SECTION 18C AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

LARISSA WELMANS*

This article examines whether Racial Discrimination Act 1975 (Cth) s18C is constitutionally invalid, wholly or in part, by virtue of the implied freedom of political communication. It analyses s18C's constitutional validity at the burden, compatibility and balancing stages of the recently affirmed McCloy test. In doing so, it aims to highlight aspects of these stages which are uncertain of application, or the subject of divergent High Court authority, and where possible offer acceptable resolutions. Ultimately, this paper concludes that s18C is capable of withstanding a High Court constitutional challenge, meanwhile acknowledging that such a finding may be premised on departure from prevailing Federal Court authority on certain aspects of s18C's operation.

I INTRODUCTION

Given the existence of a structural implication of freedom of political communication ('implied freedom'), in the *Commonwealth Constitution* ('*Constitution*'),[1] an important question arises: will section 18C ('s18C') of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') withstand a constitutional challenge from this implied freedom?[2] An affirmative answer is likely. Within this context, s18C's constitutional validity will be analysed from narrative, normative and critical perspectives, by synthesising and applying the test enunciated by the *McCloy* plurality judgment ('*McCloy* test'), as revised in *Brown v Tasmania* ('*Brown*').[3] In doing so, the focus is on the *burden*, *compatibility* and

* Student at the University of Western Australia. This article is based on my Advanced Legal Research paper submitted in partial fulfilment of the Juris Doctor degree. Thank you to Jim Thomson for his generous supervision.

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1 For the contrary position, see: *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 187-9, 227, 230-3 (Dawson J).

2 Section 18C has come before the High Court on two occasions. In *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2002] HCA Trans 132 (19 March 2002) and Transcript of Proceedings the constitutional issue was not pursued in the High Court. In *Bropho v Human Rights and Equal Opportunity Commission* [2005] HCA Trans 9 (4 February 2005) special leave was refused by the majority.

3 *McCloy v New South Wales* (2015) 257 CLR 178, 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 349 ALR 398, 34-5 [104]-[105] (Kiefel CJ, Bell and Keane JJ), 83 [279] (Nettle J). It should be noted that the individual judgments in that case did not adopt this approach. See: *McCloy v New South Wales* (2015) 257 CLR 178, 235 [142], 238 [152] (Gageler J), 259 [221] (Nettle J), 287-8 [336]-[339] (Gordon J). Similarly, in *Brown v Tasmania* (2017) 349 ALR

balancing stages of this test[4] because they contribute most significantly to formulating relevant doctrinal and principled arguments to support and justify an answer to s18C's constitutional validity questions.[5]

This article seeks to identify and analyse critical issues relevant to s18C's constitutional validity at these stages, taking two main focuses. First, exposing areas of uncertainty in High Court approaches to applying the *burden*, *compatibility* and *balancing* tests. Second, pinpointing where, and to what extent, the implied freedom may dictate an operation of s18C dissimilar to prevailing Federal Court authority.

Part I outlines the background to the implied freedom and Part IIA of the RDA's terms and operation, within which s18C sits. Part II considers whether s18C burdens the implied freedom and the extent of that burden. It identifies divergent High Court authority on whether laws regulating offensive and insulting communication burden the implied freedom,6 concluding that they do. It also measures the breadth of s18C's elements, outlining their scope and interpretation as articulated by the Federal Court. Part III tests the compatibility of s18C's purpose. It reveals conflicting narrow and broad judicial approaches to determining an impugned law's purpose,7 finding s18C's purpose compatible on either approach, while concluding the broad is preferable. Part IV considers whether s18C is adequate in its balance. This Part suggests that balancing the importance of s18C's purpose would outweigh its burden. In doing so, it explores the extent to which the High Court might depart from High Court authority in undertaking a balancing inquiry. However, this Part ultimately argues that s18C's overall effect is to enhance rather than burden the implied freedom. It

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398, Gageler and Gordon JJ did not express support for the *McCloy* approach. Also, note recent observations in: *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1038-9 [37]-[39] (French CJ and Bell J), 39 [101]-[102] (Gageler J), 63-4 [202]-[205], 95-6 [296] (Keane J), 96-7 [297]-[305] (Gordon J); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 319 [92] (Perram, Mortimer and Gleeson JJ).

4 *McCloy v New South Wales* (2015) 257 CLR 178, 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ).

5 In s18C's case, *suitability* and *necessity* testing are straightforward and relatively uncontroversial. See for example: Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, *No offence intended: Why 18C is wrong* (Connor Court, 2016) 203-6; Cameron Barnes, *Debating sensitive racial issues in Australia: achieving a legitimate balance between free speech and the elimination of racial discrimination* (Honours Thesis, University of Western Australia, 2015) 27-9.

6 *Coleman v Power* (2004) 220 CLR 1, 113-4 [299] (Callinan J), 124 [330] (Heydon J), 136 [85] (Hayne J); *Monis v The Queen* (2013) 249 CLR 92, 131 [67] (French CJ).

7 *Coleman v Power* (2004) 220 CLR 1, 98-9 [256] (Kirby J), 121-2 [323]-[324] (Heydon J); *Monis v The Queen* (2013) 249 CLR 92, 133-4 [73] (French CJ), 147 [125], 162 [178], 163 [184] (Hayne J), 205 [317] (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [66] (French CJ), 64-5 [141] (Heydon J), 90 [221] (Crennan and Kiefel JJ).

acknowledges uncertainty surrounding how a balancing test should be performed in such circumstances, finally concluding that none is necessary. This article demonstrates that in the event of a High Court challenge, s18C will not be wholly constitutionally invalidated.

II PROVIDING LEGAL CONTEXT

A *The Implied Freedom and McCloy v New South Wales*

In Australia, a constitutional implication operates to limit Commonwealth and State legislative power in the area of political communication.[8] This implied freedom's existence was first recognised in two twin cases in the 1990s[9] and subsequently unanimously confirmed in *Lange v Australian Broadcasting Company*[10] ('*Lange*') as an indispensable incident of the system of representative government derived from the *Constitution*'s[11] text and structure.[12] *Lange*'s first limb tested an impugned law's legitimacy by virtue of its compatibility with the maintenance of the constitutionally prescribed system of representative government.[13] *Lange*'s second limb considered whether an impugned law's means were reasonably appropriate and adapted to achieving its legitimate purpose.[14] Traditionally, this second enquiry involved proportionality analysis solely of the relationship between an impugned law's means and purpose.[15] However, in 2015, a High Court majority in *McCloy v New South Wales*[16] ('*McCloy*') adopted a

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[8] *Monis v The Queen* (2013) 249 CLR 92, 112 [19] (French CJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272 (Brennan J); *McCloy v New South Wales* (2015) 257 CLR 178, 203 [30] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 349 ALR 398, 2 [6] (Kiefel CJ, Bell and Keane JJ). See further: Bryn Dodson, *Dirty Politics: Offensiveness and the Implied Freedom of Political Communication* (Honours thesis, University of Western Australia, 2006) 3; Zoe Robinson, 'A Comparative Analysis of the Doctrinal Consequences of Interpretive Disagreement for Implied Constitutional Rights' (2010) 11 *Washington University Global Studies Law Review* 93, 98.

[9] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See further: Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia* (Cambridge University Press, 2015) 357-9.

[10] (1997) 189 CLR 520.

[11] *Australian Constitution* ss 7, 24, 128.

[12] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558-9, 566-7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See further: Dodson, above n 8, 4; James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239, 243; Dan Meagher, 'What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne Law Review* 438, 445.

[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-2, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[14] Ibid 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[15] *Monis v The Queen* (2013) 249 CLR 92, 151 [138] (Hayne J).

[16] (2015) 257 CLR 178.

structured proportionality approach, adding a further balancing stage to examine the proportionality between an impugned law's purpose and burden.[17]

In 2017, in *Brown*,[18] the High Court revised the *McCloy* test to dictate the following enquiries.[19] First, whether the law effectively burdens the implied freedom in its terms, operation or effect?[20] Second, whether the law's purpose is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? [21] Third, whether the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[22] This third enquiry is answered by asking the following three questions. First, whether the law has a rational connection to its purpose? [23] Second, whether there are no obvious and compelling, reasonably practicable alternative means of achieving the law's purpose which have a less restrictive effect on the freedom?[24] Third, whether the law adequately balances the importance of its purpose and the extent of its restriction on the implied freedom?[25] A negative answer to enquiry two or three, including any of its sub-enquiries, results in the impugned law's constitutional invalidity.[26]

B *Section 18C and Part IIA of the RDA*

Section 18C sits within Part IIA of the *RDA*,[27] enacted by the *Racial Hatred Act 1995* (Cth) ('*RHA*'), pursuant to the Racial Hatred Bill 1994 (Cth) ('*RHB*'). Read together, Part IIA's ss18B, 18C and 18D make unlawful non-private acts which reasonably cause offence, insult, humiliation or intimidation to persons where one of the reasons for that act was those persons' race, colour, national or

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[17] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ). See further: Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27(2) *Public Law Review* 101, 102.

[18] (2017) 349 ALR 398.

[19] *Brown v Tasmania* (2017) 349 ALR 398, 27 [104] (Kiefel CJ, Bell and Keane JJ), 41 [156] (Gageler J), 82 [277] (Nettle J), 152-3 [481] (Gordon J).

[20] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

[21] *Brown v Tasmania* (2017) 349 ALR 398, 27 [104] (Kiefel CJ, Bell and Keane JJ), 41 [156] (Gageler J), 82 [277] (Nettle J), 152-3 [481] (Gordon J).

[22] Ibid.

[23] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 349 ALR 398, 34-5 [104]-[105] (Kiefel CJ, Bell and Keane JJ), 83 [279] (Nettle J).

[24] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 349 ALR 398, 36 [139] (Kiefel CJ, Bell and Keane JJ).

[25] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

[26] Ibid 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ).

[27] Sections 18B, 18C and 18D appear in full in an appendix to this article.

ethnic origin and where not justifiable as a form of expression contemplated by s18D.[28] Part II of this article explores *RDA* Part IIA and s18C's aspects and operation in greater detail, outlining prevailing Federal Court authority.

III SECTION 18C'S BURDEN

A *Nature of the Enquiry*

Section 18C can only infringe the implied freedom if s18C's terms, operation or effect burden the implied freedom.[29] A law will only burden the implied freedom where it restricts the making or content of political communication.[30] The burden enquiry is not merely perfunctory.[31] It requires due consideration,[32] for, without such a burden, the implied freedom's requirement for the court to consider the justification for that burden is not engaged.[33]

B *Whether s18C Burdens the Implied Freedom?*

Putting aside s18C's public focus, the necessary elements of conduct made unlawful by s18C are racial motivation, and likely offensiveness, insult, humiliation or intimidation.[34] Therefore, for s18C to burden the implied freedom, neither element can be necessarily inconsistent with political communication. That is, the following two instances of communication must exist. First, communication that is racially motivated and political. Second, communication that is political and offensive, insulting, humiliating or intimidating. Section 18C burdens the implied freedom to the extent, if any, political communication concurrently embodies both of these aspects.[35]

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[28] *Toben v Jones* (2003) 129 FCR 515, 546 [128] (Allsop J).

[29] *McCloy v New South Wales* (2015) 257 CLR 178, 179 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 349 ALR 398, 79 [269] (Nettle J).

[30] *Monis v The Queen* (2013) 249 CLR 92, 142 [108] (Hayne J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 574 [119] (Keane J); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 318 [85] (Perram, Mortimer and Gleeson JJ); *Brown v Tasmania* (2017) 349 ALR 398, 127 [395] (Gordon J).

[31] *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 318 [85] (Perram, Mortimer and Gleeson JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 231 [217] (Gageler J).

[32] *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 318 [85] (Perram, Mortimer and Gleeson JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 231 [217] (Gageler J).

[33] *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 318 [85] (Perram, Mortimer and Gleeson JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 231 [217] (Gageler J). See further: Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 41.

[34] *Racial Discrimination Act 1975* (Cth) s 18C.

[35] In *Jones v Scully* (2002) 120 CLR 243, 305 [238]-[239], Hely J did consider whether s18C burdens the implied freedom, concluding in the affirmative. However, this precedent is merely persuasive. Moreover, Hely J's reasoning, in that case, has been deemed unsatisfactory. See: Dan Meagher, 'The Protection of Political Communication Under the Australian Constitution' (2005) 28(1) *University of New South Wales Law Journal* 30, 54.

1 *Racially Motivated and Political Communication?*

The High Court has avoided defining what constitutes 'political communication'.[36] It is likely this is because the *content* of *any* communication can be political depending on the contemporaneous political climate.[37] Thus, the Court's description of political communication potentially includes 'all speech relevant to the development of public opinion on the whole range of issues an intelligent citizen should think about'.[38] Despite contrary suggestion,[39] the Court has 'acknowledge[d] the amorphous nature of [this] concept'.[40]

Though political *content* evades definition,[41] the Court has enunciated in what circumstances a communication's *effect* will render it 'political'.[42] First, where a communication effects direct discussion and criticism of governments and governmental institutions,[43] including conduct, policies or fitness for office of political parties, public bodies and officers.[44] Second, where a communication effects broader public discussions[45] to bring about political change,[46] to influence

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[36] Dodson, above n 8, 7; Kcasey McLoughlin and Jim Jose, 'The Politics of the Public and Private Spheres: The High Court's Decision in Monis and the Gendered Privileging of Free Speech' (2017) 52(4) *Australian Journal of Political Science* 1, 6.

[37] Meagher, above n 12, 465. Another compelling reason is that the answer to 'what is political' requires consideration of the implied freedom's rationale. That is, to articulate what communications are protected by the implied freedom, it is necessary to understand its purpose and foundations. Failure to identify these foundations may explain the court's difficulty in delineating the bounds of the political communication the freedom exists to protect. See: Robinson, above n 8, 116; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 26; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842, 844.

[38] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ). See further: Eric Barendt, *Freedom of Speech* (Clarendon Press, 1985) 152.

[39] Meagher, above n 12, 466.

[40] Ibid. See: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ); *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322, 361 [67] (McHugh J).

[41] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 76-7 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ); *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322, 361 [67] (McHugh J).

[42] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106, 168-9 (Deane and Toohey JJ), 216 (Gaudron J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51, 73-4 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 122-3 (Mason CJ).

[43] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J).

[44] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 122-3 (Mason CJ, Toohey and Gaudron JJ)).

[45] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 73-4 (Deane and Toohey JJ).

[46] *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106, 168-9 (Deane and Toohey JJ), 216 (Gaudron J).

elected representatives,[47] is relevant to political action or decision,[48] or which 'could affect [voters'] choice[s] in federal elections or constitutional referenda'.[49]

Political communication's amorphousness means its overlap with racially motivated communication depends on the political climate at a particular time.[50] Currently, 'many important political debates … in Australia involve issues of race, colour, ethnicity or nationality'.[51] Debates surrounding immigration and terrorist activity provide clear examples.[52] These issues have widespread attention and constitute an aspect of the political platform for electing Commonwealth parliamentarians.[53] These examples demonstrate instances in which communication is both racially motivated and political.[54]

2 *Political and Offensive, Insulting, Humiliating or Intimidating Communication?*

This analysis focuses on the relationship between political communication and *offensive* or *insulting* communication,[55] which was considered, but not determined, in *Coleman v Power*[56] ('*Coleman*') and *Monis v The Queen*[57] ('*Monis*').[58] Judicial observations gleaned from these cases are contradictory, making clarification desirable and analysis necessary.

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[47] Ibid.

[48] Ibid 138 (Mason CJ).

[49] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[50] However, Anne Twomey has suggested that communication of racial matters will often fall within the category of political communication as they often involve social or cultural problems. See: Anne Twomey, Submission No 10 to Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Human Rights Commission Act 1986 (Cth)*, 4 December 2016, 3.

[51] Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, 'The Constitutional Sound of Silence' (2016) 68(1) *IPA Review* 21, 22.

[52] Asaf Fisher, 'Regulating Hate Speech' (2006) 8 *University of Technology Sydney Law Review* 21, 44.

[53] To take an obvious example, One Nation candidates.

[54] See also, the examples given by Dan Meagher in: Meagher, above n 35, 53; Meagher, above n 12, 460.

[55] There are three reasons for this. First, the very fact that laws regulating offensive and insulting communications have been previously considered by the High Court in *Coleman v Power* (2004) 220 CLR 1 and *Monis v The Queen* (2013) 249 CLR 92. Second, offensiveness and insult represent the lower forms of harm to which s18C is directed. Therefore, analysis of these forms is particularly important in later ascertaining the extent of s18Cs burden. Third, and importantly, the observations made in relation to offensiveness and insult hold true for intimidating and humiliating communications.

[56] (2004) 220 CLR 1.

[57] (2013) 249 CLR 92.

[58] The burdens of provisions analogous to s18C were not in issue in *Coleman v Power* (2004) 220 CLR 1, nor *Monis v The Queen* (2013) 249 CLR 92. In the former, a burden was agreed by the parties. In the latter, a burden was conceded by the Commonwealth. Justice Susan Kiefel lamented

The *Coleman* minority considered that, while communication may be offensive and contain political content, these aspects are necessarily severable.[59] That is, for every instance of such communication, the same political message can be communicated inoffensively.[60] Heydon J considered it 'possible, and indeed quite easy, to communicate the substance of what is habitually communicated about government and public matters without recourse to insulting words'[61] and therefore, that a provision outlawing insulting communication might not be said to 'burden the … freedom at all'.[62] Callinan J found the notion that offensive statements burden the implied freedom far-fetched, because such statements are not at all necessary and are unlikely to throw light on government or political matters.[63] Their Honours suggest the 'political' and 'offensive' are necessarily distinct and therefore laws, such as s18C,[64] which restrict the communication of offensive communications, do not restrict political communication.[65]

Contrasting starkly with the minority, the *Coleman* majority Justices observed that offensive political communications cannot always be fully replicated without the use of offensive language because offensiveness contributes to the delivery and impact of the political message communicated.[66] For example, Hayne J considered that abuse and invective are intended to drive a political point home by inflicting the pain of humiliation and insult,[67] an argument

these missed opportunities to clarify the relationship between offensive or insulting and political communication in: 'Social Justice and the Constitution – Freedoms and Protections' (Speech delivered at the School of Law, James Cook University, 24 May 2013. This issue has also not been addressed in Federal Court decisions. In the recent case of *Brown v Tasmania* (2017) 349 ALR 398, a similar concession was made.

[59] *Coleman v Power* (2004) 220 CLR 1, 113-4 [299] (Callinan J), 124 [330] (Heydon J).

[60] A similar argument was made in *APLA Ltd v Legal Services Commissioner* (2005) 219 ALR 403, 413 (Gleeson CJ and Heydon J), 422 (McHugh J), 427 (Gummow J), 497-8 (Hayne J). Also, see relevantly: Dodson, above n 8, 22-3.

[61] *Coleman v Power* (2004) 220 CLR 1, 124 [330] (Heydon J).

[62] Ibid.

[63] Ibid 113-4 [299] (Callinan J).

[64] See: Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) 226 where it is argued that s18c mainly restricts 'incivility in the style and content of publication of racist material, not racist content as such'.

[65] Dodson, above n 8, 22.

[66] The majority Justices generally stressed the interconnected relationship between offensiveness and political communication. See, for example: *Coleman v Power* (2004) 220 CLR 1, 45-6 [81], 54 [105] (McHugh J), 78 [197] (Gummow and Hayne JJ), 91 [238]-[239] (Kirby J). Similar observations are evident in: *Monis v The Queen* (2013) 249 CLR 92, 136 [85], 174 [220] (Hayne J); *Roberts v Bass* (2002) 212 CLR 1, 62-3 [171] (Kirby J). See further: Adrienne Stone, ''Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 80.

[67] *Monis v The Queen* (2013) 249 CLR 92, 136 [85] (Hayne J).

also made in the literature.[68] This demonstrates an instance in which political communication and offensive communication do coincide. In contributing to the potency of the political message, *offensiveness itself can be political*.

The converse observation, that *political communication can be offensive*, is not articulated by the *Coleman* minority or majority. Yet, it provides the clearest demonstration of overlap between political and offensive communication. Quite distinct from whether offensive or insulting language is used, political ideas themselves may offend.[69] French CJ recognised in *Monis* that: '[t]here may be deeply and widely held community attitudes on important questions which have a government or political dimension and which may lead reasonable members of the community to react intensely to a strident challenge to such attitudes.'[70] A very clear example, pertinent to s18C, is racially sensitive ideas, which can be both political and intrinsically offensive or insulting.[71] Kiefel J noted, in the context of s18C, that in some situations, offence cannot be avoided because of some historical or other discourse.[72] These observations make clear the incorrectness of the *Coleman* minority view,[73] establishing that the spheres of offensive communication and political communication do overlap.

3 *Racially Motivated, Offensive, Insulting, Humiliating or Intimidating Political Communication*

The above analysis confirms that communication can be simultaneously political, racially motivated and offensive, insulting, humiliating or intimidating, and therefore that s18C burdens the implied freedom.[74]

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[68] For example, Ronald Dworkin is quoted as considering scorn, mockery and ridicule are modes of expression which transmit content in a way which cannot be duplicated inoffensively in Flemming Rose, *The Tyranny of Silence: How One Cartoon Ignited a Global Debate on the Future of Free Speech* (Cato Institute, 2014) 117. See also: Dodson, above n 8, 35.

[69] Jo Lennan, 'Law Against Insult: History and Legitimacy in *Coleman v Power*' (2006) 10(1-2) *Legal History* 239, 254; George Brandis, 'Section 18C has no place in a society that values freedom of expression', *The Australian* (online), 30 September 2011, 12, 12.

[70] *Monis v The Queen* (2013) 249 CLR 92, 131 [67] (French CJ).

[71] Katharine Gelber and Luke McNamara, 'Freedom of Speech and Racial Vilification in Australia: 'The Bolt Case' in Public Discourse' (2013) 48(4) *Australian Journal of Political Science* 470, 480. See further: Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41 *Common Law World Review* 167, 183.

[72] *Toben v Jones* (2003) 129 FCR 515, 532 [70] (Kiefel J).

[73] Lennan, above n 69, 254.

[74] The coexistence of racially motivated and offensive, insulting, humiliating or intimidating communication is borne out by s18C's sheer operation. If racially motivated communication and offensive, insulting, humiliating or intimidating communication could not, or did not, coincide, s18C would fail to capture any communication and, therefore, no s18C's claims could succeed. On the contrary, many s18C claims have been successfully made. See, for example: *McGlade v Lightfoot* (2002) 124 FCR 106; *Jones v Scully* (2002) 120 FCR 243; *Toben v Jones* (2003) 129 FCR 515;

4 *Political Communication Exempted?*

If s18D exempts all political communication from s18C's ambit, s18C will cease to burden the implied freedom. However, s18D only operates to exempt specified conduct done 'reasonably' and 'in good faith' from being unlawful under s18C.[75] Therefore, s18C still applies to any unreasonable or bad faith conduct.[76] Unreasonable and bad faith conduct is protected by the implied freedom. In *Levy v Victoria*[77] ('Levy') three justices clearly stated the implied freedom protects unreasonable communication.[78] Indeed, McHugh J even considered that appeals to the emotions to achieve evil ends might be protected.[79] Therefore, despite s18D's operation, s18C still burdens the implied freedom.[80]

C *Extent of s18C's Burden*

Assuming this conclusion – that s18C does burden the implied freedom – is correct, another issue arises: what is the extent of s18C's burden? The answer will assume its principal significance in assessing whether s18C is reasonably appropriate and adapted to its purpose, limited in this article to the analysis undertaken in Part IV.[81] The extent of s18C's burden depends on the degree of conduct captured by its legal or practical operation.[82] The greater the degree of conduct s18C captures, the greater its burden on the implied freedom. As demonstrated below, s18C regulates a significant degree of conduct.

1 *'Act'*

Section 18C's scope extends to all 'acts'.[83] It is not confined to verbal communication, the written word, or its publication, but seeks to encompass all conduct.[84] It is clear, from *Levy*, that non-verbal communication is protected by

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Silberberg v Builders Collective of Australia Inc (2007) 98 ALD 54; *Eatock v Bolt* (2011) 197 FCR 261; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389; *Haider v Hawaiian Punch Pty Ltd* [2015] FCA 37 (6 February 2015). It should also be noted that it is the prevailing academic opinion that s18C burdens the implied freedom. See, for example: Meagher, above n 35, 53; Lennan, above n 69, 256; Fisher, above n 52, 42.

[75] *Racial Discrimination Act 1975* (Cth) s 18D.

[76] Twomey, above n 50, 5.

[77] (1997) 189 CLR 579.

[78] Ibid 613 (Toohey and Gummow JJ), 623 (McHugh J). See further: Barnes, above n 5, 30.

[79] *Levy v Victoria* (1997) 189 CLR 579, 623 (McHugh J).

[80] Barnes, above n 5, 26; Twomey, above n 50, 5.

[81] *Brown v Tasmania* (2017) 349 ALR 398, 23 [90] (Kiefel CJ, Bell and Keane JJ), 64 [237] (Nettle J).

[82] Ibid 79 [269] (Nettle J).

[83] *Racial Discrimination Act 1975* (Cth) s 18C.

[84] Ibid.

the implied freedom.[85] Thus, in regulating non-verbal acts, as well as those spoken or published, s18C's burden on the implied freedom is amplified.

2 *'Otherwise Than in Private'*

Section 18C encompasses acts done in many locations and forms. It regulates conduct done 'otherwise than in private'[86] and, therefore, does not expressly extend to acts done in private.[87] However, s18C(2) sets out a broad notion of non-private acts, including any act done in a public place or in sight or hearing of people in a public place.[88] The definition of public places includes 'any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place'.[89] Therefore, s18C's ambit stretches to conduct in meagre contact with the public sphere. For example, conduct done in private but visible or audible in a place open to the public, perhaps, only by invitation. Section 18C also captures acts causing words, sounds, images or writing to be communicated to the public.[90] Obviously, this is directed toward communication via publication.[91]

3 *Causation - 'Because of" and s18B*

'Because of the race, colour or national or ethnic origin' introduces a causation concept into s18C.[92] This requires that the act,[93] reasonably likely to 'offend, insult, intimidate or humiliate', be done *because of* the race, colour or national or ethnic origin of the targeted person or group.[94] Section 18B deems acts done for this reason if *one* reason they were done was race, colour or national or

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[85] *Levy v Victoria* (1997) 189 CLR 579, 594-4 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-3 (McHugh J), 641 (Kirby J).
[86] *Racial Discrimination Act 1975* (Cth) s 18C(1).
[87] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1.
[88] *Racial Discrimination Act 1975* (Cth) s 18C(2)(c).
[89] Ibid s 18C(3).
[90] Ibid s 18C(2)(a). The Federal Court has interpreted this as encompassing non-password protected websites, see: *Jones v Toben* (2002) 71 ALD 629, 646 [74] (Branson J). As well as, journalist interviews, see: *McGlade v Lightfoot* (2002) 124 FCR 106 [38]-[40] (Carr J).
[91] For example: *Eatock v Bolt* (2011) 197 FCR 261; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.
[92] Sir Ronald Sackville, 'Anti-Semitism, Hate Speech and Pt IIA of the Racial Discrimination Act' (2016) 90(9) *Alternative Law Journal* 631, 642.
[93] *Eatock v Bolt* (2011) 197 FCR 261, 332 [304] (Bromberg J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56, 61 [26] (Ryan, Dowsett and Hely JJ). In cases of publication of material authored by others, the Federal Court has often seen fit to find racial motivation of a publisher via a lack of diligence. See, for example: *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 409 [97] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 337-8 [330]-[332] (Bromberg J).
[94] *Eatock v Bolt* (2011) 197 FCR 261, 332 [304] (Bromberg J); *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 358 [22].

ethnic origin. Consequently, s18C's burden is more onerous than if s18B prescribed a dominant, substantial or sole purpose test. This casts s18C's ambit widely, capturing all conduct done for racial reasons, even if forming the slightest motivation.[95]

4 *'Race, Colour or National or Ethnic Origin'*

'Race, colour or national or ethnic origin', within s18C, carries a broad meaning.[96] The Explanatory Memorandum states that phrase was intended to adopt a definition of 'ethnic origin' inviting consideration of:

> shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group.[97]

Consequently, the Commonwealth Parliament ('Parliament') intended the concept of 'race, colour or national or ethnic origin' to provide protection for various categories of racial and ethno-religious groups, for example, Muslims and Jews.[98] In *Eatock v Bolt*[99] ('*Bolt*'), Bromberg J confirmed 'race' and 'ethnic origin' should be given their broad popular meanings.[100] This enlarges the amount of conduct caught by s18C, contributing to its considerable burden.

5 *Harm Threshold – 'Offensiveness, Insult, Humiliation or Intimidation'*

Section 18C makes unlawful 'offensive, insulting, intimidating or humiliating' conduct. The Federal Court has generally interpreted this harm threshold narrowly to apply only to serious conduct.[101] Kiefel J held in *Creek v*

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[95] Section 18C's scope may be made even wider by the Kiefel J's suggestion in *Toben v Jones* (2003) 129 FCR 515, 531 [63] that causation can be established objectively even in instances where the communicating party was unaware that their motivation had a racial element. See, on the same point: *Toben v Jones* (2003) 129 FCR 515, 526 [31] (Carr J); Sackville, above n 92, 643.

[96] *Eatock v Bolt* (2011) 197 FCR 261, 334 [313] (Bromberg J).

[97] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 2-3. This Explanatory Memorandum can be utilised to ascertain the meaning of the phrase 'race, colour or national or ethnic origin' pursuant to *Acts Interpretation Act 1901* (Cth) s 15AB(b)(i) because the scope of this phrase is ambiguous.

[98] Forrester, Finlay and Zimmerman, above n 5, 133-4.

[99] (2011) 197 FCR 261

[100] Ibid 334 [313] (Bromberg J).

[101] Ibid 325 [267]-[268] (Bromberg J); *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commissioner* (2004) 135 FCR 105, 131 [69]-[70] (French J); *Jones v Scully* (2002) 120 FCR 243, 269 [102] (Hely J).

Cairns Post Pty Ltd[102] ('*Creek*') that s18C is directed at conduct having 'profound and serious effects, not to be likened to mere slights'.[103] This position was later affirmed by the Federal Court in *Bropho v Human Rights and Equal Opportunity Commissioner*,[104] *Jones v Scully*[105] ('*Scully*') and *Bolt*[106]. This Federal Court construction narrows the degree of conduct captured by s18C, significantly lessening its burden.

Ostensibly, the Federal Court approach is supported by High Court authority narrowly interpreting similar provisions, notably *Coleman* and *Monis.*[107] In *Coleman*, three majority Justices confined 'insulting' to refer to conduct of such a serious nature as to provoke violence.[108] In *Monis*, the High Court unanimously construed 'offensive' as confined to a high level of offensiveness calculated or likely to arouse significant anger, resentment, outrage, disgust or hatred.[109]

However, the High Court has acknowledged 'offensive' and 'insulting' can be narrowly or broadly interpreted and the meaning of these words depends on the particular statutory context in which they are used.[110] Therefore, regard must be given to s18C's context to resolve the ambiguous meaning of these terms.[111]

S18C's context

Context may be provided by s18C's surrounding words, provisions and headings,[112] though in s18C's case they prove equivocal. Reading 'offend, insult, humiliate and intimidate' conjunctively could suggest that 'offend' and 'insult'

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[102] (2001) 112 FCR 352.
[103] Ibid 356 [16] (Kiefel J).
[104] (2004) 135 FCR 105, 131 [69]-[70] (French J).
[105] (2002) 120 FCR 243, 269 [102] (Hely J).
[106] *Eatock v Bolt* (2011) 197 FCR 261, 325, [267]-[268] (Bromberg J).
[107] Barnes, above n 5, 30; Twomey, above n 50, 5; Tim Soutphomassane, 'Commentary on section 18C often blind to substantial body of case law', *The Australian* (online), 13 March 2014, 27, 27 <www.theaustralian.com.au/business/legal-affairs/commentary-on-section-18c-often-blind-to-substantial-body-of-case-law/news-story/7fda6a92fa7493162c931dfc03d88772>.
[108] *Coleman v Power* (2004) 220 CLR 1, 74 [183], 77 [193], 78 [198]-[200] (Gummow and Hayne JJ), 98 [254]-[255] (Kirby J).
[109] *Monis v The Queen* (2013) 249 CLR 92, 122 [43] (French CJ, with whom Heydon J agreed), 169 [201] (Hayne J), 202-4 [309]-[316] (Crennan, Kiefel and Bell JJ).
[110] Ibid 155 [151] (French CJ), 155 [151] (Hayne J); *Coleman v Power* (2004) 220 CLR 1, 87 [224]-[225] (Kirby J). The ability to interpret 'offend' and 'insult' broadly or narrowly was also recognised in Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 9.
[111] Context is to be considered in the first instance, not later when some ambiguity is said to arise. See: *Monis v The Queen* (2013) 249 CLR 92, 202 [309] (Crennan, Kiefel and Bell JJ); *Eatock v Bolt* (2011) 197 FCR 261, 307 [192] (Bromberg J).
[112] *Eatock v Bolt* (2011) 197 FCR 261, 307 [192] (Bromberg J); *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 357 [18] (Kiefel J).

should be coloured by the seriousness of 'intimidate' or 'humiliate',[113] *or* that 'offend' and 'insult' were chosen deliberately to lower s18C's threshold to less serious conduct. Similarly, the headings in Part IIA support a broad and narrow construction of 'offend' and 'insult'.[114] In singling out and emphasising 'offensive behaviour', s18C's heading may suggest 'offend' should be given its ordinary meaning.[115] Contrastingly, Part IIA's heading emphasises 'racial hatred' thereby suggesting a more restricted meaning of 'offend' and 'insult'.[116]

Further context is provided by extrinsic material.[117] Section 18C's extrinsic material suggests the words 'offend, insult, humiliate and intimidate' form a low harm threshold. The *RHA*'s Explanatory Memorandum describes the *RHA* as designed to 'clos[e] a gap in the legal protection available to the victims of extreme racist behaviour'.[118] However, these statements seem to be directed toward other criminal provisions proposed in the RHB,[119] rather than Part IIA and s18C.[120] These criminal provisions were to be included in the *Crimes Act 1914* (Cth) and criminalised threats made to people because of their race, colour or national or ethnic origin as well as the intentional incitement of racial hatred.[121] Contrastingly, s18C is a civil liability provision, inserted into the *RDA*, under which disputes are to be determined primarily by means of conciliation.[122] The *RHA*'s Explanatory Memorandum acknowledges s18C's 'victim-initiated process

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[113] In *Eatock v Bolt* (2011) 197 FCR 261, 324 [265] Bromberg J considered that in the context of s18C the word 'offend' should be interpreted conformably with the words chosen as its partners. See also: *Coleman v Power* (2004) 220 CLR 1, 77 [192], 87 [224] where Gummow, Hayne and Kirby JJ held that the word 'insulting' used in the phrase 'threatening, abusive or insulting' carried a narrow meaning.

[114] Headings to Parts and Divisions form part of the substantive law of the *Racial Discrimination Act 1975* (Cth) pursuant to *Acts Interpretation Act 1901* (Cth) s 13(2)(d) and therefore can assist in interpretation.

[115] Similarly, it only refers to 'race, colour or national or ethnic origin' which was contrasted with the reference to 'racial hatred' in Part IIA's heading by Kiefel J in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 357 [17].

[116] *Eatock v Bolt* (2011) 197 FCR 261, 307 [196], 310 [208] (Bromberg J); *Toben v Jones* (2003) 129 FCR 515, 548-9 [132] (Allsop J).

[117] *Acts Interpretation Act 1901* (Cth) s 15AB(1)(b)(i) allows extrinsic material to be used in instances of ambiguity. The ambiguity of s18C's harm threshold is manifest. See: Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225, 229-30, 233.

[118] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1. The Explanatory Memorandum also describes the *Racial Hatred Act 1995* (Cth) as intended to prevent people from inciting racial hatred or threatening violence. As well as describing s 18C as 'the proposed prohibition on offensive behaviour based on racial hatred', see: *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [15] (Kiefel J).

[119] Meagher, above n 117, 231.

[120] Forrester, Finlay and Zimmerman, above n 5, 125.

[121] *Jones v Scully* (2002) 120 FCR 243, 249-50 [11] (Hely J).

[122] *Eatock v Bolt* (2011) 197 FCR 261, 309 [203]-[204] (Bromberg J). See further: Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' (2004) 30(1) *Monash University Law Review* 27, 28, 31.

is quite different from the criminal offence regime where the initiative for action generally involves police and prosecution authorities'.[123] Section 18C's lack of criminal character suggests a low harm threshold because 'it has long been accepted that penalty is an indication of the seriousness with which the legislature view[s] [an] offence'.[124] The obvious implication is that s18C was directed to lower level conduct than its proposed criminal counterparts[125] and was a clear and deliberate departure from previous models of racial vilification laws targeted at more serious conduct.[126]

(b) Statutory construction

Turning to principles of statutory construction,[127] the High Court is unlikely to narrow s18C's scope, because of the principle of legality,[128] to reduce s18C's infringement of the fundamental common law right to freedom of expression.[129] The *RHA*'s Explanatory Memorandum expressly evidences Parliament's deliberate consideration of whether the implied freedom would be infringed.[130] Indeed, s18C's enactment implies Parliament considered its use of 'offend, insult, intimidate or humiliate' sufficiently clear to convey the intention that s18C was to

[123] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 2.

[124] *Monis v The Queen* (2013) 249 CLR 92, 203 [311] (Crennan, Kiefel and Bell JJ). The degree of penalty was also taken into account in construing the harm threshold of provisions considered in: *Ball v McIntyre* (1966) 9 FLR 237, 243; *Coleman v Power* (2004) 220 CLR 1, 73 [177] (Gummow and Hayne JJ).

[125] It could be implied from the fact that the Commonwealth Parliament intended s18C would not infringe the implied freedom that the conduct captured by s18C would be sufficiently severe that it did not. On the other hand, the range of analogous legislation, cited in the Explanatory Memorandum as not infringing the implied freedom, ranges from regulating serious expression (for example, child pornography) to, arguably, less serious (for example, misleading and false advertising). See: Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1.

[126] *Eatock v Bolt* (2011) 197 FCR 261, 309 [203], 310 [208] (Bromberg J); *Toben v Jones* (2003) 129 FCR 515, 548-9 [132] (Allsop J).

[127] A further principle of statutory construction, that protective legislation should be construed broadly and beneficially, if relevant, may also support a broad reading of s18C's harm threshold. See further: Forrester, Finlay and Zimmerman, above n 5, 21.

[128] *Coleman v Power* (2004) 220 CLR 1, 87 [225] (Kirby J); *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ); *Bropho v Western Australia* (1990) 171 CLR 1, 17-8 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ), *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ).

[129] Forrester, Finlay and Zimmerman, above n 5, 21. On the common law freedom of expression, see: *Coleman v Power* (2004) 220 CLR 1, 97 [253] (Kirby J); *Monis v The Queen* (2013) 249 CLR 92, 128 [60] (French CJ); *Evans v New South Wales* (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 125-6 [72] (French J); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 67-8 [151] (Heydon J). On limits to that common law freedom, see: Rosalind Croucher, 'Getting to Grips with Encroachments on Freedoms in Commonwealth Laws: The ALRC Freedoms Inquiry' (2016) 90(7) *Australian Law Journal* 478, 487.

[130] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1. See, in addition: Forrester, Finlay and Zimmerman, above n 5, 21.

restrict freedom of expression.[131] Arguably, by using the words 'offend' and 'insult' without qualification, Parliament evinced an intention that all levels of offensiveness and insult be made unlawful. The High Court has acknowledged the principle of legality may have limited application in cases where abrogating a right or freedom is a clear object of a statute.[132] Section 18C is arguably such a case.[133] To insist the principle of legality continues to have application, where Parliament has implicitly addressed and answered the interpretive question of whether the legislation abrogates freedom of expression during the legislative process, sits uncomfortably with the justification for the principle's existence.[134] Therefore, the principle of legality should not be utilised to narrow s18C's scope.[135]

Section 18C's operation, statutory context, legislative history and relevant principles of statutory construction, suggest s18C should be construed broadly to give due regard to its civil character, its intended dissimilarity to its proposed criminal counterparts,[136] and that Parliament consciously sought to abrogate freedom of expression. Therefore, despite Federal Court authority,[137] s18C's operation is not confined to the prohibition of seriously offensive, insulting, intimidating or humiliating conduct. Rather, s18C captures all conduct from a low level of offensiveness, insult, humiliation and intimidation, making its burden on the implied freedom considerable.

6 *'Reasonable Victim' Perspective*

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[131] In *Coleman v Power* (2004) 220 CLR 1, 117 [313] Heydon J considered that the word 'insulting' in *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d) was sufficiently clear to abrogate the fundamental freedom of expression. By contrast Kirby J at 97 [252] did not consider that word unequivocal and clear enough to eliminate the operation of the principle of legality.

[132] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310-1 [314] (Gageler and Keane JJ).

[133] Brad Jessup has noted that the debate leading up to the introduction of the Racial Hatred Bill 1994 (Cth) focused almost entirely on the relationship between racial vilification laws and free speech. See: Brad Jessup, 'Five Years On: A Critical Evaluation of the *Racial Hatred Act 1995*' (2001) 6(1) *Deakin Law Review* 91, 93.

[134] That justification being that the principle is known to Parliaments as a basis for the interpretation of statutory language. This understanding underpins the legitimacy of courts interpreting legislation other than in accordance with the meaning evident from its text. See: *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ).

[135] See: Chief Justice Robert French, 'The courts and the parliament' (Speech delivered at the Queensland Supreme Court Seminar, Brisbane, 4 August 2012) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf> where Chief Justice Robert French extra-curially stated that the principle of legality does not authorise the courts to rewrite statutes.

[136] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [15] (Kiefel J).

[137] Ibid [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commissioner* (2004) 135 FCR 105, 131 [69]-[70] (French J); *Jones v Scully* (2002) 120 FCR 243, 269 [102] (Hely J); *Eatock v Bolt* (2011) 197 FCR 261, 325 [267]-[268] (Bromberg J).

Section 18C's text requires the impugned act be 'reasonably likely to offend, insult, humiliate or intimidate another person or a group of people'. To date, the Federal Court has merged objective and subjective elements into the perspective from which 'offensiveness, insult, humiliation and intimidation' is assessed.[138] The relevant perspective is that of a hypothetical reasonable person of the relevant racial, ethnic or national group.[139] Thus, its designation: a 'reasonable victim' test.[140] Federal Court application of this test has amplified its subjectivity, suggesting subjective intolerances to offensiveness, insult, humiliation or intimidation supersede an objective perspective in three common instances.[141]

First, the Federal Court frequently identifies the perspective of racial *sub*-groups from which to judge offensiveness.[142] Often, the Court has considered that using the perspective of a broad racial group whose members may vary in appearance, beliefs and experiences insufficiently tailors the harm enquiry to the relevant group targeted by the conduct allegedly contravening s18C.[143] For example, in *Bolt*, Bromberg J held a diverse racial group will:

> likely comprise discernible sub-groups. Reactions to the same conduct may vary as between sub-groups. That may be because of an extra attribute common to the sub-group. … Additionally, it may be appropriate in some cases of alleged group offence to assess the reaction of those within a group to whom the conduct is particularly targeted and thus most likely to have been offended.[144]

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[138] In *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 402 [51] Barker J held that one reason for incorporating subjective elements into the perspective was to be attuned to cultural differences and what racial groups and sub-groups consider offensive, insulting, humiliating or intimidating rather than subjecting their claims to the views of dominant Australian views. See also: *Eatock v Bolt* (2011) 197 FCR 261, 321 [253] where Bromberg J held that importing general Australian standards would run the risk of reinforcing the prevailing level of prejudice.

[139] *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 (10 November 2000) [15] (Drummond J); *Jones v Scully* (2002) 120 FCR 243, 268–9 [98], 271 [108] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [46] (Carr J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [253] (Bromberg J).

[140] Chapman, above n 105, 32.

[141] It should be noted that at time, Justices of the Federal Court have cautioned against considering the subjective reactions of actual s18C complainants lest s18C's reach become overbroad. See, for example: *Hagan v Trustees of Toowoomba Sports Ground Trust* (2001) 105 FCR 56 (10 November 2000) [15] (Drummond J); *Jones v Scully* (2002) 120 FCR 243 [98]-[101] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106, 124 [88] (Carr J).

[142] See, by way of example: *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 404 [63] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [252] (Bromberg J); *Jones v Toben* (2002) 71 ALD 629, 652 [40] (Branson J); *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [46] (Carr J).

[143] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 404 [63] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [252] (Bromberg J); *Creek v Cairns Post Ltd* (2001) 112 FCR 352, 356 [13] (Kiefel J).

[144] *Eatock v Bolt* (2011) 197 FCR 261, 321 [252] (Bromberg J).

His Honour identified the relevant sub-group as 'Aboriginal persons of mixed descent who have fair skin'.[145] The peculiar intolerances attending members of this sub-group included sensitivity to challenges to identity through an awareness that their appearance does not fit the stereotypical image of Aboriginal people and sensitivity to attempts by non-Aboriginal people to define Aboriginal identity.[146] Likewise, in *Creek*, Kiefel J considered the appropriately tailored perspective to be 'an Aboriginal mother, or one who cares for children, and who resides in the township of Coen'.[147] A reasonable member of this sub-group would feel offended if portrayed (as they were in that case) as living in rough bush conditions in the context of a report about a child's welfare.[148] These cases indicate that the subjective reactions of the sub-group, to the conduct allegedly contravening s18C, will significantly contribute to the court's decision over which characteristics should be imputed to the hypothetical group.[149]

Second, the Federal Court has suggested it is appropriate to adopt a purely subjective enquiry where conduct is directed towards individual persons rather than racial groups.[150] In *Bolt*, Bromberg J held that where allegedly offensive conduct is directed at an identified person the conduct should be analysed from the perspective of that targeted person.[151] This approach was approved in *Prior v Queensland University of Technology (No 2)*.[152]

Thirdly, the Federal Court has taken a complainant's subjective reactions into account where necessitated by evidentiary requirements.[153] In *Clarke v Nationwide News Pty Ltd*[154] ('*Clarke*'), Barker J considered:

> while the subjective feelings of a particular person who complains about an act is not determinative of the question whether an act is reasonably likely to offend, etc, the Court is not properly equipped without relevant evidence to identify that perspective. The Court will therefore regard evidence led by the parties to that end, including from the complainant.[155]

This passage indicates that, where little evidence is available to the court, it will rely on a complainant's subjective reactions. An obvious alternative approach

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[145] Ibid 328 [284] (Bromberg J).
[146] Ibid 328 [282], 329-30 [291]-[292] (Bromberg J).
[147] *Creek v Cairns Post Ltd* (2001) 112 FCR 352, 356 [13] (Kiefel J).
[148] Ibid.
[149] Sackville, above n 92, 641. See as a further example: *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 421 [191] (Barker J).
[150] *Eatock v Bolt* (2011) 197 FCR 261, 320 [250] (Bromberg J).
[151] Ibid.
[152] *Prior v Queensland University of Technology (No 2)* [2016] FCCA 2853 [37] (Jarrett J).
[153] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 406 [75] (Barker J).
[154] (2012) 201 FCR 389.
[155] Ibid 406 [75] (Barker J).

would be to require objective evidence to be brought, failing which no contravention of s18C is found.

The 'reasonable victim' test, applying these three Federal Court practices, increases s18C's burden because the more subjective the enquiry the more personal intolerances and susceptibilities to becoming offended, insulted, humiliated or intimidated are incorporated into the touchstone for measuring harm.[156]

7 *Section 18D, 'Reasonableness' and 'Good Faith'*

Section 18D ostensibly provides broad exemptions for conduct otherwise unlawful under s18C, making lawful four categories of conduct.[157] First, artistic works.[158] Second, statements or publications made for academic, artistic, scientific or public interest purposes.[159] Third, fair and accurate reports on matters of public interest.[160] Fourth, fair comments on matters of public interest provided the beliefs therein are genuinely held.[161]

Even so, the Federal Court's demanding interpretation of s18D's threshold requirements of 'reasonableness' and 'good faith' has made it historically difficult for acts unlawful under s18C to satisfy s18D's requirements.[162] Similar conditions have been required for the satisfaction of both.[163] Particularly, that the communicator had conscientiously made every effort to restrain communication to a manner designed to minimise the offensiveness, insult, humiliation or intimidation given.[164]

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[156] Sackville, above n 92, 638.
[157] Adrienne Stone, 'The Ironic Aftermath of *Eatock v Bolt*' (2015) 38(3) *Melbourne University Law Review* 926, 937; Centre for Comparative Constitutional Studies, University of Melbourne, Submission No 137 to Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Human Rights Commission Act 1986 (Cth)*, 23 December 2016, 7.
[158] *Racial Discrimination Act 1975* (Cth) s 18D(a).
[159] Ibid s 18D(b).
[160] Ibid s 18D(c)(i).
[161] Ibid s 18D(c)(ii).
[162] Stone, above n 157, 937; Sackville, above n 92, 644; Augusto Zimmerman and Lorraine Finlay, 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14 *Macquarie Law Journal* 185, 197.
[163] The Federal Court has interpreted the words 'reasonably' and 'in good faith' as incorporating both subjective and objective standards and as requiring a degree of proportionality in the conduct engaged in, having regard to the degree of harm inflicted. See, for example: *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 128 [79], 132 [95]-[96], 133 [101]-[103] (French J), 141-2 [139]-[140] (Lee J); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 415 [131] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 341 [346]-[348] (Bromberg J).
[164] *Eatock v Bolt* (2011) 197 FCR 261, 354 [411], 358 [425] (Bromberg J); *Toben v Jones* (2003) 129 FCR 515, 528 [44]-[45], 534 [77] (Kiefel J), 555 [163] (Allsop J); *Bropho v Human Rights and*

However, the Federal Court has had difficulty ignoring the content of an expression in deciding whether it was made 'reasonably and in good faith'.[165] The Federal Court has often inferred the degree of care taken in delivering a communication (and therefore the extent of reasonableness and good faith) by the communication's ostensible offensiveness.[166] This enquiry is circular, with self-evident offensiveness being determinative of a lack of reasonableness or good faith. In *Clarke*, Barker J seems to conflate the enquiries of offensiveness, good faith and reasonableness.[167] On three occasions, His Honour stated 'for the same reasons [that established offensiveness] the comment was not published reasonably or in objective good faith'.[168] By interpreting s18D's threshold requirements in this manner, the Federal Court has vastly limited s18D's application. As observed by Meagher:

> the more extreme the racist message the more likely a decision-maker will find that the conduct was *in fact* done for a purpose other than to further public debate on a matter of academic, scientific or public interest. In other words, the application of the 'good faith' requirement has served to evaluate the racist *content* of a message and effectively limit how extreme it can be.[169]

In this way, the Federal Court has narrowed s18D's scope thereby broadening s18C's scope and its burden on the implied freedom.

D *Conclusion as to s18C's Burden*

This Part has demonstrated that, in regulating racially motivated, offensive, insulting, intimidating or humiliating political communication which is unreasonable or made other than in good faith, s18C can and does burden the implied freedom. It has also examined the relationship between political and offensive or insulting communication which is the most unsettled and contentious aspect of the burden enquiry in s18C's context. Certain judicial authority that

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Equal Opportunity Commission (2004) 135 FCR 105, 131-2 [95], 133 [100]-[102] (French J). See further: Sackville, above n 92, 644; Stone, above n 157, 942-3 where it is argued that this interpretation is inconsistent with the High Court authority that the implied freedom protects incivility of discourse.

[165] Gray, above n 71, 194.

[166] See: *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 430 [250], 438 [314], 440 [328] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 360 [439] (Bromberg J). See, further: Sackville, above n 92, 644; Gray, above n 71, 194-5.

[167] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 430 [250], 438 [314], 440 [328] (Barker J). Despite the fact that it is obvious a finding that a communication is reasonably likely to be offensive, insulting, intimidating or humiliating, for the purposes of s18C, cannot determine want of reasonableness or lack of good faith or s18D would have no application. See: *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 135 [107] (French J).

[168] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 430 [250], 438 [314], 440 [328] (Barker J).

[169] Meagher, above n 117, 250.

laws restricting offensive or insulting communication do not burden the implied freedom because such communication is necessarily distinct from political communication has been rejected. That is, it has been argued that offensive communication can be political and political communication can be offensive.

The extent of s18C's burden on the implied freedom has also been identified. Each aspect of s18C has been examined, in conjunction with ss18B and 18D, concluding that all aspects contribute to s18C's considerable burden on the implied freedom. Notably, it was identified that the High Court is likely to interpret s18C's harm threshold as a lower bar than previously held by the Federal Court, magnifying s18C's burden. The significance of the extent of s18C's burden will be demonstrated in Part IV where a balancing test will be articulated and applied.

IV SECTION 18C'S COMPATIBILITY

A *Nature of the Enquiry*

If s18C's purposes are not compatible with the maintenance of the system of representative and responsible government prescribed by the *Constitution* ('compatible'), s18C will be invalid by virtue of the implied freedom.[170] According to *McCloy*, a law will be compatible if it is not directed to, or does not operate so as to, impinge upon or impede this representative and responsible system's ability to function.[171]

B *Divergent Approaches to Determining Purpose – Narrow vs Broad*

High Court approaches to determining an impugned law's purpose have varied considerably.[172] Two main purposes approaches can be identified.[173] The difference between them is the extent to which each approach ties itself to the means or operation of the impugned law.[174] First, some judges have taken a narrow approach, adhering closely to the statute's text and operation and treated a

[170] *Coleman v Power* (2004) 220 CLR 1, 51 [95]-[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J); *Monis v The Queen* (2013) 249 CLR 92, 141-2 [106] (Hayne J).
[171] *McCloy v New South Wales* (2015) 257 CLR 178, 213 [67] (French CJ, Kiefel, Bell and Keane JJ).
[172] Bonina Challenor, 'The Balancing Act: A Case for Structured Proportionality Under the Second Limb of the *Lange* Test' (2015) 40(1) *University of Western Australia Law Review* 267, 270.
[173] Ibid.
[174] Ibid 270-1.

law's means as its purpose.[175] Second, using a wider approach, other judges have identified statutory purpose as the broader objective the law pursues.[176] This tension is evident in the major High Court cases concerning offensive communications: *Coleman* and *Monis.*[177]

In *Coleman*, the relevant provision made it a criminal offence to use any 'threatening, abusive, or insulting words' to any person in public.[178] Kirby J, pursuing a textual interpretative approach, confined the relevant provision's purpose to 'preventing and sanctioning public violence and provocation to such conduct'.[179] By contrast, Heydon J, using a broader approach to construing the law's purpose, found many.[180] Examples included lessening the 'risk of acrimony leading to breaches of the peace, disorder and violence',[181] preventing the 'wounding effect on the personal publically insulted',[182] avoiding 'other persons who hear the insults from feeling intimidated or otherwise upset',[183] preserving 'an ordered and democratic society';[184] and defending or vindicating 'the legitimate claims of individuals to live peacefully and with dignity within such society'.[185]

In *Monis*, the purpose approach of the plurality and minority judges displayed similar differences which ultimately determined their respective conclusions as to the relevant law's validity.[186] That law made it an offence for a person to use a postal service 'in a way … that reasonable persons would regard as being, in the circumstances … offensive'.[187] The plurality implemented the broad approach, stating the 'question of purpose is rarely answered by reference

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[175] *Coleman v Power* (2004) 220 CLR 1, 98-9 [256] (Kirby J); *Monis v The Queen* (2013) 249 CLR 92, 133-4 [73] (French CJ), 147 [125], 162 [178], 163 [184] (Hayne J); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [66] (French CJ), 64-5 [141] (Heydon J).
[176] *Coleman v Power* (2004) 220 CLR 1, 121-2 [323]-[324] (Heydon J); *Monis v The Queen* (2013) 249 CLR 92 119-20 [317] (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 90 [221] (Crennan and Kiefel JJ).
[177] Challenor, above n 172, 270. It should be noted that this divergence was not readily apparent in *Brown v Tasmania* (2017) 349 ALR 398 or *McCloy v New South Wales* (2015) 257 CLR 178. However, this may be because the Court had resort to an express objects clause. See, for example: *McCloy v New South Wales* (2015) 257 CLR 178, 203 [33] (French CJ, Kiefel, Bell and Keane JJ), 232 [132] (Gageler J), 284 [320] (Nettle J), 284-5 [322]-[324] (Gordon J).
[178] *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d).
[179] *Coleman v Power* (2004) 220 CLR 1, 98-9 [256] (Kirby J).
[180] Ibid 121-2 [323]-[324] (Heydon J).
[181] Ibid 121 [323] (Heydon J).
[182] Ibid.
[183] Ibid.
[184] Ibid 122 [324] (Heydon J).
[185] Ibid.
[186] Ibid 98-9 [256] (Kirby J), 121-2 [323]-[324] (Heydon J); *Monis v The Queen* (2013) 249 CLR 92, 133-4 [73] (French CJ), 163 [184] (Hayne J), 119-20 [317], 122 [324] (Crennan, Kiefel and Bell JJ).
[187] *Criminal Code 1995* (Cth) s 471.12.

only to the words of the provision, which commonly provide the elements of the offence and no more'.[188] Their Honours adopted Parliament's 'wider social objective of the legislation'[189] which could be readily inferred as the 'protection of people from the intrusion of offensive material into their personal domain'.[190]

By contrast, French CJ and Hayne J adopted the narrow approach.[191] French CJ stated statutory purpose is 'properly described as the prevention of the conduct which it prohibits'.[192] Similarly, Hayne J construed purpose according to the impugned law's legal and practical operation.[193] His Honour conceded that one of the legislative intentions behind the provision's enactment was to protect the integrity of the post.[194] However, His Honour distinguished between the law's 'external' purpose, being the political motives behind enacting a provision, and its 'ostensible' purpose, evident from the statutory text.[195] His Honour held that construing purpose is 'not a search for some subjective purpose of intention of the parliament in enacting the impugned law'.[196]

C *Section 18C's Narrow Purpose and its Compatibility*

1 *Section 18C's Narrow Purpose*

Applying the narrow approach to s18C's purpose focuses the enquiry on its text and operation.[197] Section 18C's terms reveal that s18C targets the offensive, insulting, humiliating or intimidating effect of the prohibited conduct on the targeted person or group, not the underlying message, focusing attention on the perpetration of this effect.[198] Therefore, the purpose likely to be identified using the narrow approach is the prevention of racially offensive, insulting, humiliating or intimidating public acts.

2 *Compatibility of s18C's Narrow Purpose*

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[188] *Monis v The Queen* (2013) 249 CLR 92, 119-20 [317] (Crennan, Kiefel and Bell JJ).
[189] Ibid 122 [324] (Crennan, Kiefel and Bell JJ). Kristen Walker has argued that Crennan, Kiefel and Bell JJ consider that it is not for the courts to second-guess the legislature on legitimate ends' in: 'Justice Hayne and the Implied Freedom of Political Communication' (2015) 26(4) *Public Law Review* 292, 296.
[190] *Monis v The Queen* (2013) 249 CLR 92, 205 [317], 122 [324] (Crennan, Kiefel and Bell JJ).
[191] Ibid 133-4 [73] (French CJ), 162-3 [178]-[184] (Hayne J).
[192] Ibid 133-4 [73] (French CJ).
[193] Ibid 162 [178] (Hayne J).
[194] Ibid 163 [184] (Hayne J).
[195] Ibid.
[196] Ibid 147 [125] (Hayne J).
[197] Ibid 162 [180], 164 [184] (Hayne J).
[198] Fisher, above n 52, 42.

The compatibility of s18C's narrow purpose is questionable.[199] A majority in *Coleman* considered offensive or insulting words are integral to, and an inevitable incident of, Australian political discourse.[200] Therefore, such political offence and insult was constitutionally protected – a law aimed at prohibiting this conduct would be incompatible.[201]

In *Monis*, French CJ and Hayne J clarified that even conduct causing very great offence or insult would be constitutionally protected.[202] Therefore, even if s18C's operation was to be construed narrowly, to only make unlawful acts of serious offensiveness, insult, intimidation or humiliation, s18C's narrow purpose would still be vulnerable to a finding of incompatibility.[203]

Together, *Coleman* and *Monis* stand as authority that only where offensive and insulting conduct is likely to provoke violence will it lose constitutional protection.[204] In *Coleman*, three of the four majority judges read down the relevant law as applying only to conduct of this severity, to preserve compatibility.[205]

Section 18C is not, and cannot be read down to be, confined to conduct provoking violence for three main reasons.[206] First, as demonstrated in Part II, s18C's terms encompass low level instances of offensiveness, insult, humiliation and intimidation which are unlikely to lead to violence.[207] Reading in such a requirement would be to ignore the legislative intention that s18C was to differ from its intended criminal counterparts.[208] Second, s18C's focus is on 'the

[199] Stone, above n 66, 80, 88.
[200] *Coleman v Power* (2004) 220 CLR 1, 54 [105] (McHugh J), 78-9 [199]-[200] (Gummow and Hayne JJ), 91 [238]-[239] (Kirby J).
[201] Ibid.
[202] *Monis v The Queen* (2013) 249 CLR 92, 131 [67] (French CJ), 137 [87], 171 [207] (Hayne J).
[203] In *Monis v The Queen* (2013) 249 CLR 92, 171 [207], 174 [219]. Hayne J held that laws regulating 'really' or 'seriously' offensive conduct merely regulated part of a wider field of civilising discourse the regulation of any part of which would infringe the implied freedom.
[204] *Coleman v Power* (2004) 220 CLR 1, 74 [183], 77 [193], 78 [198]-[200] (Gummow and Hayne JJ), 91 [237], 98 [254]-[255] (Kirby J). *Monis v The Queen* (2013) 249 CLR 92, 122-3 [43] (French CJ, with whom Heydon J agreed), 167-8 [196]-[199] (Hayne J), 202-5 [309]-[316] (Crennan, Kiefel and Bell JJ). See relevantly: Dodson, above n 8, 37; Stone, above n 66, 84; Lennan, above n 69, 241. For the contrary position, see: *Coleman v Power* (2004) 220 CLR 1, 24 [9] (Gleeson CJ), 114 [300] (Callinan J), 122 [325] (Heydon J).
[205] *Coleman v Power* (2004) 220 CLR 1, 53 [102], 54 [104]-[105] (McHugh J), 74 [183], 78-9 [198]-[201] (Gummow and Hayne JJ), 98 [254]-[255], 100 [261] (Kirby J).
[206] It should be noted that, s18C's public nature does support this narrow reading. See: *Coleman v Power* (2004) 220 CLR 1, 74-7 [183]-[193] (Gummow and Hayne JJ), 87 [224] (Kirby J).
[207] See relevantly: David Hume, 'The Rule of Law in Reading Down: Good Law for the 'Bad Man'' (2014) 37(3) *Melbourne University Law Review* 620, 636-7.
[208] *Acts Interpretation Act 1901* (Cth) s 15AA requires Commonwealth legislation to be interpreted to best achieve its purpose or object which can be discerned with the aid of extrinsic material. See further: *Coleman v Power* (2004) 220 CLR 1, 22 [5] (Gleeson CJ), 41 [67] (McHugh J), 87 [224] (Kirby J), 117 [312] (Heydon J) where it was held that in replacing a previous provision which

negative effects of the conduct on members of the targeted group, not the likely effect on the wider audience'.[209] The conduct outlawed by s18C is 'not dependent upon a state of emotion … which is sought to be incited in others'.[210] Third, s18C encompasses communications made via publication.[211] Reading a publication is unlikely to result in violence, not least because the likely recipient of the violence, the author, is not immediately present.[212] As, s18C cannot be read down in this way, *Coleman* and *Monis* suggest that where s18C's narrow purpose is to provide a prohibition against racially offensive, insulting, humiliating or intimidating public conduct, it will be incompatible with the implied freedom.[213]

(a) Distinguishing s18C's Narrow Purpose

However, s18C's narrow purpose can be distinguished from the provisions considered in *Coleman* and *Monis* on three grounds. These grounds demonstrate it is open to the High Court to find s18C's narrow purpose compatible, making it likely to do so.

First, s18C is concerned with communications targeting persons and groups specifically because of their race, not generally or because of their political opinions.[214] In *Bolt*, Bromberg J observed that a distinction can be drawn between 'harsh language directed at a person and harsh language directed at a person's opinion'.[215] Conduct caught by s18C is less likely to be 'discourse' in the sense that it is directed towards race and not directed towards the political thoughts or ideas of its target audience. In this way, similarities can be drawn with the view of

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contained an element of incitement to violence, with the impugned provision considered in that case, the Queensland Parliament evidenced a deliberate intention to remove such an element. Therefore, there was difficulty in reading that element into the impugned provision.

[209] Katharine Gelber and Luke McNamara, 'Anti-vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 498. See further: Elizabeth Hicks, 'Context and the Limits of Legal Reasoning: The 'Victim' Focus of Section 18C in Comparative Perspective' (2016) 44(2) *Federal Law Review* 257, 259; Sarah Joseph, 'Free Speech, Racial Intolerance and the Right to Offend: Bolt Before the Court' (2011) 36(4) *Alternative Law Journal* 225, 225.

[210] *Eatock v Bolt* (2011) 197 FCR 261, 310 [206] (Bromberg J). See further: Gray, above n 71, 170.

[211] *Eatock v Bolt* (2011) 197 FCR 261; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.

[212] See: *Monis v The Queen* (2013) 249 CLR 92, 208 [329] where Crennan, Kiefel and Bell JJ hold that impugned provisions can only be read down in conformity with the *Commonwealth Constitution* in so far as statutory language permits.

[213] *Coleman v Power* (2004) 220 CLR 1, 54 [105] (McHugh J), 78-9 [199]-[200] (Gummow and Hayne JJ), 91 [238]-[239] (Kirby J); *Monis v The Queen* (2013) 249 CLR 92, 131 [67] (French CJ), 137 [87], 171 [207] (Hayne J).

[214] *Eatock v Bolt* (2011) 197 FCR 261, 354 [410] (Bromberg J). Cameron Barnes considers there is a significant difference between generally offensive speech and racially offensive speech in: Barnes, above n 5, 31.

[215] *Eatock v Bolt* (2011) 197 FCR 261, 354 [410] (Bromberg J). See further: Justice Patrick Keane, 'Sticks and Stones May Break My Bones, But Names Will Never Hurt Me' (2011) 2 *Northern Territory Law Journal* 77, 83.

the *Monis* plurality that communication via a postal service could not be considered 'discourse' because it was not mutual or solicited.[216]

Second, s18C seeks to do more than just outlaw offensive and insulting communication.[217] In *Monis*, Hayne J observed the relevant law was not shown to be directed to achieving any further social good other than protecting against offensive conduct.[218] French CJ and Hayne J held that, 'without more', elimination of offensive communications was inconsistent with maintaining the constitutionally prescribed system of representative and responsible government.[219] Further, s18C's terms clearly reveal a racial focus, evidencing the pursuit of social benefits, including: preventing racial discrimination and hatred, protecting racial groups from racially motivated conduct and promoting social cohesion through fostering greater racial tolerance.[220] The likely effect of these social benefits is the promotion of greater diversity of political discourse ultimately benefitting the system of representative and responsible government.[221] While s18C's restriction of low level offensive or insulting conduct generally does not prevent imminent breaches of the peace, its pre-emptive prevention of these acts addresses them before such acts develop into incitement or promotion of racial hatred or discrimination.[222]

Thirdly, and most importantly, s18C is qualified in its operation because s18D exempts broad areas of conduct provided they are done reasonably and in good faith.[223] In *Coleman*, *all* threatening, abusive or insulting words publicly expressed were outlawed.[224] In *Monis*, *all* offensive communications were outlawed where sent via postal or similar services.[225] In neither case were viable defences available.[226] By contrast, s18D provides a measure of qualification. In *Coleman*, McHugh J suggests that a prohibition on insulting words may only be necessarily incompatible with the implied freedom where it is unqualified.[227] A law which is sufficiently qualified will not be incompatible.[228]

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[216] *Monis v The Queen* (2013) 249 CLR 92, 205 [318] (Crennan, Kiefel and Bell JJ).
[217] Barnes, above n 5, 27.
[218] *Monis v The Queen* (2013) 249 CLR 92, 139-40 [97] (Hayne J).
[219] Ibid 133-4 [73] (French CJ), 139-40 [97], 174-5 [220]-[222] (Hayne J).
[220] See the below discussion on s18C's broad purposes.
[221] Gelber and McNamara, above n 71, 479; Fisher, above n 52, 46.
[222] *Toben v Jones* (2003) 129 FCR 515, 525 [20] (Carr J).
[223] Twomey, above n 50, 5.
[224] *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d).
[225] *Criminal Code 1995* (Cth) s 471.12.
[226] *Coleman v Power* (2004) 220 CLR 1, 41-2 [69]-[71] (McHugh J); *Monis v The Queen* (2013) 249 CLR 92, 140 [100] (Hayne J).
[227] *Coleman v Power* (2004) 220 CLR 1, 54 [104] (McHugh J).
[228] Ibid.

D *Section 18C's Broad Purpose and its Compatibility*

1 *Section 18C's Broad Purpose*

Utilising a broader approach to ascertaining statutory purpose enables courts to look beyond s18C's express terms and legal and practical operation to broader legislative objectives.[229] Possible legislatively intended purposes can be distilled into three main focuses: prevention of racial hatred and discrimination,[230] protection of racial groups,[231] and promotion of racial tolerance and social cohesion.[232] Each must be considered.

A first broad purpose is preventing racial discrimination and hatred and their effects.[233] Section 18C is housed in the *RDA* which was enacted to fulfil international obligations to eliminate racial discrimination.[234] Its Explanatory Memorandum describes s18C as making provision for racial hatred,[235] and the RHB as intended to address concerns highlighted by findings of the National Inquiry into Racist Violence and Royal Commission into Aboriginal Deaths in Custody.[236]

A second broad purpose is protecting racial groups from certain forms of racially motivated conduct.[237] Section 18C's Explanatory Memorandum states the RHB was intended to close a gap in the legal protection available to victims of racist behaviour and protect individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.[238] The Second Reading Speech describes the RHB as being 'about the protection of groups of individuals

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[229] *Monis v The Queen* (2013) 249 CLR 92, 205 [317], 122 [324] (Crennan, Kiefel and Bell JJ).
[230] Barnes, above n 5, 27; Meagher, above n 117, 233; Forrester, Finlay and Zimmerman, above n 5, 21; Croucher, above n 129, 492.
[231] Sackville, above n 92, 637.
[232] Forrester, Finlay and Zimmerman, above n 5, 21; Murray Wesson, Holly Cullen and Fiona McGaughey, Submission No 133 to Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Human Rights Commission Act 1986 (Cth)*, 9 December 2016, 3.
[233] *Toben v Jones* (2003) 129 FCR 515, 527 [36] (Allsop J); *Jones v Scully* (2002) 120 FCR 243, 306 [239] (Hely J). See further: Forrester, Finlay and Zimmerman, above n 5, 21; Croucher, above n 129, 492; Barnes, above n 5, 27.
[234] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 4.
[235] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1.
[236] Ibid.
[237] Sackville, above n 92, 637. This purpose is similar to the protective purpose adopted in: *Monis v The Queen* (2013) 249 CLR 92, 214 [348] (Crennan, Kiefel and Bell JJ).
[238] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1.

from … the incitement of "racial hatred", [and] violence';[239] also noted in a 2017 Inquiry Report.[240]

A third broad purpose is promoting social cohesion through developing greater racial tolerance.[241] Section 18C's Explanatory Memorandum evidences legislative intention to strengthen and support social cohesion within the Australian community as well as preventing people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or ethnic origin.[242] This emphasis on promoting awareness of the detrimental effects of racist conduct is reflected in the Second Reading Speech.[243] In *Bolt*, Bromberg J held s18C's objective was to promote racial tolerance 'through remedial measures encouraging understanding and agreement, rather than punishment, deterrence and the stigma of a criminal conviction'.[244] His Honour considered s18C was directed to conduct injurious to the public interest in a socially cohesive society.[245]

Initially, it appears difficult to coherently formulate s18C's broad purpose. However, reflection reveals that the second and third broad purposes underlie the first. That is, protection of racial groups and the promotion of racial tolerance are ancillary to the prevention of racial discrimination and hatred effected by s18C.[246] In these circumstances, where s18C is intended to accomplish so much, it seems appropriate to adopt the first broad purpose to encapsulate all three legislative

[239] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 (Michael Lavarch, Attorney-General).
[240] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 7.
[241] *Toben v Jones* (2003) 129 FCR 515, 527 [36] (Allsop J); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 141 [138] (Lee J); *Eatock v Bolt* (2011) 197 FCR 261, 310 [207] (Bromberg J). See further: Forrester, Finlay and Zimmerman, above n 5, 21; Sackville, above n 92, 637.
[242] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1. See further: *McGlade v Lightfoot* (2002) 124 FCR 106, 124 [90] (Carr J); Forrester, Finlay and Zimmerman, above n 5, 125.
[243] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3342 (Michael Lavarch, Attorney-General).
[244] *Eatock v Bolt* (2011) 197 FCR 261, 310 [205], 310 [205]-[207], 324 [263] (Bromberg J).
[245] Ibid 324 [263] (Bromberg J).
[246] See: *McCloy v New South Wales* (2015) 257 CLR 178, 204 [34] where French CJ, Kiefel, Bell and Keane JJ held that the impugned law's purpose was preventing 'corruption and undue influence in the government of the state' and its ancillary purpose was 'overcoming perceptions of corruption and undue influence, which may undermine public confidence in government and in the electoral system itself'.

purposes.[247] Therefore, on a broad approach, s18C's purpose is identifiable as the prevention of racial discrimination and hatred.

2 *Compatibility of s18C's Broad Purpose*

The compatibility of s18C's broad purpose has been previously judicially considered and confirmed.[248] For example, in *Scully*, Hely J held: 'it is not supposed that the elimination of racial discrimination is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution'.[249] To the contrary, His Honour considered such a purpose was conducive to the public good.[250] Relevant commentary largely agrees,[251] considering it may be immediately conceded that prevention of racially discriminatory treatment is a legitimate end.[252] Meagher opines that allowing racial harassment actually invites the destruction of constitutional government.[253] Accordingly, it is submitted that the prevention of racial discrimination or hatred does not jeopardise the maintenance of the constitutionally prescribed system of representative and responsible government.

E *Broad or Narrow Purpose Approach?*

The above analysis demonstrates that it matters little to s18C's constitutional validity, at the compatibility stage, whether a broad or narrow approach to determining its purpose is taken. Both s18C's narrow and broad purposes are likely compatible. Therefore, on either approach, s18C will not be constitutionally invalidated by virtue of compatibility testing.[254]

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[247] In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [15] Kiefel J considered that the drafters of s18C intended for it to serve multiple purposes.

[248] *Jones v Scully* (2002) 120 FCR 243, 306 [239] (Hely J). It should be noted that if the previous conclusion is incorrect and, in fact, s18C's broad purpose is either the protection of racial groups from certain forms of racially motivated conduct or the promotion of social cohesion through developing greater racial tolerance both of these broad purposes are compatible with the implied freedom. See: Forrester, Finlay and Zimmerman, above n 5, 145; Sackville, above n 92, 637; Gray, above n 71, 187.

[249] *Jones v Scully* (2002) 120 FCR 243, 306 [239] (Hely J).

[250] Ibid.

[251] Gray, above n 71, 187; Forrester, Finlay and Zimmerman, above n 5, 145; Barnes, above n 5, 31; Kathleen Mahoney, 'Hate Vilification Legislation and Freedom of Expression: Where is the Balance?' (1994) 1(1) *Australian Journal of Human Rights* 353.

[252] Gray, above n 71, 187.

[253] Meagher, above n 35, 62.

[254] It should be noted that if the previous conclusions are incorrect, and s18C's narrow purpose is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government, s18C's broad purpose will be selected in any event, in accordance with *Acts Interpretation Act 1901* (Cth) s15A. See relevantly: *Coleman v Power* (2004) 220 CLR 1, 87 [225] (Kirby J).

However, this question of what purpose approach is used is not relevant only to compatibility testing. Rather, the proportionality of a law's purpose is ascertained in three different stages during subsequent strict proportionality testing.[255] Therefore, a preferred approach must be identified. It is suggested, consistently with the current weight of authority,[256] that a broad approach to determining an impugned law's purpose should be adopted to enable a better application of strict proportionality testing. The benefits of a broad purpose approach for each strict proportionality stage is considered.

First, adopting a narrow purpose approach 'forestalls the proper application of the rational connection test' undertaken at the *suitability* stage.[257] At that stage, the connection between an impugned law's means and purpose is tested.[258] Clearly, if a law's purpose is derived from its operation (or means), this test is rendered otiose.[259] There is internal inconsistency between the suitability enquiry and the narrow purpose approach.

Second, the narrow purpose approach stunts the application of the *necessity* stage. At that stage, the court considers whether an impugned law's means go further than necessary in achieving its purpose by considering reasonably practicable, compelling, less restrictive alternative measures of achieving that purpose.[260] On a narrow purpose approach, an impugned law's means essentially are its purpose. Therefore, necessarily that law's means will go no further than required in achieving its purpose. Thus, adopting a narrow purpose approach renders necessity testing superfluous.

Third, employing an impugned law's narrow purpose at the *balancing* stage contradicts the form of testing the *McCloy* majority intended to be undertaken at that stage.[261] Utilising a narrow purpose approach, an impugned law's actual operation and effect would be balanced against its restrictive effect on the implied freedom. This measures what proportion of the law's actual effect burdens the

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[255] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 319 [92] (Perram, Mortimer and Gleeson JJ).

[256] Notably, the McCloy plurality because unless these Justices envisaged that the broad purpose approach would be taken there would have been no utility in them distinguishing between an impugned law's purpose and means. See also recent comments in *Brown v Tasmania* (2017) 349 ALR 398 of Gageler J at 57-8 [208]-[209] and Gordon J at 133 [414] where Her Honour states that if a law's purpose is identified too narrowly, there will be flow-on consequences for the subsequent reasonably appropriate and adapted analysis.

[257] Challenor, above n 172, 273.

[258] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

[259] Challenor, above n 172, 273.

[260] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

[261] Ibid.

implied freedom; that is, the proportionality between its total operation and the extent of its burden. Utilising a broad purpose approach, an impugned law's intended legislative objectives are balanced against its restrictive effect on the implied freedom. This measures the proportionality between what the law was intended to achieve and its burden on the implied freedom. The broad purpose approach better accords with the *McCloy* plurality's description of the balancing stage as requiring an 'adequate congruence between the benefits gained by the law's policy and the harm it may cause'[262] and determining whether the extent of the impugned law's restriction is reasonable, by considering the importance of the purpose and the benefit sought to be achieved.[263] The *McCloy* majority does not confine the balancing enquiry to effects actually achieved but those sought to be.[264]

The question then becomes: is it appropriate for the balancing test to embody this *McCloy* approach? For example, it might be argued that the better approach is to measure the importance of the *actual* effect of the law, rather than the *intended* effect. Arguably, this would remain truer to the purpose behind the existence of the implied freedom, to protect the constitutionally required degree of political communication free from legislative interference.[265] However, this criticism is assuaged by the prior performance of suitability testing. Suitability testing ensures a sufficiently rational connection between an impugned law's means and legitimate purpose such that the law's operation contributes to achieving its purpose.[266] In this way, before a law's broad purpose reaches the balancing stage, suitability testing has already established that the law's actual effect can achieve its broader purpose.

F *Conclusion as to s18C's Compatibility*

This Part has identified conflicting narrow and broad High Court interpretative approaches to determining the purpose of an impugned law,[267]

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[262] Ibid 219 [87] (French CJ, Kiefel, Bell and Keane JJ).
[263] Ibid 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[264] Ibid 220-1 [93] (French CJ, Kiefel, Bell and Keane JJ).
[265] *McCloy v New South Wales* (2015) 257 CLR 178, 220 [91] (French CJ, Kiefel, Bell and Keane JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J). See further: Stellios, above n 12, 243; Dodson, above n 8, 3.
[266] *McCloy v New South Wales* (2015) 257 CLR 178, 217 [80] (French CJ, Kiefel, Bell and Keane JJ); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 317 [80] (Perram, Mortimer and Gleeson JJ). See further: Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 118.
[267] *Coleman v Power* (2004) 220 CLR 1, 98-9 [256] (Kirby J), 121-2 [323]-[324] (Heydon J); *Monis v The Queen* (2013) 249 CLR 92, 133-4 [73] (French CJ), 147 [125], 162 [178], 163 [184] (Hayne J), 205 [317] (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [66] (French CJ), 64-5 [141] (Heydon J), 90 [221] (Crennan, Kiefel and Bell JJ).

finding that on either approach s18C's purpose will be compatible. Nevertheless, the need to select one approach to facilitate strict proportionality testing has been recognised and the conclusion, that the broad approach is preferable, made. The significance of this conclusion is demonstrated in the next Part, which purports to balance the importance of s18C's against its restriction of the implied freedom.

V SECTION 18C'S ADEQUACY OF BALANCE

A *Nature of the Enquiry*

Section 18C will be invalid if it inadequately balances the importance of its purpose with its restriction of political communication.[268] The balancing enquiry compares the positive public effect of realising an impugned law's purpose and the negative consequent effect of its restriction on the implied freedom.[269] To be proportionate, the greater the infringement of the implied freedom, the more important must be the legislation's purpose.[270] This test requires the court to invalidate laws which are 'unbalanced solutions' resulting in a societal net loss.[271]

B *Importance of s18C's Purpose*

As argued in Part II, a broader approach to determining s18C's purpose is preferable.[272] The Court is likely to attribute considerable importance to s18C's broad purpose of preventing racial discrimination and hatred.[273] Regulating racial hatred and discrimination obviates racist words or conduct which left unchecked may 'fester and sprout as serious or even deadly violence at a later time'.[274]

Section 18C's ancillary broad purposes, identified earlier as the protection of racial groups and the promotion of racial tolerance, also contribute to the importance of s18C's purpose.[275] Section 18C protects victims of racist conduct from psychological intimidation, hurt, anger, anxiety and loss of self-esteem

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[268] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[269] Ibid 219 [87] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 349 ALR 398, 91 [295] (Nettle J).
[270] *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).
[271] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174, 201.
[272] It should be noted that the Court is likely to attribute considerably less importance to s18C's narrow purpose of preventing racially offensive, insulting, intimidating or humiliating public acts. See: *Monis v The Queen* (2013) 249 CLR 92, 112 [19], 175 [223] where French CJ and Hayne J, respectively, held that the general law has never recognised a right to be free from offence. See also: Chief Justice Robert French, 'Sir Harry Gibbs Memorial Oration: Giving and Taking Offence' (Speech delivered at the Samuel Griffith Society, Adelaide, 13 August 2016) < http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj13Aug2016.pdf>.
[273] See: Keane, above n 215.
[274] Meagher, above n 117, 225. See relevantly: *Toben v Jones* (2003) 129 FCR 515, 525 [20] (Carr J).
[275] *Eatock v Bolt* (2011) 197 FCR 261, 324 [264] (Bromberg J).

consequent on racism.[276] Indigenous and minority ethnic and religious community members have indicated that experiences of racial abuse are frequent and routine, occur directly and indirectly in multiple settings and lead to constitutive, consequential and cumulative harm.[277] Section 18C's ancillary purpose of promoting racial tolerance and social cohesion is important in confirming Australians of all racial groups are members of society in good standing and worthy of equal respect.[278] Racial tolerance is important in combatting structural racism: the ideology of racial supremacy and the mechanisms for keeping selected victim groups in subordinated positions.[279] As previously stated, fulfilment of these purposes also enriches diversity of political discourse, thereby benefitting the constitutional system of representative and responsible government.

C *Extent of s18C's Restriction on the Implied Freedom*

1 *Section 18C's Burden*

Section 18C burdens the implied freedom by prohibiting public, racially motivated offensive, insulting, humiliating and intimidating acts.[280] The extent of s18C's burden on the implied freedom was identified in Part II as considerable, given the following aspects of its scope: a broad concept of 'act[s] done otherwise than in private', a broad meaning of 'race, colour or national or ethnic origin', a minimal causal requirement deeming conduct done on that basis, a low harm threshold, an often subjective 'reasonable victim' perspective; and marginal operation of s18D. It is also of note that, contrary to the provisions contested in *Coleman* and *Monis*, s18C constitutes a civil, rather than criminal, prohibition.

D *Adequacy of s18C's Balance*

It is submitted that, in undertaking a balancing exercise, s18C's previously identified burden on the implied freedom is unlikely to outweigh its demonstrably

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[276] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 31 January 2017, 60 (Colin Rubinstein); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 30. See, further: Fisher, above n 52, 29.

[277] Gelber and McNamara, above n 209, 500.

[278] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2002) 5. For the contrary view, that s 18C is counterproductive to tolerance and cohesion, see: Zimmerman and Finlay, above n 162, 190-1; David Furse-Roberts, 'How Section 18C Betrays Menzies Liberalism' (2017) 61(3) *Quadrant* 16, 19-20.

[279] Mari J Matsuda, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 2332.

[280] *Racial Discrimination Act 1975* (Cth) s 18C.

important purpose.[281] This view is supported by the approach to the balancing enquiry enunciated by Nettle J in *Brown.* According to His Honour, a law's burden is only inadequate if it is a manifestly excessive response to, is grossly disproportionate to, or goes far beyond its legislative purpose.[282]

1 *Reading down s18C?*

If the above submission is incorrect, s18C may be rendered constitutionally invalid. However, because of historical judicial reluctance to constitutionally invalidate laws outlawing offensiveness and insult, [283] and because courts endeavour to preserve validity where possible,[284] the High Court may read down aspects of s18C's burden to make it adequate in balance.

(a) Section 18D

One such aspect is the scope of s18D's operation. As seen in Part II, the Federal Court has interpreted s18D's threshold requirements of 'reasonableness' and 'good faith' in a way that many communications are not exempted.[285] If necessary, the High Court may expand the meaning of the terms 'reasonably and in good faith' to increase s18D's operation and provide further qualification for s18C,[286] thereby preserving the s18C's adequacy of balance. For example, to extend their meaning to cover all communications not clearly containing gratuitous offensiveness, insult, humiliation or intimidation. [287] On this interpretation, good faith and reasonableness are established for any communication where the communicator exercised sufficient restraint to avoid

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[281] In *Jones v Scully* (2002) 120 FCR 243, 306 [240] Hely J considered that the exemptions in s18D sufficed to ensure s18C provided an appropriate balance between the legitimate end of eliminating racial discrimination and the implied freedom. See further on this point: Jeremy Waldron, '2009 Oliver Wendell Holmes Lectures – Dignity and Defamation: The Visibility of Hate' (2010) 123(7) *Harvard Law Review* 1597, 1645; Barnes, above n 5, 31; Meagher, above n 35, 68; Leighton McDonald, 'The Denizens of Democracy: The High Court and the 'Free Speech' Cases' (1994) 5 *Public Law Review* 160, 190; Fisher, above n 52, 48.

[282] *Brown v Tasmania* (2017) 349 ALR 398, 88-9 [290] (Nettle J).

[283] See: *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

[284] In accordance with *Acts Interpretations Act 1901* (Cth) s 15A which states that legislation should be construed as much as possible to conform to the *Commonwealth Constitution*.

[285] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 430 [250], 438 [314], 440 [328] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 360 [439] (Bromberg J); Stone, above n 157, 937; Sackville, above n 92, 644; Zimmerman and Finlay, above n 162, 197; Gray, above n 71, 194.

[286] This expansion is consistent with French J's observation in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 125-6 [72]-[73] that it is appropriate to give s18D a broad reading because it defines the limits of s18C's proscription rather than providing a free speech exception to it.

[287] This aligns with Darryn Jensen's observation that 'reasonable' and 'in good faith' in s18D are used to qualify the verbs 'said' and 'done' suggesting it is the *manner* in which an act is said or done which must be done reasonably and in good faith, rather than the content of the act. See: Darryn Jensen, 'The Battlelines of Interpretation in Racial Vilification Laws' (2011) 27(2) *Policy* 14, 15.

unnecessary offensiveness, insult, humiliation or intimidation. Generally, this would allow for the communication of inherently political ideas so long as sufficient care is taken in their delivery. Such an interpretative exercise is consistent with the legislative intent behind ss18C and 18D's operation, described in the Explanatory Memorandum, as not intended to limit public debate in the public interest or prohibit people from having and expressing ideas.[288] In this way, s18C's purpose and burden could be balanced.

(b) Reasonable victim test

A second aspect of s18C is the perspective from which harm is assessed. As outlined in Part II, the Federal Court has articulated a 'reasonable victim' test as the appropriate perspective from which offensiveness, insult, humiliation and intimidation is assessed.[289] However, in applying this perspective, the Federal Court has often resorted to considering the subjective reactions of s18C complainants, thereby magnifying s18C's restriction of the implied freedom.[290]

If necessary to ensure s18C's adequacy of balance, the High Court may adopt a more exacting perspective which eschews subjective reactions in an attempt to preserve s18C's compatibility. The High Court may adopt either a stricter form of the objective/subjective reasonable victim perspective or a wholly objective perspective of the reasonable member of Australian society. These perspectives would exclude extreme or atypical reactions from s18C's protection.[291] In doing so, they would require a certain measure of tolerance of the recipients of regulated communication and ensure s18C's operation does not extend to situations in which 'it is the intolerance of the receiver of the message rather than the intolerance of the speaker that is responsible for causing the offence'.[292] Adopting this objective perspective is open because it is consistent with the legislative purpose behind s18C as evidenced by the Second Reading Speech 'requir[ing] an objective test to be applied … so that community standards of behaviour rather than the subjective views of the complainant are taken into account'.[293]

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[288] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1.
[289] *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 (10 November 2000) [15] (Drummond J); *Jones v Scully* (2002) 120 FCR 243, 268–9 [98], 271 [108] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [46] (Carr J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [253] (Bromberg J).
[290] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 404 [63] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, 321 [252] (Bromberg J); *Jones v Toben* (2002) 71 ALD 629, 652 [40] (Branson J); *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [46] (Carr J).
[291] See relevantly: *Eatock v Bolt* (2011) 197 FCR 261, 320-1 [251] (Bromberg J).
[292] *McGlade v Lightfoot* (2002) 124 FCR 106, 124 [88] (Carr J).
[293] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336, 3341 (Michael Lavarch, Attorney-General).

(c) Harm threshold

A third aspect of s18C, which may be read down by the High Court, is its harm threshold. In Part II, it was identified that prevailing Federal Court authority sets s18C's harm threshold as a high bar. Notwithstanding, this article argued that the preferable construction of s18C's harm threshold is considerably less demanding, capturing a broad spectrum of conduct from a low level of offensiveness, insult, humiliation and intimidation. However, if required to preserve s18C's adequacy of balance, the High Court may choose to adopt the Federal Court approach in order to minimise s18C's burden on the implied freedom.

(d) Preserving adequacy of balance

It is unlikely that s18C will be rendered constitutionally invalid at the balancing stage because the High Court may read down s18C's burden to preserve its adequacy of balance in any or all of the above ways. However, doing so might substantially undermine s18C's legitimate purpose of preventing racial discrimination and hatred. For example, adopting a more objective perspective from which harm is assessed is likely to further marginalise minority viewpoints. This article argues that any requirement for s18C to be read down, and the attendant consequences, can be avoided by acknowledging and adopting the broader 'burden' concept outlined below.

2 *A Broader Concept of Burden – Enhancing Not Burdening?*

To this juncture, any analysis of s18C's restriction of the implied freedom has been identified using a narrow concept of what it means to 'burden' the implied freedom. It has focused solely on how s18C operates to restrict what political communications can be made. Aspects of s18C's operation having the opposite effect, which bolster the implied freedom and promote political communication, were ignored. This was appropriate at the burden stage because that enquiry's purpose is to determine whether the court's jurisdiction to undertake an assessment of constitutional validity with respect to a law is enlivened.[294] The suitable question is: does that law have *some* restrictive effect on the implied freedom as opposed to a *net* restrictive effect on it?

[294] *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 318 [85] (Perram, Mortimer and Gleeson JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 231 [217] (Gageler J).

By contrast, the balancing enquiry is concerned with the *net* effect of an impugned law's negative and positive impact.[295] While the court has generally conceived of an impugned law's positive impact as stemming from the realisation of its socially beneficial purpose,[296] the positive effects of a law's restriction on the implied freedom should also be accounted for in assessing the effect of the impugned law's restriction and whether that effect is *negative* at all. Arguably, a law which enhances the implied freedom more than it restricts carries no such negative effects.

(a) Laws Enhancing the Implied Freedom

High Court decisions on the implied freedom have often acknowledged instances where laws furthered the enhancement of political communication.[297] For example, in *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*'),[298] the court noted that where a legislative measure is directed to ensuring one voice does not drown out others this may bolster its likelihood of validity.[299] In *Coleman*, Kirby J held that a law prohibiting words likely to incite violence 'protects the social environment in which debate and civil discourse … can take place without threats of actual physical violence'.[300] Heydon J noted insulting words can damage rather than enhance any process of political discourse;[301] 'crush[ing] individual autonomy rather than vindicating it'.[302] McHugh J held that regulations enhancing or protecting the communication of political matters do not detract from the implied freedom but rather enhance it.[303]

Analogous sentiments were advanced in *McCloy*.[304] The plurality considered the purpose of one of the impugned laws preserved and enhanced the implied

[295] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 352; Mark Watts, 'Reasonably Appropriate and Adapted? Assessing Proportionality and the 'Spectrum' of Scrutiny in *McCloy v New South Wales*' (2016) 35(2) *University of Queensland Law Journal* 349, 361.
[296] See: *McCloy v New South Wales* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).
[297] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 144-5, 159, 175, 188-91, 239; *Coleman v Power* (2004) 220 CLR 1, 52 [97] (McHugh J), 121 [323], 126 [352]-[353] (Heydon J); *McCloy v New South Wales* (2015) 257 CLR 178, 208 [47] (French CJ, Kiefel, Bell and Keane JJ).
[298] (1992) 177 CLR 106.
[299] Ibid 144-5, 159, 175, 188-91, 239. See further: Katharine Gelber, 'Freedom of Speech and Australian Political Culture' (2011) 30(1) *University of Queensland Law Review* 135, 139; Stone, above n 66, 88.
[300] *Coleman v Power* (2004) 220 CLR 1, 99 [256] (Kirby J).
[301] Ibid 126 [352] (Heydon J).
[302] Ibid 126 [353] (Heydon J).
[303] Ibid 52 [97] (McHugh J).
[304] *McCloy v New South Wales* (2015) 257 CLR 178, 207 [47] (French CJ, Kiefel, Bell and Keane JJ), 257 [218] (Nettle J), 290 [344], 294 [365] (Gordon J).

freedom.[305] Nettle J held that, by reducing opportunity for the purchase of political influence, that law encouraged candidates and parties to seek support from broader segments of society and motivated individuals with common interests to build political power groups.[306] Nettle and Gordon JJ considered that law 'levell[ed] the playing field' by reducing the distortion of political communication,[307] making it 'conducive to enhancing the system protected by the implied freedom … and unlikely to infringe the freedom'.[308] Their Honours both quoted the 'great underlying principle' of the *Constitution*, 'that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each … an equal share, in political power'.[309]

(b) Section 18C's Net Enhancing Effect

Section 18C emulates the laws in *Coleman* and *McCloy* because, in prohibiting offensive, insulting, humiliating and intimidating communication, it improves the quality of Australian political discourse,[310] rather than frustrating it.[311] It is submitted that despite the breadth of many of s18C's aspects, once the perspective from which offensiveness, insult, humiliation and intimidation is assessed is confined to an objective perspective and s18D's operation is broadened, s18C's net effect is to enhance the implied freedom more than it burdens it. This enhancement is achieved in two main ways.

First, s18C requires, where reasonableness and good faith dictate,[312] that racially motivated political discourse be conducted other than in an offensive, insulting, humiliating or intimidating manner.[313] As observed in Part II, the *Coleman* minority took the view that much of political discourse could be delivered in this way.[314] Rather than allowing political discourse on racially charged issues to be wholly adversarial in nature, s18C promotes civilised and thoughtful political discourse which will contribute to better general education on these issues and will allow for the implementation of better resolutions.[315]

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[305] Ibid 207 [47] (French CJ, Kiefel, Bell and Keane JJ).
[306] Ibid 257 [218] (Nettle J).
[307] Ibid 267 [249] (Nettle J), 290 [344], 294 [365] (Gordon J).
[308] Ibid 258 [218] (Nettle J).
[309] Ibid 258 [219] (Nettle J), 284 [318] (Gordon J). Similar sentiments were offered by the plurality at 207 [45].
[310] Gelber and McNamara, above n 71, 479; Fisher, above n 52, 46.
[311] Marie Iskander, 'Balancing Freedoms and Creating a Fair Marketplace of Ideas: The Value of 18C of the *Racial Discrimination Act*' (2012-2016) 8(10) *Indigenous Law Bulletin* 19, 19.
[312] *Racial Discrimination Act 1975* (Cth) s 18D.
[313] Ibid s 18C.
[314] *Coleman v Power* (2004) 220 CLR 1, 113-4 [299] (Callinan J), 124 [330] (Heydon J).
[315] Gelber and McNamara, above n 71, 479.

Second, s18C prevents the views of targeted groups from being silenced and opens up channels of communication.[316] In much the same way as certain phenomenon distort the marketplace for goods,[317] racially discriminatory or hateful communication has the potential to silence targeted individuals, consequently reducing the range of views in Australia's marketplace of ideas and distorting Australian political discourse.[318] Section 18C protects the right to freedom of expression of members of vulnerable groups who could be otherwise marginalised[319] or silenced by conduct captured by s18C.[320] It assists segments of

[316] Fisher, above n 52, 45-6; Meagher, above n 35, 67; Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 31 January 2017, 5 (Andrew Oboler); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 33. For the contrary opinion, that minority participation in the political process is better served by the absence of s18C, see: Zimmerman and Finlay, above n 162, 188, 191; Ben O'Neill, 'Anti-Discrimination Law and the Attack on Freedom of Conscience' (2011) 27(2) *Policy* 3, 7; Jacob Mchangama, 'The Harm in Hate Speech Laws' (2012-2013) *Policy Review* 95, 102; Katharine Gelber, 'Hate Speech in Australia: Emerging Questions' (2005) 28(3) *UNSW Law Journal* 861, 861; Fiona Kerr, 'The Policy Implications of Enacting Legislation Prohibiting Racial VIlification' (1998) *ALSA Academic Journal* 61, 68.

[317] Keane, above n 215, 86.

[318] Ibid; Fisher, above n 52, 45-6.

[319] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 31 January 2017, 60 (Colin Rubinstein); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 30.

[320] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 1 February 2017, 6 (Simon Rice); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 40. It should be noted that this protection runs contrary to liberal free speech principles which consider that unrestricted discussion facilitates the emergence of truth, see: *Abrams v United States*, 250 US 616, 630 (Holmes J) (1920); John Stuart Mill, *On Liberty* (John W Parker and Son, 2nd ed, 1859) 33-4; Gray, above n 71, 184-5, 189; Dilan Thampapillai, 'Inconsistent At Best?: An Analysis of Australia's Federal Racial Vilification Laws' (2010) 1 *Canberra Law Review* 1, 2. See further: Chesterman, above n 64; Katharine Gelber, 'Pedestrian Malls, Local Government and Free Speech Policy in Australia' (2003) 22(2) *Policy and Society: Journal of Public, Foreign and Global Policy* 23; Zimmerman and Finlay, above n 162, 189, 204; Furse-Roberts, above n 278, 19. However, it has been convincingly argued that such principles are predicated on false assumptions of political equality, see: Iskander, above n 311, 19; Owen Fiss, 'Free Speech and Social Structure' (1986) 71 *Iowa Law Review* 1405, 1410, 1415; Marcus O'Donnell, 'Hate Speech, Freedom, Rights and Political Cultures: An Analysis of Anti-vilification Law in the Context of Traditional Freedom of Speech Values and an Emerging International Standard of Human Rights (2003) 5 *University of Technology Sydney Law Review* 23, 32; Keane, above n 215, 86; Francesca Dominello, 'Protecting the Right to be a 'Bigot' in the Wake of the 'Apology to Australia's Indigenous Peoples'' (2014) 14 *Macquarie Law Journal* 47, 64; Kenneth Lasson, 'Racial Defamation as Free Speech: Abusing the First Amendment' (1985) 11 *Columbia Human Rights Law Review* 17; Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Aldershot, 1994) 1, 12-13.

the Australian community to participate in civic life confidently,[321] by preventing selective discouragement [322] and addressing inequalities existing between dominant and minority groups' abilities to engage in the political process.[323] Justice Keane has extra-curially stated that '[a]n irreducible minimum of civility is a precondition of any real public debate; otherwise those who command legal access to a bully pulpit can intimidate others'.[324] Similarly, Meagher suggests:

> laws that proscribe racist … communications tend to have the corresponding and inverse effect of giving, increasing or protecting the voice of those who are the subject of this conduct, this indirectly protects and enhances the freedom of communication opportunities of those effectively silenced by the racist … communications of others.[325]

Therefore, despite the generally burdensome nature of many of s18C's aspects, interpreted in the above ways, s18C operates to enhance the implied freedom more than it restricts that freedom.

(c) Impact on the Balancing Enquiry

Despite acknowledging an impugned law's enhancement of the implied freedom may outweigh its restriction of it, the High Court has not explicitly outlined how a balancing enquiry should proceed in such instances.[326] It is suggested that it becomes unnecessary to consider s18C's adequacy of balance because there is no *true* burden to be outweighed. Section 18C's enhancement of the implied freedom effectively cancels out the burden it imposes, creating a net balance upholding, rather than diminishing, the implied freedom. This approach aligns with the international jurisprudence on the balancing stage which focuses on the marginal benefits of the impugned law.[327] This conclusion largely stunts

[321] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 31 January 2017, 4 (Tasneem Chopra); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia – Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 31.

[322] Stone, above n 66, 88.

[323] Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 392. Jeremy Waldron has written on the subject of the 'public good of inclusiveness', see: Waldron, *The Harm in Hate Speech*, above n 278.

[324] Keane, above n 215, 84.

[325] Meagher, above n 12, 455.

[326] In fact in *McCloy v New South Wales* (2015) 257 CLR 178, 219 [88] French CJ, Kiefel, Bell and Keane JJ held generally that 'the methodology to be applied in [the balancing] aspect of proportionality does not assume particular significance'. Also, the High Court has often acknowledged the uncertainty around application of the balancing stage, generally. See, by way of recent example: *Brown v Tasmania* (2017) 349 ALR 398, 88 [290] (Nettle J), 138 [432] Gordon J).

[327] Barak, above n 295, 352; Watts, above n 295, 361; Julian Rivers, above n 271, 201.

the rest of the balancing enquiry necessitating that s18C will not be constitutionally invalidated by this stage of the *McCloy* test.[328]

E *Conclusion as to s18C's Adequacy of Balance*

Having identified the importance of s18C's broad purpose, this Part suggests that if a balancing exercise were to take place, the importance of s18C's purpose will outweigh its burden. In so suggesting, it has acknowledged the possibility that to ensure s18C's adequacy of balance, the High Court might read down s18C's burden to an operation narrower than previously articulated by the Federal Court.

However, this Part concludes that s18C's overall operation and effect is to enhance and promote the implied freedom more than it restricts, or detracts from, that freedom. This Part has observed the High Court's failure to address how a balancing enquiry should be conducted in such circumstances, but it has concluded that such an enquiry becomes redundant. No strict balancing exercise arises because no true burden on the implied freedom exists. Therefore, s18C will not be constitutionally invalidated at the balancing stage.

VI CONCLUSION

This article has applied three stages of the *McCloy* test to s18C: the *burden*, *compatibility* and *balancing* stages, revealing that s18C is likely to withstand constitutional challenge by virtue of the implied freedom. In doing so, two important tasks have been performed. First, areas of legal uncertainty surrounding the implied freedom have been exposed and their resolution attempted. As this task is essential to formulating conclusions of s18C's constitutional validity, its immediate significance is obvious. However, this undertaking also contributes, more broadly, to developing a greater understanding of the current law on the implied freedom and the relatively recently espoused and as-yet largely untried *McCloy* test. Second, instances in which a constitutional challenge to s18C might cause the High Court to depart from current Federal Court interpretation have been identified. These observations hang a question mark over s18C's current

[328] Interestingly, if this argument is accepted, conclusions as to s18C's constitutional validity are the same whether on a *McCloy*/*Brown* majority approach or that of the individual *McCloy*/*Brown* judgments. That is, it makes no difference to s18C's constitutional validity whether the *McCloy* plurality approach continues to be adopted or is overruled.

operation and are particularly significant given the degree of controversy generated by s18C's contentious aspects.[329]

Above all, this article highlights the necessity for s18C's constitutional validity to be tested and determined by the High Court. This article's two focuses demonstrate the imminent need for the relationship between the implied freedom and s18C to be resolved. First, it is imperative that a law, attracting as much debate and disagreement as s18C,[330] operates in accordance with the present *Constitution* and its necessary implications, including the implied freedom.[331] Second, it is essential that the High Court's test, to determine constitutional validity, is enunciated with sufficient clarity that Australian parliaments understand the permissible scope within which they may regulate racially motivated political conduct.[332] Third, further clarification will illuminate any need for constitutional amendment to override unsatisfactory law on the implied freedom. This need will only become apparent if the High Court resolves what measure of protection the implied freedom gives to anti-discrimination legislation like s18C. In raising awareness of the extent to which a constitutional challenge to s18C is necessary and advantageous, this article hopes to facilitate such a challenge.

[329] For example, earlier this year surrounding the Human Rights Legislation Amendment Bill 2017 (Cth). See also: Sackville, above n 92, 632.
[330] Sackville, above n 92, 632.
[331] At the time of s18C's passing, Sir Maurice Byers QC argued that it would breach the implied freedom and would be struck down if challenged. See: O'Donnell, above n 320.
[332] See: Diana Sedgwick, 'The Implied Freedom of Political Communication: An Empty Promise?' (2003) *University of Western Sydney Law Review* 35, 47.

APPENDIX

Part IIA—Prohibition of offensive behaviour based on racial hatred

18B Reason for doing an act

If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate
or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the
other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation,
whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

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

(c) in making or publishing:

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

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