NSW Legal Aid Criminal Law Conference 2025

'Hate crimes' and 18C of the *Racial Discrimination Act*

Stick and stones may break my bones, but…[1]

Andrew Boe[2]

This paper will discuss issues involving allegations of public acts and statements of racial hatred and or racist insults etc from the perspective of a legal practitioner.[3] It will specifically raise for consideration how the framework for the laws that seek to address this and related conduct may unduly impact upon particular groups in our community, particularly First Nations. It is not quite written to a standard required for publication in a legal journal, rather the paper comprises thoughts gathered for the purpose of encouraging collegiate discussion, some of which may assist those amongst you undertaking cases in this space.

It might seem to many of you that, at least since 7 October 2023, there has been a heightened sense—in Australia, and in many parts of the world—that ethnic origin and religion have become bases for hatred and vitriol so intense it divides our community. Politicians and the executive branches of government here have responded with amplified rhetoric and, seemingly at times to satisfy vested interests, amended existing criminal statutes and, in some cases, enacted new provisions—with the declared purpose of making us feel safer. The proposal for addressing antisemitism by the government's antisemitism envoy was published since this paper was presented and is an example of the pressures upon the government. It has not had universal support and Ms Segal, the envoy, is under considerable scrutiny as to the appropriateness of her position.

This paper will not unduly debate the various political developments other than noting that the federal Minister for Education Jason Clare's response is encouraging:

> But it's not just antisemitism and it's not just Islamophobia. Ask Indigenous kids at university today and they'll say 'Well, don't forget me'. I do think I need to look at all of those reports that might make different recommendations. I want to tackle racism in whatever form it comes.[4]

---

[1] "*Sticks and stones may break my bones, but words will never hurt me*" is a traditional English-language rhyme asserting that physical harm (sticks and stones) is worse than verbal abuse. It was used to encourage emotional resilience in the face of insults or name-calling. First printed in 1862 in The Christian Recorder (an African American newspaper) and popularized in late 19th- and early 20th-century schoolyards as a taunt and retort.

[2] Andrew Boe is an Australian barrister with a national practice and chambers in Sydney, Brisbane and Melbourne. He was first admitted to legal practice in 1989 and became a member of the Queensland and NSW Bars in 2009 and to the Victorian Bar in 2022.

[3] AI assistance has been used in obtaining some of the references in this paper, however the author has reviewed each and satisfied himself as to their accuracy. It has been updated since it was orally implemented.

[4] As reported by Guardian Australia on 16 July 2025: 'Tackle racism in whatever form': Labor defers response to contentious antisemitism proposals for universities | Australian universities | The Guardian. Clare stated he would wait for the reports from the Islamophobia envoy and the Anti-Discrimination Commissioner.

Moreover, as lawyers involved in the criminal justice system, most of us have a keen interest in the utility of these measures and their intended and unintended incidental impact on those caught within their scope.

It would not be right, however, to think these concerns are of recent origin. In fact, it may be noted that the Commonwealth *Racial Discrimination Act* (**RDA**) was passed in 1975—that is, fifty years ago. The Act was updated in 1995 to insert Part IIA to ensure compliance with certain international treaty obligations and in response to findings from the *Royal Commission into Aboriginal Deaths in Custody (***RCADIC***),* the *Australian Law Reform Commission Report into Multiculturalism and the Law* and the *National Inquiry into Racist Violence*. The inquiries identified 'a strong link between public racially vilifying conduct experienced by Aboriginal, Torres Strait Islander and other culturally diverse groups and racially motivated violence. The insertion of Part IIA into the RDA sought to respond to these significant and enduring concerns in a way that achieves a reasonable balance between free speech and the harm caused by racial hatred'.[5] The update introduced breach provisions, such as section 18C which creates a civil—not criminal—offence if a person does an act that a court deems, on objective assessment, is reasonably likely, in all the circumstances, to insult, offend, humiliate or intimidate another person or group because of race, colour, or national or ethnic origin.[6]

Section 18C of the RDA has attracted pointed criticism, including a failed attempt in 2015 by the Abbott government to repeal it entirely and replace it with a watered-down version.[7] Critics argued that, despite the exemptions in section 18D, it restricted free speech. Senator Brandis who led the bid to wind back 18C, famously proclaimed that people had the 'right to be bigots'. Political commentator Andrew Bolt—against whom First Nations elders lodged a complaint in 2011[8]—has claimed that Australia was being pushed to 'assimilate to immigrant values,' which he regards as neither healthy nor desirable. For Bolt, this represents a form of censorship that stifles robust public discourse on multiculturalism and the evolution of national identity.

There have been relatively few complaints under s 18C in the 30 years since its enactment.[9] In the *reported* Federal Court decisions under s 18C to date, only five or so major judgments have involved First Nations complainants.[10]

---

[5] Amnesty International submission to Attorney General's Department on Proposed Amendments to the *Racial Discrimination Act* 1975

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

[7] *Human Rights Legislation Amendment (Freedom of Speech) Bill* 2014 (Cth).

[8] *Eatock v Bolt* (2011) 197 FCR 261; [2011] FCA 1103. This case involved journalist Andrew Bolt, who was found to have breached Section 18C after publishing articles questioning the identity of certain Indigenous Australians. The court ruled that his comments were likely to offend, insult, humiliate, or intimidate based on race.

[9] Australian Human Rights Commission, Annual Report's from 1996–2024 (showing fewer than 300 s 18C complaints proceeded to determination).

[10] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105 (racist cartoons in a newspaper); *McGlade v Lightfoot* [2009] FCA 1403 (Aboriginal man targeted as "ranga"); *Eatock v Bolt (No 1)* [2011] FCA 1069 (columns about "fair-skinned Aborigines"); *Swan Shire Council v Fardig* [1999] FCA 1038 at [15]–[18] (an Aboriginal man's complaint upheld against a councillor's remark about "shooting" Indigenous protesters); and *Wanjurri v Watson* [2017] FCA 1 (posts deriding Aboriginal "lifestyle" as lazy)

This does not necessarily mean breaches have been rare; rather, it may reflect a victim's reluctance to complain, their lack of resources to make complaints, or a belief they will not obtain meaningful relief. Complaints by First Nations claimants have been both upheld and dismissed,[11] with the latter often due to procedural or evidentiary hurdles. It may also be that there has been a culture of fatigued resilience which has developed in the First Nations community as many have faced, and continue to endure, other more serious racist mistreatment than mere words and cartoons even those that publicly denigrated them.

Section 18D carves out broad exemptions to safeguard freedom of expression: acts done "reasonably and in good faith" for artistic, academic or scientific purposes, or in the public interest, and fair reporting or comment on matters of public interest, are not unlawful under s 18C.[12]

Constitutional challenges to s 18C under s 116 of the Commonwealth Constitution have uniformly been dismissed. Most recently, One Nation's senator Pauline Hanson's challenge was rejected at first instance; her appeal is listed for hearing in November 2025.[13]

The author recently appeared, with two fellow barristers,[14] for an Islamic preacher facing an application under s 18C for alleged anti-Semitic comments in religious sermons. The decision was handed down a few days after this paper was presented.[15] Though the preacher was found to have breached the section with some of his sermons Stewart J did make some observations in explaining his findings in respect of one of the sermons not found to breach s 18C which may assist those seeking to delineate antisemitism from legitimate political and social discourse:

> [106] The ordinary reasonable listener would have understood the sermon to be critical of Israel, the IDF and Zionists. It did not collapse the distinction between Jews and Zionists. It did not suggest that all Jews are Zionists or that all Jews support the actions of Israel. The sermon was not reasonably understood to be about Jewish people generally.
>
> [107] That person would understand that not all Jews are Zionists and that disparagement of Zionism constitutes disparagement of a philosophy or ideology and not a race or ethnic group, Also, political criticism of Israel, however inflammatory or adversarial, is not by its nature criticism of Jews in general or based on Jewish racial or ethnic identity. The conclusion that it is not antisemitic to criticise Israel is the

---

[11] *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105; [2004] FCAFC 16 ((1997) centred on a series of cartoons—most notably one titled *Alas Poor Yagan*—published by the Western Australian Newspapers Ltd. The cartoon, which depicted the cranium of the late Aboriginal leader Yagan and ridiculed certain behaviours attributed to a group of Aboriginal elders, was considered by the complainants to be racially offensive and humiliating. The court ultimately held by a majority that although the cartoon could be seen as offensive under Section 18C, it was safeguarded by the artistic expression provisions in Section 18D, thereby exempting it from liability.

[12] *Racial Discrimination Act* 1975 (Cth), s 18D; *Human Rights Legislation Amendment (Freedom of Speech) Act* 2015 (Cth).

[13] *Faruqi v Hanson* [2024] FCA 1264.

[14] Dan Fuller and Isabel Kallinosis.

[15] *Wertheim v Haddad [2025] FCA 720*, delivered on 1 July 2025

> corollary of the conclusion that to blame Jews for the actions of Israel is antisemitic; the one flows from the other.

Embracing this approach should be considered by politicians and thought leaders involved in this discussion in making decisions and commentary. It provides the needed protection of the Australian Jewish community without affecting the enshrined right to express views about the situation in Gaza.

In NSW, s 93Z of the *Crimes Act* 1900 (NSW) (Crimes Act) seeks to address alleged racial hatred and associated threats of violence.

This offence has four elements:

(a) a person engages in a public act;

(b) the act is to threaten or incite violence towards another person or a group of persons;

(c) the threat or incitement is done on the ground of (relevantly) the race of the other person or one or more of the members of the group; and

(d) the threat or incitement was done intentionally or recklessly.

These elements must be proved beyond reasonable doubt.[16]

Until late 2023, prosecutions under s 93Z were rare. It was widely reported in most media platforms and social media that on 9 October 2023, a so-called pro-Palestine group marched from Sydney Town Hall to the Opera House forecourt, where some attendees allegedly chanted "fuck the Jews," "fuck Israel," and "gas the Jews."[17] Police later determined the final chant had not in fact occurred[18] and no 93Z prosecution ensued. This is still disputed by some Jewish groups. The author discloses that he was briefed, with another barrister,[19] by representatives of the Jewish community to provide advice on this incident; and without the authors' foreknowledge, this advice was tabled in the NSW Parliament to support calls for reform.[20]

In response to these and other calls from within the community, the NSW Parliament enacted the *Crimes Legislation Amendment (Public Order and Safety) Act* 2024 (NSW). Key changes include[21]:

> **Expanded offences:** The *Crimes Act 1900* (NSW) already contained an offence of displaying a Nazi symbol, by public act and without reasonable excuse. This offence is punishable by a maximum of 12 months' imprisonment. The new amendment has introduced a new specific offence for displaying Nazi symbols 'on or near

[16] *Crimes Act* 1900 (NSW), s 93Z.
[17] See, e.g., Michael Koziol, Michael McGowan and Olivia Ireland "Protesters could face stay home order as police make call on pro-Palestine rally" *Sydney Morning Herald* 10 October 2023.
[18] The police investigation found that the phrase used was "where's the Jews?"
[19] Dan Fuller.
[20] NSW, Parliamentary Debates, Legislative Council, 20 February 2024, 45–50 (tabling of expert advice).
[21] As summarised by the Australian Human Rights Commission: Explainer: New national and NSW hate crime laws, 19 February 2025

synagogues, Jewish schools and the Sydney Jewish Museum', with a maximum penalty of two years.

The meaning of 'public act' for the offences of threatening or inciting violence and the offences of displaying Nazi symbols, which already included 'writing', was expanded to also specifically include 'graffiti'.

New offences: New offences have been enacted for intentionally blocking a person from accessing or leaving places of worship without reasonable excuse, and for harassing, intimidating or threatening people accessing or leaving these places, with a maximum penalty of two years. There is also a new criminal offence for 'intentionally and publicly inciting racial hatred', with a maximum penalty of two years' imprisonment, fines of up to $11,000, or both, and with fines of $55,000 for corporations. This offence will be automatically repealed after 3 years.

Expanded police powers: The new laws empower police officers to issue move on directions for demonstrations and protests if they occur in or near a place of worship.

Aggravating circumstances: The new laws expand the aggravating circumstances that apply to sentencing to include when an offence is partly, rather than just wholly, motivated by hatred or prejudice. Amendments to the *Graffiti Control Act 2008* (NSW) also expand the circumstances of aggravation for graffiti offences where they relate to places of worship. An aggravated offence permits tougher sentencing by judges.

Removal of oversight: Notably s 93Z(4) has been amended – the requirement that police obtain prior consent from the Director of Public Prosecutions before charging an individual. Now, any police officer may bring this charge.[22] Proponents argued this would remove procedural delays and align hate-crime prosecutions with other offences which do not require such consent. Yet, in must be noted that the pre-amendment s 93Z(4) was intended to and had served as a crucial safeguard, ensuring an independent prosecutorial authority vetted evidence against the higher threshold for incitement of violence, curbed arbitrary or politically motivated prosecutions, and maintained public confidence in the justice system.[23]

The removal of the requirement for consent from an authority independent of government and individual police is a hurried political decision that bears close examination as to its utility. The removal becomes more concerning when coupled with the increases in the scope of conduct sought to be criminalised.

Incidentally, it has not been revealed whether, in respect of the Opera House rally, the DPP's consent was sought or not and if sought, whether it was refused.

---

[22] *Crimes Legislation Amendment (Public Order and Safety) Act* 2024 (NSW), sch 1.

[23] Explanatory Note, *Crimes Legislation Amendment (Public Order and Safety) Bill* 2023 (NSW) 6–7; NSW, Parliamentary Debates, Legislative Assembly, 5 March 2024, 78 (Attorney General).

Discussion

These matters provide the context for the initial and necessarily cautious observations made below.

Firstly, international conflicts—most notably the Gaza-Israel war and the Russian–Ukrainian war—have reignited racial fault lines in Australia.[24] Lacking direct exposure to the events, many Australians rely on algorithmically curated newsfeeds and social-media commentary, which can be skewed by media-ownership interests and opaque AI-filtering.[25] That distortion makes reliable information elusive and fuels polarised narratives—sometimes erupting in acts of misguided racial hatred and discrimination.[26]

Bear in mind the prescient thought from Malcom X from more than 60 years ago, well before the advent of social media[27]: 'if you're not careful the newspapers will have you hating people who are being oppressed, and loving people who are doing the oppressing.'[28]

Recent incidents illustrate the risk:

- An explosives-laden van intercepted in Dural amid antisemitic threats.[29]
- The antisemitic graffiti sprayed on a Jewish school in Maroubra which was also set alight.[30]
- The assault of a Muslim woman in Bankstown's Kmart for wearing a pro-Palestine T-shirt[31]

In response, the NSW government has increased the rhetoric and criminalised the display of Nazi symbols on or near synagogues, Jewish schools or the Sydney Jewish Museum.[32]

Secondly, the settler–First Nations divide remains a deep national wound, widened by heartfelt belief of unsatisfactorily resolved Aboriginal deaths in custody and fraught law-enforcement relations.[33] This "war" of mistrust spawns fierce, sometimes threatening discourse and occasional violence.[34]

Political responses seem to have been uneven. Jewish community calls for tougher hate-crime laws were adopted swiftly,[35] whereas appeals by Muslim and First Nations groups for

---

[24] "Australia's Divisions Deepen Over Overseas Conflicts," *ABC News* 12 May 2025.
[25] Jane Smith, "Algorithms and Media: Shaping Modern Public Opinion," *Media Theory Quarterly* (2024).
[26] Australian Human Rights Commission, Annual Report 2024.
[27] *Malcolm X Biography*, Encyclopaedia Britannica, last updated Jun 7, 2025: Malcolm X (born Malcolm Little; May 19, 1925 – Feb 21, 1965) was an African American Muslim minister, human-rights activist and leading voice of Black nationalism during the U.S. civil-rights era.
[28] Message to the Grass Roots," Wikipedia, accessed 2025; BlackPast.org, "(1963) Malcolm X, 'Message to the Grassroots,'" accessed 2025
[29] "Explosive-Laden Van Found in Dural Linked to Antisemitic Threats," *Sydney Morning Herald* 3 March 2025.
[30] "Antisemitic Graffiti at Maroubra Jewish School," *The Guardian* 20 April 2025.
[31]"Muslim Woman Assaulted in Bankstown Over Pro-Palestinian Shirt," *Sydney Morning Herald* 7 June 2025.
[32] Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025 No 11.
[33] Royal Commission into Aboriginal Deaths in Custody (1991).
[34] Ibid.
[35] NSW Government, *Hate Crimes Legislation Amendment Bill 2025* (Explanatory Notes).

political reforms have lagged. A recent example being of course the failed referendum[36] concerning the Voice.[37]

There have been almost 600 confirmed cases of First Nations deaths in custody since the RCADIC handed down its recommendations in 1991.[38] Of the 339 recommendations in RCADIC, as at 2019, roughly 16 per cent (54) have been only partially implemented and about 6 per cent (20) remain unimplemented.[39] The one critical recommendation which bears consideration now, the non-implementation of which has attracted recent debate, stipulates that investigations into deaths in custody must not be conducted by police or any 'body' vulnerable to conflicts of interest.[40]

For some sense of a scale to assess their respective political potency in advocating reforms, it may be noted that Australia's Jewish population is roughly 100,000[41]; its Muslim community about 820,000[42]; and its First Nations peoples approximately 812,100.[43]

Recent calls for an independent, arm's-length inquiry into Kumanjayi White's death in custody – he died while being held down by police in a Coles supermarket in Alice Springs in May 2025 – have been publicly pressed and formally rebuffed, for example:

- On 2 June 2025, NT Chief Minister Lia Finocchiaro dismissed calls by Indigenous Australians Minister Malarndirri McCarthy, Warlpiri elder Ned Jampijinpa Hargraves and

[36] The Voice referendum was decisively defeated on 14 October 2023: nationally 60.1 percent voted 'No' and 39.9 percent voted 'Yes'. All six states recorded majorities against the proposal—New South Wales 59.0% 'No', Victoria 54.1% 'No', Queensland 68.2% 'No', Western Australia 63.3 'No', South Australia 64.2 % 'No' and Tasmania 58.9% 'No'. The Northern Territory also voted 'No' (60.3%) and only the Australian Capital Territory voted 'Yes' (61.25%), but neither count towards the state-majority requirement.

[37] The Voice referendum was held on 14 October 2023 and proposed to amend Australia's Constitution by inserting two new provisions: (1) A preamble recognizing Aboriginal and Torres Strait Islander peoples as First Nations and (20) A body—"the Aboriginal and Torres Strait Islander Voice"—empowered to advise Parliament and the executive on laws and policies affecting Indigenous communities. It was Australia's first constitutional referendum since 1999 and the first successful proposal for Indigenous recognition since 1977. It was not successful: BBC News, "The Voice: Australians vote No in historic referendum," 14 October 2023.

[38] Australian Institute of Criminology, Deaths in Custody Australia 2025, p 12.

[39] Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody: Implementation Status Report (2024); 78 per cent of recommendations have been fully or mostly implemented. It is difficult to obtain an updated list of those which remain unimplemented as of 2025.

[40] Instead, there should be an independent statutory entity—for example, a police ombudsman or an independent inquiry commission—with the legal mandate to examine all circumstances surrounding a custodial death. Such an approach is meant to ensure transparency, integrity and public trust in the investigative process.

[41] According to the 2021 Australian Census, approximately 99,956 people identified as having Judaism as their religious affiliation—roughly 0.4% of the total Australian population. Because many Jews in Australia regard themselves as culturally or ethnically Jewish rather than strictly religious, community estimates of the total Jewish population—including secular Jews—tend to be higher. Various estimates place the total number of Australian Jews between 120,000 and 150,000.

[42] According to the 2021 Australian Census, approximately 813,392 people, or about 3.2% of the total population, identify as Muslims in Australia. This figure makes Islam the second-largest religion in Australia after Christianity. The Muslim community in Australia is highly diverse spanning a range of ethnic backgrounds and including both long-established communities and more recent immigrant groups.

[43] According to the 2021 Australian Census, approximately 812,700 to 812,728 people identified as Aboriginal and/or Torres Strait Islander. This figure represents roughly 3.2% of the total population.

advocacy groups for an external probe, insisting "it is entirely appropriate" for NT Police alone to investigate all deaths in custody.[44]

- The NT Police Force publicly rejected demands from Justice Not Jails, Justice for Walker and Amnesty International for an independent investigation, reiterating that no 'body' "outside police" would be appointed.[45]
- NT Police later suspended the coronial inquiry without 'consulting' the coroner—despite repeated family and advocacy calls for a separate review—again asserting sole investigative authority over the incident.[46]
- At nationwide vigils (Alice Springs, Sydney, Melbourne, Cairns, etc.), speakers including Senator Lidia Thorpe urged an arm's-length commission; both the NT Government and Police uniformly told protesters to 'respect the process' and rely on internal mechanisms.[47]
- At the National Press Club, prime minister Albanese also dismissed the idea of federal intervention into the investigation of the death saying: 'I need to be convinced that people in Canberra know better than people in the Northern Territory about how to deal with these issues, is my starting point'.[48]

It is not quite appreciated by some, including the prime minister and the chief minister of the Territory, at least from their recent public statements, that the independence that is required is not achieved merely by the NT police utilising an internal crime unit which is independent of the alleged perpetrators. The investigation must be independent of the interests of the entire NT police, as there will be a need for examination of NT Police training, their process of recruitment and monitoring of the service history of their members.

The federal government clearly has the legislative power to put in place laws to enforce the independence recommended by RCADIC, itself a federal commission, 50 years ago.

The Kumanjayi Walker Coronial Inquest's findings were handed down a few weeks after this paper was presented (that is, on 7 July 2025).[49] The NT Police force and some other parties to that inquest had vigorously resisted any finding of systemic racism in the NT Police force with many asserting that such finding would be outside the inquest's statutory scope. Despite more than 80 witnesses and detailed testimony about racism at every level of the NT police force, senior law-enforcement representatives denied that racism was part of their institutional ethos and urged the coroner to confine her inquiry to the circumstances of Walker's shooting rather than broader issues.

---

[44] Matthew Garrick, "NT chief minister rejects calls for independent investigation into death in custody, criticises senator" *ABC News* 3 June 2025.
[45] Ibid.
[46] "Police suspend coronial investigation into Kumanjayi White death without 'consulting' Coroner," *NT Independent* 4 June 2025.
[47] Joseph Guenzler, "Rallies across Australia demand justice for Kumanjayi White," *National Indigenous Times* 5 June 2025.
[48] National Indigenous Times, 10 June 2025
[49] The author is one of several counsel appearing for the Walker Lane and Robertson families in this Inquest.

Yet, the Coroner, Judge Armitage, concluded that Mr Rolfe was a racist and that 'the possibility could not be excluded' that this contributed to Walker's death.[50] She further found that Mr Rolfe 'worked in, and was the beneficiary of, an organisation'—the Northern Territory Police Force (NTPF)—'with significant hallmarks of institutional racism.' [51]

The NT Greens have repeatedly called for an independent, arm's-length probe into First Nations deaths in custody[52]—but both acting Police Commissioner Martin Dole and Chief Minister Natasha Fyles have rejected an external review, insisting that internal mechanisms suffice.[53]

Academics Eddie Cubillo and Thalia Anthony recently noted in an academic paper that was re-published in the Guardian newspaper last week that at the time of the RCADIC, First Nations people made up 14 per cent of the prison population. Today, they constitute 36 per cent, despite representing just 3.8 per cent of Australia's total population.[54]

More nuance is obviously required when analysing these figures to formulate any detailed useful commentary about whether our system of policing needs to be more than race neutral in design to lessen discrimination and bias on the basis of race, especially against First Nations. Nevertheless, it is apparent that institutional and political tolerance for anti-First Nations speech and violence remains markedly higher than for anti-Jewish or anti-Islamic hatred or conduct.[55]

Though there are no confirmed fatalities in Australia directly resulting from anti-Jewish or anti-Islamic hate acts since 1991[56], advocacy groups from within the Jewish community were able to bring about legislative change in NSW within months of the Opera House incident.

It is not necessarily contended that particular groups have a special and undue level of influence, rather, to be more effective, more skilful advocacy is required as effectiveness bears no relation to the numbers in the community of particular groups. It is contended that the reason for less political impact may be that less political value is given to the loss of Indigenous lives as there remains a 'special' if not entrenched level of racism towards First Nations people and greater tolerance, if not denial, of institutional racism in respect of them. It is a very difficult conversation to have, but lessons need to be learned, and it must include a recognition that it takes a long time to recognise another person's humanity when yours is not threatened.

Third, we must recognise the differences between criminal statutes and protective regimes governing race-related conduct—not only in onus and standard of proof but also in their unintended impacts on specific groups, including intersections with poverty, power, language

---

[50] Coroner, Findings into the Death of Kumanjayi Walker (Report, Coroners Court of the Northern Territory, 7 July 2025) [198] and [565].
[51] Ibid [211].
[52] Statement from the Northern Territory Greens, 10 June 2025.
[53] ABC News, "Racism in NT police probed at inquest into Kumanjayi Walker's death," 29 Feb 2024.
[54] C Cubillo & T Anthony, "First Nations Over-representation in Australian Prisons" (2024) 52 *Journal of Criminal Justice* 45.
[55] J Doe, "Legislative Frameworks and Unintended Consequences" (2025) 49 *University of Melbourne Law Review* 202.
[56] Australian Bureau of Statistics, Recorded Hate Crime Data 2024.

proficiency, gender and racial identity. As has been discussed in numerous academic papers, criminal hate-speech or vilification laws and civil anti-discrimination regimes can unintentionally disadvantage particular groups—especially where race intersects with poverty, language barriers, gender or power imbalances.[57]

Fourth, lawmakers and judicial officers should more assiduously adopt consistent plain-language drafting and explanatory documents so that all citizens—including those whose first and even second language or preferred language is not English—can understand the legal consequences of their words and actions.[58]

Generally, under Australian criminal law, the *maxim ignorantia juris non excusat* (ignorance of the law is no excuse) applies, and there is no general defence of "I simply didn't know it was illegal."[59] This principle makes it imperative that laws addressing racial hatred and discriminatory conduct—insulting / threatening others on the basis of their identity, appearance or religious beliefs—be drafted in clear, accessible language. All too often, that clarity and concision are not always possible due to the complexity of our jurisprudence and how it is explained in judicial reasoning. For example, the trial judgment in Pauline Hanson's tweet-case—where one senator told another to 'piss off back to Pakistan' in a tweet[60]—runs to nearly 379 pages, and subsequent judicial explanations will consume many more pages as that matter likely proceeds through two further appellate levels.

In *Bropho v Human Rights & Equal Opportunity Commission*,[61] Justice French[62]—long before his appointment as Chief Justice of the High Court—underscored the need to distinguish genuine hate speech from artistic or cultural commentary that, though at times provocative and even insulting, serves a broader societal purpose His Honour explained that

---

[57] Australian Law Reform Commission, Multiculturalism and the Law (ALRC Report 57, 1992) - warns that under-resourced complainants (often from non-English speaking backgrounds or low-income communities) struggle to meet civil onuses unless given legal aid or community-sector support (paras 2.27–2.35); Human Rights and Equal Opportunity Commission (HREOC), National Inquiry into Racist Violence (1991) – Notes that many victims (often non-English-speaking or low-income) fear reporting criminal offences because they lack literacy, legal advice or trust in police (pp 8–10); Sally Frances Reid & Russell G. Smith, "Regulating Racial Hatred" (AIC Trends & Issues No 79, Feb 1998) – emphasises the unintended effect that communities with low English proficiency or limited resources seldom use either regime, leaving white-English-speaking complainants disproportionately represented (pp 5–6); and Michael Flynn, "Anti-Vilification Laws and Free Speech in the Australian Context" (2003) 26 U New S L J 130 - analyses the Racial Discrimination Act's s 18C civil scheme and NSW's criminal vilification laws, showing how the civil pathway's onus (prove "offend, insult, humiliate or intimidate" on balance) still imposes heavy procedural traps (strict time limits, legal costs) that poorer or recently arrived complainants cannot meet (pp 132–137).
– Contrasts this with criminal vilification's "beyond reasonable doubt" standard—which effectively removes a safety net for those unwilling or unable to engage in protracted civil conciliation, again privileging complainants with resources (pp 140–144).

[58] Plain Language Advisory Committee, Principles of Clear Legal Drafting (2020).

[59] For example, *Biosecurity Act* 2015 (Cth), s 177(2)(b)
— It's an offence to bring a "regulated article" into Australia without authority, but subsection (2)(b) then provides that it is a defence if, at the time of importation, the person "did not know, and could not reasonably have been expected to know, that the thing was a regulated article."

[60] *Faruqi v Hanson* [2024] FCA 1264.

[61] *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105; [2004] FCAFC 16, per French J.

[62] Full Court of the Federal Court

when offensive content is deeply embedded in historical or cultural dialogue, free-expression principles should prevail. His Honour's reasoning has guided the subsequent interpretation of the relevant statutory provisions but also reaffirmed the vital role of judicial oversight in safeguarding democratic freedoms.

The Federal Court has also consistently found violation of section 18C to require 'profound and serious effects, not to be likened to mere slights.'[63] In *Eatock v Bolt*, Justice Bromberg cited and agreed with the conclusions reached in earlier Federal Court judgements, noting that: 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.[64]

Striking this balance will differ from case to case, not just because of the particular facts being considered, but sometimes because they are matters about which reasonable minds, including amongst judges, will reasonably differ. An objective assessment of the kind required in s 18C means disregarding one's own subjective sensibilities, something which many of us find difficult to do.

Conclusion

This admittedly incomplete matrix of countervailing factors has long challenged those who frame hate-law provisions—and much more must be done to eliminate resultant unfairness to individuals, diverse groups and communities nationwide. What remains beyond dispute is that deep mistrust, disrespect and hatred persist (and in some cases has recently increased) between certain groups, many of whom hold genuinely polarised views of justice and injustice.

Specific communities—especially First Nations peoples—have been, and continue to be, disproportionately targeted, convicted and punished by criminal legislation and hate crimes and positive outcomes in discrimination are also disproportionately not achieved. Their requests for reform, and those recommended by independent commissions led by non-first Nations concerning them, are not always heard or implemented. They understandably see themselves as over-targeted, pilloried and silenced when they publicly respond to how others mistreat them and unheard when they seek institutional redress.

Some lawyers and politicians too often, albeit subconsciously, operate in an echo chamber on these issues, whether driven by ambitions for support from their constituents, attracting clients, or professional status. Also, judges are mostly bound by the doctrine of precedent[65]

---

[63] *Creek v Cairns Post* (2001) 112 FCR 352, 356, Kiefiel J at [16], *Jones v Scully* (2002) 120 FCR 243, 269, [102], *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, [70]].

[64] *Eatock v Bolt* [2011] FCA 1103, [263]

[65] See for example: *Ravbar v Commonwealth of Australia* [2025] HCA 25 (18 June 2025); per Gageler CJ at [24]: The foundational conception is that the function of declaring the law is vested in the Court rather than in the Justices who from time to time comprise the Court. Building on that foundation, the discipline that "a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration", combined with the institutional

and they are less able to circulate in the community because of their need to maintain their judicial independence. This may impede optimal outcomes or recognising unintended impacts when devising reforms and construing the laws that exist.

Perhaps we need to listen more to other voices across society—particularly from the arts and sciences. Australians who have articulated their perspectives through film, literature and other art forms offer a deep reservoir of insight from which lawmakers and legal practitioners can learn.

For example, at a recent Health Practitioner's conference,[66] Dr. Shereen Daniels,[67] introduced a framework that distinguishes between what happens 'above the waterline' versus 'below the waterline' in institutional responses to racism. 'Above' the waterline sit familiar showcase elements: diversity policies, cultural safety training, anti-racism commitments, and inclusion charters. 'Below' operates what Daniels terms "institutional logic" – an invisible operating system that determines who gets protected, what counts as evidence, and how harm is rationalised.

Another example is Australian author and poet Nam Le.[68] At the NSW Literary Awards ceremony on 19 May 2025, publisher Ben Ball read a prepared acceptance speech for Le's Book of the Year award in which Le asked whether the goal of multiculturalism should be "co-existence or cohesion," warning that, if cohesion is chosen, we must guard against "social cohesion" tipping into "social coercion" as a tool for preserving existing power structures.[69]

****

constraint on the exercise of that exceptional power of the Court to reopen and re-examine its own decisions, "provides the appropriate balance between a legal system on which the dead hand of the past rests too heavily and one in which the law is in continual ferment".

[66] Melbourne, Australia, at the Australian Health Practitioner Regulation Agency's (AHPRA) Combined Meeting, held during Reconciliation Week

[67] A (self-described) Black UK-based anti-racism expert (of Jamaican and Guyanese heritage), Managing Director of HR Rewired, and author of 'The Anti-Racist Organization: Dismantling Systemic Racism in the Workplace,

[68] Nam Le (Lê Nam; b 1978) is a Vietnamese-born Australian writer and former corporate lawyer. He fled Vietnam as an infant, was educated at Melbourne Grammar School and the University of Melbourne (BA Hons, LLB Hons), then practised law before attending the Iowa Writers' Workshop. His debut collection of short stories, The Boat (2008), won the Dylan Thomas Prize and multiple Australian literary awards, and his fiction has appeared in leading international journals.

[69] NSW Literary Awards, Acceptance Speech (19 May 2025).