is not however the only consideration in assessing reasonableness and good faith, and I disagree with the contention of Mr Bolt and [Herald & Weekly Times] that it is. For the reasons already canvassed in relation to s 18D(c)(ii) the pursuance of an expressive activity reasonably and in good faith is also to be assessed by reference to the extent of harm done to the protective objectives of the [RDA] by the expressive conduct and whether a *conscientious* approach was

¹²⁵ As Bromberg J states: ‘Section 18D(b) seems to be concerned to excuse conduct done reasonably and in good faith in the pursuit of a public benefit through the exercise of freedom of expression.’: *Eatock v Bolt* [2011] FCA 1103 [434]).

¹²⁶ Ibid [435]. Once again, Bromberg J. may be using the term ‘objective’, in this context, merely to indicate a situation wherein a particular matter of fact (e.g. whether a ‘purpose’ is ‘genuinely in the public interest’) is not to be decided by the ‘subjective’ interpretations of a party to the action. But for the reasons explained at note 75 above, the ‘non-neutrality’ of a term like ‘public interest’ renders it equally subjective when applied to specific facts by any *other* party, and so the use of the term ‘objective’, in such contexts, is philosophically ill-informed.

¹²⁷ For some indication of what ‘rationally related’ might mean in this context: see *ibid* [438].

taken which gave sufficient regard to those objectives including the minimising of the potential harm.¹²⁸

We see, therefore, that Bromberg, French and Lee JJ.'s interpretation of the phrase 'reasonably and in good faith', within the auspices of s. 18D, has taken us beyond 'non-neutrality' to a contestation concerning the very meaning of this phrase itself, as it ought to be understood within its wider context in the Act. Such contestation arises because there is nothing intrinsic to this phrase that makes any definition of its meaning inevitable, and therefore incontrovertible, with the result that individual judgment is 'underdetermined' in this matter, with all the reasonable disagreement that is likely to follow.

XVIII UNDERDETERMINED REASON II

We saw above that reasonable disagreement can arise concerning whether Andrew Bolt's articles ought to have been found, by the Federal Court, unlawful under s 18C, given the 'underdetermined' status of any individual's judgment in reaching such conclusions. We can perceive the same contestation and disagreement, arising from the same 'underdetermined' status of individual judgment, in the context of the Leak cartoon. On the one hand, we have seen (quoted earlier) statements by leading Australian politicians and other public and professional figures insisting that this was a 'racist' cartoon and, as it lacked sufficient redeeming qualities, should not have been published at all. We shall see below the view of others, including Leak, that it was not 'racist'. We have seen the Commission President offer her personal opinion that even if it was 'racist', it deserved exemption under s 18D.¹²⁹ In this respect, we see persistent disagreement concerning the Leak cartoon. This is again apparent in the following exchange that occurred on the ABC's *Q&A* program on 21 November 2016. One panel member, journalist Greg Sheridan, declared:

That was not a racist cartoon. Even if you think it was it certainly shouldn't have been illegal.¹³⁰

Sheridan was then immediately cut short by another member of the panel, Nakkiah Lui, who declared:

¹²⁸ Ibid [438]-[439] (emphasis added).

¹²⁹ See n 25 above.

¹³⁰ Australian Broadcasting Corporation, 'End of the Year, Dawn of an Era', *Q&A*, 21 November 2016 <<http://www.abc.net.au/tv/qanda/txt/s4559268.htm>>.

As an Aboriginal person I'm interrupting you. Greg, I *do* think it was racist. So as an Aboriginal person, please do not make that general statement that it wasn't. As a white man, you think it wasn't, so good for you.¹³¹

This exchange shows that what Justice Bromberg called 'evaluative judgement' is an irreducible element in any consideration of the propriety of applying the term 'racism' to describe a specific set of 'facts' – in this case, Leak's cartoon. Such judgment may vary because, as we have seen, in the case of each individual, it is informed, among other things, by different personal experiences, and the diverse variables and considerations that arise from this. This is evident in Lui's statement above where she suggests that it is perhaps Sheridan's own racial identity, and the experiences associated with this, that has led him to a different conclusion on this matter to her.¹³²

Further, whether 'racism' has occurred, in any specific set of circumstances, depends on both the intentions of those engaging in the behaviour in question and the effect of that behaviour on those towards whom it is directed.¹³³ It is possible for an act to be experienced as 'racist', by those subject to it, without its author intending it to be so, and vice versa. In some cases, there may be disagreement as to whether an individual's perception that they were subject to 'racist' behaviour is a 'reasonable' conclusion for they or others to derive from a specific set of 'facts'. It is precisely such disagreement which divided the respective parties in the Bolt and QUT cases, and divided opinion in the Leak affair. It is precisely these types of questions that the Federal Court's 'objective test' for determining the 'reasonable likelihood' of 'offence', 'insult', 'humiliation' or 'intimidation', under the terms of s 18C(1)(a), as well as

¹³¹ Ibid.

¹³² Upon one other Leak cartoon, however, I think there is less room for reasonable disagreement concerning its alleged 'racism' or 'racist' effects. According to the ABC's *Media Watch*, the cartoon appeared in *The Australian* in May 2006 (ABC, 'Fear, Loathing and the Right to Offend', *Media Watch*, no <<http://www.abc.net.au/mediawatch/episodes/fear-loathing-and-the-right-to-offend/9972908>>). It depicted two poorly dressed indigenous men, sitting on stumps in the outback, one holding what is presumably a beer can, and both reading 'Brough's Ten Commandments' – a reference to Families and Community Services and Indigenous Affairs Minister, Mal Brough's, directives concerning appropriate behaviour in remote indigenous communities. The one without the beer can says to the other: 'Rape's out, bashing's out – this could set our culture back by 2000 years'. Paul Barry, the *Media Watch* host, declared that if such a cartoon doesn't 'brand all indigenous men as drunken thugs and rapists I don't know what would': *ibid*. But even more to the point, the cartoon, at the very least, identifies the two men's conception of indigenous 'culture' with the same.

¹³³ We have seen that both these elements, concerning 'intention' and 'effect', are embodied, respectively, in s 18C(1)(b) and s 18C(1)(a) of the *Racial Discrimination Act* (see the section 'Profound and Serious Effects' above). However we have also seen that, for the purposes of s 18C(1)(a), 'effects' are not determined, by the Courts, in terms of the subjective experience of the person or persons actually affected by the behaviour, but rather by the 'reasonable likelihood' that the behaviour would have such an 'effect' on a representative and reasonable member of the racial, ethnic or national group to whom that person or persons belong (see above n 69-71 and 77).

the consideration of ‘intention’ under s 18C(1)(b), is supposed to determine – though we have seen that not only the conclusions of such a ‘test’ but also the ‘test’ itself, and the criteria it employs, is open to reasonable contestation, thereby undermining its purported claims to ‘objectivity’.¹³⁴ In each case, individual ‘evaluative’ judgment, involving multiple variables, is inescapable in the consideration of any of these issues, and is, in such circumstances, ‘underdetermined’, with all the reasonable contestation and disagreement to which this can give rise.

Does this mean that ‘racism’, like the terms of s 18C and s 18D identified above, is a ‘non-neutral’ term? It would appear that this is the case. This is because any judgment that ‘racism’ accurately describes a particular set of facts does not arise intrinsically, as an objective and inevitable conclusion from those facts themselves (like Aristotle’s ‘white’ or ‘straight’ at note 63 above). Rather, it is a product of each individual’s wide (and individually chosen) series of considerations, as applied to those facts, the understanding and evaluation of which is based on multiple and diverse personal experiences, resulting in judgments which, for the reasons explained above, will vary in their outcomes. As with other non-neutral terms, individuals may agree concerning what ‘racism’ is, but for the reasons above, reasonably disagree as to whether it accurately describes a particular set of facts. In other words, individual judgment, in such circumstances, does not lead to ‘objective’ and incontrovertible conclusions, but rather is once more ‘underdetermined’, so that reasonable disagreement between individuals is likely.

This does not mean that ‘racism’, any less than ‘offence’, ‘humiliation’, ‘insult’ or ‘intimidation’, does not exist, nor that in many instances it will not be a reasonable description of a particular set of facts. The *Oxford English Dictionary* defines ‘racism’ as:

[a] belief that one’s own racial or ethnic group is superior ... (also) a belief that the members of different racial or ethnic groups possess specific characteristics, abilities, or qualities, which can be compared and evaluated. Hence: prejudice, discrimination, or antagonism directed against people of other racial or ethnic groups (or, more widely, of other nationalities), esp. based on such beliefs.¹³⁵

¹³⁴ See the section ‘The Federal Court and Section 18C’ above. See also n 75 and n 126 above concerning what the Federal Court *might* have meant by ‘objectivity’ in these circumstances, and the implications of this.

¹³⁵ ‘Racism’, *Oxford English Dictionary*, <<http://www.oed.com/view/Entry/157097?redirectedFrom=racism#eid>>.

On the basis of this definition, there will certainly be circumstances wherein very few people will disagree that ‘racism’ has occurred. The Jim Crow era of the American South, Apartheid in South Africa, or the frontier wars and other forms of repeated violence perpetuated against indigenous Americans and Australians by elements of white settler society, would be instances in which clear and obvious acts of racism occurred on a frequent and, sometimes, systematic basis. Acts of racism also accompany not only these periods, but also our own. Refusing a person entry to a hotel, or access to real estate, or applying to them a more punitive process of policing, or even being averse to their company, if the motivation is their ‘race’, would be equally obvious instances of racism. In such circumstances, the room for ‘reasonable’ disagreement as to whether ‘racism’ is an appropriate description of a particular set of facts has been significantly reduced.

But we have seen that in regard to sets of ‘facts’ such as the Leak cartoon, this room for ‘reasonable’ disagreement is much wider. Individuals, we have seen, sincerely disagree on whether the cartoon is ‘racist’. It is in the application of ‘racism’, as a descriptive term, to the specific ‘facts’ in this context – the content of Leak’s cartoon and its publication in *The Australian* newspaper – that the ‘non-neutral’ status of ‘racism’ once again becomes apparent.

This is not to suggest that the use of ‘racism’, as a descriptive term, in any specific context, is unjustified. It is simply to point out that this application will, in many circumstances, be reasonably contestable, because the use of individual judgment, in these same circumstances, is ‘underdetermined’.

Of course, it is possible that prejudice, partiality and absence of relevant personal experience will, in such cases, inform the individual judgment of some involved in such contestation, just as will well-intentioned error. This is particularly likely to be the case among those not subject to the type of racism in question and so lacking in the personal experience, and therefore existential understanding, of this reality. But even among better informed individuals, sincere and reasonable disagreement, for all the reasons above, is possible.

XIX ‘RACISM’ AND DELEGITIMATION

However it is not adequate to leave discussion of ‘racism’ simply at the claim that the term is ‘non-neutral’, the use of individual judgment, in relation to it, ‘underdetermined’, and therefore the validity of its application in any specific circumstance a matter of possible

contestation. This is because, as the examples above suggest, the term ‘racist’ is widely used in Australian public discourse as an epithet to describe specific individuals, or their speech acts, and in such circumstances, it is a very powerful signifier which, when successfully applied, is capable of denying legitimacy to the public statements of those to whom it is directed. For the purposes of our discussion, an epithet may be said to be ‘successfully applied’ when its ‘truth’, or its ‘appropriateness’, comes to be widely accepted within the polity. Accusations of ‘racism’, when successfully applied, are therefore acts of power (just as are acts of ‘racism’ themselves) precisely because they can give rise to these outcomes of delegitimation.

This does not necessarily render the accusation of ‘racism’ unjustified. Nor does it render it morally equivalent to an act of ‘racism’. Both may be acts of power, but one is an overt attempt to discriminate while the other is an attempt to identify and combat discrimination. However for the reasons explained, accusations of racism are, in some circumstances, highly contestable. For this reason, although I would not contest whether the overtly discriminatory acts of neo-Nazi or white supremacist groups are ‘racist’, it is, I believe, necessary to consider more closely the extent to which the accusation of ‘racism’ can be appropriately applied to Bill Leak’s cartoon.

As Leak explained, he sought to symbolically portray, in his cartoon, what he believed to be instances of parental neglect of children within remote indigenous communities, and which, he believed, accounted for the fact that a high proportion of the inmates at the Don Dale Youth Detention Centre were Aboriginal children.¹³⁶ When asked by Emma Alberici on the ABC’s *Lateline* if he ‘intended to be provocative with the cartoon?’, Leak replied:

Provocative, yes. I suppose so. I mean ... it was in the context of the debate that was raging after Four Corners showed those terrible scenes from the Don Dale Detention Centre, and it was pretty distressing stuff. And I couldn't help thinking, well, 97 per cent of the children in the Don Dale Detention Centre are Aboriginal kids. That's a vast preponderance, isn't it? And I thought why so many? Of course I know the answer, I knew the answer, as do most people, and that is that ... a lot of these kids are coming from the most desperate circumstances, you know, especially in outback remote Aboriginal communities, where there is incredibly high, you know, rates of drug-taking and alcoholism. Terrible. They are exposed to the most awful

¹³⁶ Leak, ‘Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia’, above n 8, 1-2; Leak, ‘Interview: Bill Leak, Cartoonist for The Australian Newspaper’, above n 8; Leak, ‘Bill Leak Cartoon: What Are You Tweeting About?’, above n 8; Parliamentary Joint Committee on Human Rights, above n 8, 85.

violence and abuse and neglect. And so it just, I thought to myself, well, it comes back ultimately to parents, you know? We all know that's true.¹³⁷

In response to the cartoon, the Western Australian Police Commissioner, Karl O'Callaghan, confirmed Leak's depiction of this particular aspect of remote indigenous communities:

Bill Leak's cartoon is representative of a situation that is more common in the indigenous population than the non-indigenous one. The fact that most children in detention in WA are indigenous is a reflection of that. It's an accurate representation. The situation where indigenous parents are reluctant to take responsibility is a more common one and is well-known to police. Any regional police officer, especially in the state's north, recognises the scenario presented by Bill Leak.¹³⁸

Karl O'Callaghan, therefore, sought to defend Leak's cartoon in terms of its purported 'truth'. From the perspective of Leak's critics, however, the possibility that the cartoon truthfully reflected a wider social reality did not excuse it from a charge of 'racism'. After all, as many of Leak's critics argue earlier above, irrespective of its 'truth', the cartoon engages in a 'stereotyping' of indigenous Australians, and such stereotyping, being 'racist', is, they insist, impermissible.

XX CARTOONS AND STEREOTYPING

Justice Bromberg, in his judgment in the Bolt case, declared that the 'dissemination of racial prejudice usually involves attributing negative characteristics or traits to a specific group of people' and that '[t]he attribution of negative characteristics will often, although not invariably, involve the use of stereotyping'.¹³⁹ According to the *Oxford English Dictionary*, a 'stereotype' is '[a] person or thing that conforms to a widely held but oversimplified image of the class or type to which they belong'.¹⁴⁰ Concerning the role which 'stereotyping' plays in the dissemination of racism, Justice Bromberg quotes Milton Kleg, in his book *Hate Prejudice and Racism*:

¹³⁷ Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', above n 8.

¹³⁸ V. Laurie, 'Bill Leak 18C Cartoon Accurate, Says WA Police Commissioner', *The Australian* (online), 21 October 2016 <<http://www.theaustralian.com.au/business/media/bill-leak-18c-cartoon-accurate-says-wa-police-commissioner/news-story/34fe96789280c8ed6ab77ee21c362ece>>.

¹³⁹ *Eatock v Bolt* [2011] FCA 1103 [215].

¹⁴⁰ 'Stereotype', *Oxford English Dictionary*, above n 135.

The effects of stereotyping lie at the base of prejudice. Stereotypic beliefs form the rationale for feelings of disdain and disparagement. When tied to prejudiced attitudes, stereotypes help create a number of behaviors ranging from avoidance to violence.¹⁴¹

Such an act of ‘stereotyping’, as occurs in Leak’s cartoon, is, according to its critics, either ‘racist’ in and of itself or has ‘racist’ effects.¹⁴² This is because in seeking to depict the indigenous father as negligent, alcohol-dependent, and irresponsible, Leak has (whether intentionally or unintentionally) reinforced such prejudiced images of indigenous Australians prevalent within white Australian society in the past and still held by some today.¹⁴³ The former chairperson of the Australian Government’s Indigenous Advisory Council, Nyunggai Warren Mundine, although not holding this point of view himself, has described the conclusions such a perspective reaches as follows:

In this world view, criticising one indigenous person is to criticise the group; insulting or offending one means insulting or offending the group. So: racist.¹⁴⁴

It is true that Leak, in his cartoon, sought to depict what he saw as a wider social reality through a process of ‘stereotyping’. This is evident in the fact that he drew an image of a beer-swilling, poorly clothed, bare-footed indigenous man, situated in a remote indigenous community, to represent the boy’s father, and to embody what Leak perceived to be a wider reality of parental neglect among some parents in some of these communities.

But far from being gratuitous, such ‘stereotyping’ is an inescapable consequence of the discursive confines of the cartoon and the message Leak sought to convey. Within the confines of the cartoon, Leak could only draw a limited number of images, with the result that, if the cartoon was to serve its discursive purpose of conveying a message of parental neglect within a wider set of communities, this limited number of images had to represent what Leak perceived as a reality much wider, more complex and more variegated than these

¹⁴¹ Milton Klegg, *Hate Prejudice and Racism* (SUNY Press, 1993) 155, quoted in *Eatock v Bolt* [2011] FCA 1103 [215].

¹⁴² See the criticisms of Leak advanced in the section ‘Bill Leak and Section 18C’ above.

¹⁴³ Bromberg J applied such reasoning in his Bolt judgment. He concluded that, given the public standing of Bolt, and the propensity of his readers to regard him ‘as speaking with authority and knowledge’, his column (the subject of the litigation) ‘will likely have been read by some persons susceptible to racial stereotyping and the formation of racially prejudicial views. I have no doubt that some people will have read the Newspaper Articles and accepted the imputations conveyed to the ordinary reader as true and correct and that racially prejudiced views have been “reinforced, encouraged or emboldened”.’: *Eatock v Bolt* [2011] FCA 1103 [421].

¹⁴⁴ Nyunggai Warren Mundine, ‘Bill Leak: A Policeman, A Father, His Son – and the Brutal Truth’, *The Australian* (online), 17 March 2017 <<http://www.theaustralian.com.au/opinion/bill-leak-a-policeman-a-father-his-son-and-the-brutal-truth/news-story/075eeb21b287c121c45f928f5cd7847c>>.

images themselves. ‘Stereotyping’, in this context, was therefore inevitable, since if Leak was to make his message clear, he needed to draw ‘a widely held but oversimplified image of the class or type to which [the individuals to which he was referring] belong’.¹⁴⁵ As Leak put it:

This ... is what a good cartoonist does. The cartoonist highlights topics of debate....through confronting, hard-hitting and pointed imagery.¹⁴⁶

Given that the cartoon (like all cartoons seeking to represent what is alleged to be a wider social reality) could only contain a limited number of images to represent multiple individuals, in varied situations, the discursive limits of the cartoon itself made ‘oversimplification’ a necessity and ‘stereotyping’ its inevitable result. Such ‘stereotyping’, in and of itself, Leak would insist, is not an example of ‘racism’, but rather part of the inevitable process of creating this sort of cartoon, and seeking to fulfil the sort of discursive functions he assigned to it. As he put it:

Far from seeking to malign indigenous people on the basis of their race, my cartoon aimed to expose the truth about the appalling levels of violence endured by Aboriginal women and children. It was nothing more, and nothing less than an entirely reasonable, and considered, expression of a view on a subject of intense public interest ...¹⁴⁷

This is not to deny the charge, levelled above, that the stereotyping within the cartoon might have had the wider consequence (whether Leak intended this or not) of reinforcing, among some readers, racially prejudicial attitudes towards indigenous Australians. But if such stereotyping, in the context of Leak’s cartoon, was inevitable, the only way to have avoided such wider consequences would have been for Leak not to have drawn, or *The Australian* not to have published, the cartoon at all. In other words, only if the message Leak sought to convey, in the manner Leak sought to convey it, was not conveyed at all, would the charges of ‘racism’ have been avoided.

XXI ‘TRUTH’

Of course, this is precisely the outcome that Leak’s critics insist would have been the preferable one. Both the Indigenous Affairs Minister, Nigel Scullion, and federal Greens leader, Richard Di Natale, insist above that the cartoon should *not* have been published,

¹⁴⁵ See above n 140.

¹⁴⁶ Leak, ‘Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia’, above n 8, 5.

¹⁴⁷ Ibid 3.

declaring that there is ‘no place’ for ‘depicting racist stereotypes’ in ‘modern Australia’.¹⁴⁸ This amounts to a proposition that even if Leak believed, the Western Australian Police Commissioner confirmed, and government reports identify, that parental negligence is *one* cause of juvenile delinquency in remote indigenous communities, and *one* of the causes of high rates of indigenous juvenile incarceration, it is not a message that *ought* to be conveyed to the Australian public if it involves (as Leak’s cartoon involved) symbolic pictorial representation of an indigenous parent actually engaging in such negligence.¹⁴⁹ Such a proposition is therefore a demand that such criticism, conveyed in such a manner, and irrespective of its ‘truth’, be proscribed altogether - silence, in such circumstances, being the preferable response to these parental realities.

Indeed, the same silence was demanded, by some, of the Western Australian Police Commissioner himself, in response to his confirmation, outlined above, that the Leak cartoon indeed represented a ‘truth’ that Western Australian police officers, involved with remote indigenous communities, would recognise.¹⁵⁰ Some of these demands for the Commissioner’s silence arose on the (conceivably legitimate) consequentialist grounds that any confirmation of such ‘truth’ by police, at this time, would inflame existing racial tensions in towns like Kalgoorlie.¹⁵¹

Yet the demand of Scullion, De Natalie and others for Bill Leak’s silence, a demand that arises from their insistence that Leak should never have drawn, and *The Australian* never have published his cartoon at all, is a much broader claim, declaring that ‘silence’, in circumstances involving such a cartoon, is preferable to Leak’s attempt to expose what he believed to be (and what other sources, including government reports, have confirmed to be) a ‘truth’. In other words, ‘truth’ is perceived in such circumstances as an expendable good, displaceable by more exigent imperatives, even when such ‘truth’ refers to a pressing social reality. Leak himself made this point in his appearance before the Parliamentary Joint Committee on Human Rights during its inquiry into ‘Freedom of Speech in Australia’:

¹⁴⁸ Di Natale above n 12; Scullion above n 14.

¹⁴⁹ Concerning government reports, see Parliament of Australia. ‘Doing Time – Time For Doing. Indigenous Youth in the Criminal Justice System’, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011, ch. 3 <<https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf>>. See also Mundine at below n 157.

¹⁵⁰ See above n 138. On criticisms of the Police Commissioner, see Eliza Borrello, ‘WA police chief Karl O’Callaghan slammed for citing Bill Leak cartoon, “inflaming racial tensions”’, *ABC News* (online), 21 October 2016 <<http://www.abc.net.au/news/2016-10-21/wa-commissioner-karl-ocallaghan-racial-tensions-bill-leak/7956442>>; Dennis Eggington, ‘ALSWA CEO Dismayed at WA Police Commissioner’, Press Release, 27 October 2016 <<http://www.als.org.au/alswa-ceo-dismayed-at-wa-police-commissioner/>>.

¹⁵¹ Borrello, above n 150.

I was concerned with the human rights of Aboriginal children. I am concerned about the human rights of Aboriginal women. They suffer from the most appalling levels of violence. They are 34 times more likely to finish up in hospital than white people in our community, but to mention that makes me a racist! For mentioning the shocking statistics that go along with sexual and physical abuse of children within Aboriginal communities, I get labelled a racist. It is absolutely absurd. It has nothing to do with racism at all. It is trying to stamp out truth.¹⁵²

Indeed, Leak has made a similar point elsewhere concerning ‘truth’ and ‘silence’. He did so again in relation to the topic of domestic violence and child abuse in remote indigenous communities, and pointed to the necessity of freedom of speech, as in the case of his cartoon, as one means to expose such violence and abuse:

My cartoon only hinted at the truth about the appalling levels of violence endured by aboriginal women and children, but within minutes of clapping eyes on it, [Race Discrimination] Commissioner [Tim] Soutphommasane was all over social media urging people to lodge complaints against me with the Australian Human Rights Commission ... You don’t fix a problem by closing your eyes and imagining it has gone away. We’ll never make progress unless we’re able to talk openly about the scourge before us.¹⁵³

Elected member of the Alice Springs Council, Jacinta Price, is an indigenous person who has affirmed Leak’s concerns regarding ‘truth’ and ‘silence’, and the potential sacrifice of one to the other as a result of prioritizing harms such as ‘offence’ over the need to openly identify abuse:

This notion that hurt feelings are more important than broken bones, broken faces, broken lives ... It’s appalling! It’s absolutely appalling! People are far more interested in being ‘virtue signallers’ than they are [in] actually, you know, doing something for their fellow human beings. And again, you know, if you talk about these issues regarding Aboriginal people’s lives, if you’re not indigenous, you’re a racist! You *cannot* talk about these particular issues.¹⁵⁴

XXII ‘SILENCE’

Of course, Leak himself was not ‘silenced’, in relation to his cartoon or its aftermath, and much public debate ensued concerning both the propriety of the cartoon and the decision of

¹⁵² Parliamentary Joint Committee on Human Rights above n 8, 85-86.

¹⁵³ Bill Leak, ‘A Thousand Words’, *The Spectator Australia* (online), 10 December 2016 <<http://www.spectator.com.au/2016/12/a-thousand-words>>.

¹⁵⁴ Nicola Wright, ‘Interview with Jacinta Price’, *Liberty Works*, 19 April 2017 <<https://libertyworks.org.au/interview-jacinta-price/>> (my emphasis).

The Australian to publish it. Indeed such public debate also contained discussion of the topic of the cartoon itself, not least the wider but related issues of parental neglect and domestic violence, and their links to indigenous juvenile delinquency and youth incarceration, in remote indigenous communities.

However while Leak himself was not ‘silenced’, nevertheless it is possible that the widespread public denigration to which Leak was subject as a result of the publication of his cartoon, not least involving accusations of ‘racism’, as well as his being subject to investigation by the Commission under the auspices of s 18C, could inhibit others who might wish to speak out on the same issues as Leak, with the opinion and in the tone in which he did. Leak himself acknowledged this in his appearance before the Parliamentary Joint Committee on Human Rights. The following exchange occurred between Leak and Senator James Paterson on 1 February 2017:

Senator Paterson: How do you think people in your circumstance – say, a freelance cartoonist or a cartoonist who operates online or on social media who does not have the backing of a company like News Corp – would feel having watched the experience that you have been through?

Mr Leak: You have raised what I think is one of the most important points about this. I think that that hypothetical person working for some magazine that might be online – goodness knows – or whatever but does not have the backing of an organisation like News Corp is going to look at what happened to me and say: ‘That bloke really got into a lot of trouble for telling the truth. I better not tell it myself’. If that is not a dampener on freedom of expression and freedom of speech, I do not know what is. To me, I think it is extremely sinister. I think it is downright sinister what the AHRC did in my case because that is precisely the message that it sent out to everyone: do not tell the truth; do not take a risk; speech is not free in this country.

Senator Paterson: Sometimes we call that the chilling effect –

Mr Leak: Well, that is what it is.

Senator Paterson: And we have been asking people about this this week, none of whom have been subject to a complaint like you have. They say they are unconvinced that a chilling effect exists or that if it does it is pretty small. Do you agree with that view?

Mr Leak: No, I do not ...¹⁵⁵

XXIII 'TRUTH' AND 'SILENCE'

Certainly the causes of indigenous juvenile delinquency and youth incarceration in remote indigenous communities are much more complex than the situation conveyed in Leak's cartoon. As explained above, the cartoon is bound by discursive and pictorial limits which do not allow it to convey this complexity, with all its multiple and inter-related elements, in any comprehensive way. Indeed, any attempt to do so would blunt the cartoon's rhetorical force. Its discursive effect, in starkly identifying what its author perceived to be *a* 'truth' in many remote indigenous communities, and *a* cause of such outcomes, is dependent precisely on its 'oversimplification' of such complex issues, and the 'stereotyping' which is the inevitable result of this.¹⁵⁶

But to deny legitimacy to the cartoon on this basis, irrespective of the 'truth' it seeks to convey, is to deny legitimacy to the sort of criticism it sought to advance when it is advanced in this manner. It is to demand that, when it comes to forms of communication such as Leak's cartoon, silence is the preferable response to the social reality it seeks to identify. Former chairperson of the federal government's Indigenous Advisory Council, Nyunggai Warren Mundine, has criticised those who have sought to advance such a position against Leak's cartoon, as well as those who have sought to justify such a position by describing the cartoon as 'racist'. He states:

Report after report has found indigenous children in communities across Australia plagued by dysfunction, child abuse, family violence and addiction. Telling the truth can never be racist. So those who labelled the cartoon racist believe one of two things: they think the cartoon depicted a lie (in which case they're wrong; it depicts a real situation); or they think depicting an irresponsible Aboriginal person condemns all Aboriginal people. Bill didn't believe this and the cartoon said the opposite ... Those who think it condemns all indigenous people should examine their own biases, not Bill's.¹⁵⁷

¹⁵⁵ Parliamentary Joint Committee on Human Rights, above n 8, 85.

¹⁵⁶ Leak also declared that, in his opinion, the rhetorical force and discursive effect of a cartoon is, at least in part, dependent on its capacity to cause 'offence'. As he told the Parliamentary Joint Committee on Human Rights: 'Frankly, if I did a cartoon and I could safely say with 100 per cent surety that no one would be offended by it, I would throw it away and start again because the point of a cartoon – the point of satire – is to point to something that is true ... And, if a work of satire does not have a kernel of truth, the satirist is wasting his time.': *ibid* 86-87.

¹⁵⁷ Mundine, above n 144.

Similarly, Jacinta Price is critical of those individuals who accuse Leak's cartoon of 'racism' and who would have preferred the cartoon not to advance its message concerning family dysfunction in remote Aboriginal communities. She describes such individuals as those who 'absolutely disregard what Bill Leak was trying to get across and say, "Oh, racism, racist, Bill Leak's just a racist!" And completely ignore the point that there are children out there suffering these abuses.'¹⁵⁸ She then provides her own personal testimony regarding such abuse:

We all know, in the Territory, children in these circumstances, they are running the streets at night. As a Councillor, you know, we have to pick up the slack from the parents, and the fathers, who are not taking responsibility for their children. You know, the rest of the community have to pick up that slack. And we wonder why these children wind up in youth detention? You know? When their home lives are absolutely dysfunctional. The adults in their families couldn't care less about the fact that they're running around late at night ... Any given night you can drive around Alice Springs and you will see children as young as eight years old out there. And you know, it just ... makes my blood curdle because I have children of my own and I could never imagine having let any of my children at that age walk the streets at night with the dangers that they can face.¹⁵⁹

If it is 'racist' to criticise parental neglect in remote indigenous communities, holding indigenous parents at least partly responsible for specific familial outcomes that follow from this neglect, as Leak's cartoon sought to do, then such a use of the epithet of 'racism' denies legitimacy to such criticisms altogether, irrespective of their 'truth'. Such a use of the epithet therefore seeks to shut down public debate rather than broaden it. In this way it is a discursive act of power. The key question is whether, in the context of the Leak cartoon, it was a justifiable one. This article has argued that it was not.

I fully recognize that 'free speech', as a norm, is sometimes espoused by individuals with a very specific political agenda, to enable and legitimate attacks on those they perceive as their opponents. Such individuals, sometimes associated with what has, in recent years, colloquially come to be known as the 'Alt-Right', might support the free speech positions associated with Andrew Bolt and Bill Leak. But they do so for very different reasons to those which underwrite the defence of this position in this article. This article is premised on the assumption that a plural public sphere, in which multiple voices might be heard, is an

¹⁵⁸ Wright, above n 154.

¹⁵⁹ Ibid.

important precondition of a healthy liberal democracy. Those who espouse free speech merely as a “cloak” to attack and marginalize opponents are not seeking to pluralise the public sphere, but rather dominate it, ensuring that only ‘voices’ such as their own define the prevailing terms of debate.

XXIV CONCLUSION

Bill Leak showed immense courage in his professional and personal life. His response to the massacre of the journalists and cartoonists at *Charlie Hebdo*, on 7 January 2015, was to pen a cartoon depicting the Prophet Muhammad – the very free speech act for which the *Hebdo* staff had been murdered and for which he was then required to go into federal police hiding:

My response to that was to draw a cartoon that did feature an image of the Prophet Muhammad. I thought this would be a kind of natural response from just about every cartoonist in the Western world.¹⁶⁰

In the final months of his life Leak was embroiled in controversy concerning another of his cartoons. We have seen that individuals disagree as to whether Leak’s cartoon, depicting an indigenous father and his son, is ‘racist’ or a legitimate contribution to public debate. We have seen that under the terms of s 18C and s 18D of the RDA, it is possible for it to be both.

But the underdetermined nature of all individual judgments in such matters means that individuals can reasonably disagree on such issues, without there being any objective means to decide between them. Consequently, those who resort to accusations of ‘racism’ should remember that the ‘non-neutral’ status of the term renders many such accusations contestable, rather than self-evident, and consider the extent to which the accusation, when successfully applied, is a powerful signifier, capable of shutting down public debate and denying legitimacy to specific individuals in their contribution to it.

A key question is whether the ‘silence’ that can result, on specific matters, from the successful use of such an epithet is, in all circumstances, justified, or whether it has the result of limiting what would otherwise be a legitimate realm of public inquiry, thereby reducing the plurality, and therefore quality, of Australian public debate. Although Leak himself was not ‘silenced’, and much public debate occurred concerning the propriety of his drawing or *The Australian’s* publishing his cartoon, the widespread hostility that Leak encountered, and

¹⁶⁰ Leak, ‘Interview: Bill Leak, Cartoonist for The Australian Newspaper’, above n 8.

the widespread accusation that either he or the cartoon was ‘racist’, does have the potential of inhibiting others from raising similar issues to Leak in the manner or tone in which he did so, thereby having a ‘chilling effect’ upon those with similar views wishing to make a similar contribution concerning these pressing issues in remote indigenous communities.