Australian Institute for Progress

Submission to the Parliamentary Joint Committee on Human Rights inquiry into the operation of Part II A of the *Racial Discrimination Act 1975* (Cth) and the complaints handling procedures of the Australian Human Rights Commission.

The Australian Institute for Progress

The Australian Institute for Progress is an Australian think tank, based in Brisbane. We are dedicated to human progress based on the classical individual political and civil rights and liberties, individual responsibility, and sufficient, but not excessive government intervention. We support Enlightenment values including freedom of speech and objectivity.

Summary

We believe that Section 18C should be removed from the Act for the following reasons:

1. There is no evidence that the Act in general has been effective in reducing or eliminating discrimination. In fact, what evidence there is suggests that discrimination has increased in the recent past.
2. There should be no right to be free from words or conversation that might "offend, insult, humiliate, or intimidate". Only words or actions which amount to threats of physical violence should be actionable.
3. Sufficient protection of individual reputation is available on a non-discriminatory basis through defamation law.
4. Privileging groups and feelings in law creates a less resilient and more divided society.
5. It should be obnoxious to the law that any action can be criminalised on the subjective basis of how someone else might view it.
6. Section 18D does not provide an adequate protection. Concepts of "fair" and "fair and accurate" brought into precedent in the case of *Eatock v Bolt* narrow its protection unreasonably. Section 18D provides no protection in social situations, which is where it is most likely issues of offence, insult, humiliation, or intimidation might occur, but where, apart from potential acts of violence, non-judicial and social forms of redress are most appropriate.
7. It is too easy for complainants to make a complaint under this section, with no chance of success, but to which the respondent can be forced to respond. The process becomes the punishment.
8. The Commission applies its discretions under the Act unevenly and secretively, which undermines any confidence in the act that might be justified.

Evidence

The purpose of the Act is to make racial discrimination illegal, and presumably to eliminate it. There is little evidence available on the incidence of racial discrimination, however the Scanlon Society has conducted a survey on social cohesion every year since 2007 (apart from 2008). Those answering "Yes" to the question, 'Have you experienced discrimination in the last twelve months because of your skin colour, ethnic origin or religion?' increased from 9% in 2007 to 20% in 2016.[1]

If this occurred with respect to anything else, for example, road fatalities, there would be calls for a serious overhaul of the approach to road safety. Similarly, it would appear that 40 years of regulation by the Racial Discrimination Act has not seen any improvement in incidence of racial discrimination, and this calls for an entirely new approach.

Perhaps one should not be surprised. As Jonathan Haidt points out, separating minorities from majorities actually increases perceived differences between the groups, increases resentment

[1] Scanlon Society, *Mapping Social Cohesion National Report*. Figure 12, page 25.

amongst the majority groups and entrenches distrust of the majority in the minority group.[2] As this has been the approach of ethnic policies in Australia, including this Act, one possible explanation for the rise in discrimination is the method used to try to address it.

Rights

There should be no right not to be offended, humiliated or insulted. In some cases it could be argued there is a right not to be intimidated, however, that right has to be severely constrained. One reason for this is that offence, humiliation, insult and intimidation are actions which, to a lesser or greater degree, require the actions of two parties to occur. An individual has to choose to take offence. The same applies to being insulted, humiliated or, in a range of cases, intimidated. This can happen independently of whether the other party intended to cause offence or, given the circumstances, could have reasonably foreseen the other party would be offended.

Underlying any concept of human rights is the rule of law – the idea that the law must be applied to all impartially, that the law must be knowable by the individual, and that it must not be arbitrary. If it were a right to be free of these "offences" then it would impose an unknowable obligation on every person, which would be regulated by the perceptions of another party over which the person had no control.

It may be a social norm that we should not try to upset other people, but that is not the same thing as an actionable right.

Indeed, we accept offence, insult, humiliation and intimidation, as being a legitimate part of the political process with all of these regularly being deployed in our parliaments as legislation is negotiated and passed.

Free speech is an essential part of the success of western society and is indispensable not only to our political system, but to our approach to knowledge, as exemplified by the scientific method. At some stage many of the things we now believe to be true were offensive, insulting, humiliating or intimidating to someone else. There is a range of things that could be said about someone based on race that might be true, that could potentially offend. There is also a range of things that might not be true, with the same potential.

The issue then becomes how best to deal with either position. Giving someone the right to put the offender through a conciliation, and then a court process, is not an optimal, or just, solution. If the statement is true, it should not be actionable, no matter how, why, or where, it is said. If it is untrue, then we would submit that the best remedy is to either ignore the offender, or leave it to counter argument and social pressure to correct the statement.

Damage

In the case of *Eatock v Bolt* it would have been open to the plaintiffs to pursue Bolt under defamation law. This covers similar issues to "offend", "insult" or "humiliate". This is the only legal remedy that should have been available on these counts. Defamation law deals with real damage, assessed on an objective basis, and the right to damages under defamation law arise as an individual, not because of being a member of a group, so is available to all.

[2] Wall Street Journal, "Hard Truths about Race on Campus" http://www.wsj.com/articles/hard-truths-about-race-on-campus-1462544543

"Intimidate" seems to us to cover areas which, when they should be actionable, ought to fall under laws which already outlaw harassment and assault, such as S80.2A and S80.2B of the *Criminal Code Act 1995* (Cth).

18C privileges one group who might be subject to reputational damage over other groups. If I am accused of something on the basis of race, then I can have recourse to 18C, which has much lower standards of proof than defamation. If I am accused of fraud, or domestic violence, arguably more serious than the allegations in *Eatock v Bolt*, then my recourse is to defamation law. This is unjust and should be remedied by removing Section 18C and 18D.

Psychological and social consequences of making "offence" a normative concept in law

Section 18C is the first piece of Australian legislation that makes the creation of offence in someone else an actionable matter. It has been followed by legislation in some Australian states which extends the concept beyond race to issues of gender, sexual practice and religion.

While on the one hand this approach punishes allegedly aggressive behaviours, it also encourages potential plaintiffs to see themselves as victims. And once legal remedies exist, people will find ways to put themselves in categories that can make use of those remedies, as well as agitating for the extension of this approach into other areas of the law. QUT case …?

Australians are losing much of the resilience they once had (reference Tanveer?)[3]. There are a number of possible reasons for this, but one is undoubtedly an increasing tendency to wish to be protected from anything unpleasant (as distinct from life threatening), and another is a tendency to identify as a victim and seek protection. This means increasing numbers of Australians are losing skills to cope with adversity. Any legislation that facilitates this is going to lead to a decrease in resilience across the community, which will ultimately be disempowering of society as a whole.

There is a lot of wisdom in the rhyme "Sticks and stones/may break my bones/but names will never hurt me".

Eatock v Bolt

As the law is defined by *Eatock v Bolt* the bar of the protection offered by 18D has been set too low. Section 18D requirements that, what is written must be true and well researched and have the right tone, is too restrictive. Andrew Bolt was writing a newspaper column, which is both current affairs and entertainment. It would have been better had he been accurate, but in a work of entertainment, tone can be wrong and mistakes can happen.

As noted above, if those mistakes occur and are sufficiently damaging to the character of the complainant, then a remedy exists in defamation. The costs of mounting a defamation action acts as a filter to determine whether a complaint is really worth pursuing.

As also noted above, it makes it easier to launch a prosecution for issues to do with race above issues that might more seriously reflect on a person's character, such as a tendency to violence or dishonesty.

Eatock v Bolt also creates a test of "reasonableness" depends on the point of view of the 'ordinary' or 'reasonable' representative of that group, thus making the test subjective.

[3] T.Ahmed, *Fragile Nation*, Redland Bay, Connor Court, 2016

Section 18C as a tool of oppression

The Australian Institute for Progress publishes *On Line Opinion*, an eJournal founded in 1999, which publishes opinions from a range of contributors across the political spectrum. Despite the high quality of our material we have been subject to complaints in some instances, one of which ultimately led to a conciliation under this Act.

The incident, which involved a passage claimed to be anti-Semitic, demonstrated the asymmetric nature of these complaints, and the time wasted in dealing with them by human rights officials. It seemed obvious that the comment was covered by section 18D (b) as *On Line Opinion* is "in the public interest", and while the material complained of was in a discussion thread it was almost immediately countered by other comments.

However, the Commission kept pushing us to conciliate. We expressed our willingness to go to court if the complainant wanted to take us, but not to waste time on a conciliation.

The time involved on our side was considerable, and the time spent by the complainant negligible. She could just make the allegation, but we had to defend ourselves, and take legal advice. The Commission did not have to be involved, and could have accepted the Section 18D defence.

For a small publication this was a huge diversion of resources, and if we were not dedicated to free speech and inquiry we may have just acceded to the complainant's wishes and taken the comment down. This shows how the balance has been unfairly tipped in favour of the complainant, who can exert undue influence on publishers.

Yet, while the Commission accepted this complaint against us, it apparently refuses to accept a complaint against Fairfax Media by Senator David Leyonhjelm. This seems to be at odds with the decision in our case and to suggest an uneven exercise of discretion. How uneven the Commission's exercise of its jurisdiction might be is difficult to know because it does not publish its decisions, and very few appear to actually go to court.

Conclusion

For these reasons we believe that Section 18C should be removed from the Act. It has failed in its purpose, and may in fact have heightened racial tension. It privileges particular groups and particular, and less serious, causes of actions; undermines social and individual resilience; undermines free speech, which is a cornerstone of our civilisation; can be used as a tool of oppression; is applied unevenly by the Australian Human Rights Commission; and, in any serious cases of damage to individuals or groups there are adequate remedies already available through defamation law and the *Criminal Code Act 1995 (Cth)*.

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