HOW TO REPEAL 18C

We cannot keep waiting for parliament to repeal 18C, argue **Joshua Forrester**, **Lorraine Finlay** and **Augusto Zimmermann**

When we wrote our book *No Offence Intended: Why 18C is Wrong*—published in April this year—there was an expectation that the work would provide a contribution to the debate regarding the constitutionality of a controversial provision in the Commonwealth's Racial Discrimination Act.

Section 18C of the Racial Discrimination Act was inserted in 1995 and makes it unlawful to do an act otherwise than in private if 'the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' and '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'. The use of the words 'offend' and 'insult' have been particularly controversial, with s 18C placing a significant burden on freedom of expression by prohibiting words that may only upset others. But while there has been considerable debate over whether or not s 18C should be amended or repealed, there has been comparatively little attention paid to the question of whether s 18C is constitutionally valid in the first place. This is the key issue that our book seeks to address.

We were aware of the fact that some would appreciate our contribution, whereas others would not necessarily agree with all the findings in the book. One recent example of this kind of reception is Professor James Allan's review in the June issue of *Quadrant* magazine.[1] On the one hand, he acknowledges that our 'powerfully argued' book makes a proper legal case 'for thinking that our egregious s 18C hate speech law provision is in fact unconstitutional' and strongly agrees with our statement that '[we] not only think 18C is unconstitutional, [we] also think it is philosophically wrong—that this law should never have been enacted in the first place.' On the other hand, he does not necessarily agree with all of our findings or conclusions with regards to s 18C, which is entirely fitting when discussing a book that emphasises the importance of freedom of expression and robust debate.

Of course, Professor Allan is a passionate supporter of democracy and freedom of expression. He is noted for his powerful and persuasive arguments about the dangers of judicial activism. Like ourselves, he strongly opposes the enactment of a bill of rights for Australia, believing that, in a democracy, it is the people who should make the most fundamental decisions via the elected parliament or, when it comes to amending the Australian constitution, by direct means in the form of a popular referendum. Thus we agree with his opinion that we would be much better off as a country if our parliament, rather than the unelected judiciary, honoured democracy and protected freedom of expression by repealing s 18C.

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We hope that our book may contribute in some small way to this. While the book does set out the type of legal arguments that could well be used by lawyers mounting a constitutional challenge against s 18C, this does not mean that it is a book intended exclusively for lawyers. We would hope that our parliamentarians would also be interested in the questions raised by the book—that is, whether a law enacted by the Australian parliament is actually constitutionally valid. In our view, s 18C is not. The suspect constitutionality of s 18C is yet another reason for parliamentarians to support the repeal of this law.

In our book we argue that s 18C is unconstitutional on two grounds. The first is that it is not supported by the external affairs power in s 51(xxix) of the *Commonwealth Constitution*, with s 18C reaching well beyond the intended scope of the *International Convention on the Elimination of All Forms of Racial Discrimination.* For instance, international law does not recognise the right not to be offended. The second is that s 18C impermissibly infringes the freedom of communication about government and political matters implied from the *Commonwealth Constitution.* The implied freedom of political communication is a constitutional principle introduced by the High Court in the early 1990s that effectively prevents the government from disproportionately restricting freedom of expression, based primarily upon the view that the system of representative and responsible government established by the *Commonwealth Constitution* requires that the people and their representatives be able to communicate in a free and open manner about political matters.

As can be seen, there is no actual disagreement between Professor Allan and ourselves about what the parliament should be doing. We too believe that the federal parliament should repeal s 18C. Professor Allan's view is that the implied freedom of political communication is itself the result of judicial activism. When it comes to debating how the High Court can discover such implied freedom of political communication and whether it was right to do so, it should not be taken that we all personally agree with the approach taken by the High Court. We are simply stating the facts. The implied freedom of political communication is now an entrenched part of the Australian constitutional landscape and—judging by the recent pronouncements of the Court—it isn't going anywhere anytime soon. Therefore, any discussion about the constitutionality of s 18C necessarily has to engage with the implied freedom, whether we like it or not.

In reality, we believe that the separation of powers between the judiciary and the legislature is basic to a functioning democracy. This separation of powers, however, can be disturbed by excessive judicial activism. This is why Professor Allan is correct to state that Australia should not enact a federal bill of rights. He has written prolifically on the topic of judicial activism and how the judicial elite lacks the legitimacy and training to engage in wider debates about social or economic policy. We agree that, in our legal system, the courts are not well equipped to carry out public policy decisions—a function that parliaments are far better equipped to handle. To think courts are or should be so equipped involves adding to the judiciary an extraordinary function that, on balance, may diminish rather than enhance the rule of law.

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Professor Allan then looks to his native Canada, which has 'one of the most potent and entrenched bills of rights on the planet'. He recalls that when Canada's hate speech law was taken to the top court in Canada, a majority of judges allowed it to stand—twice. Indeed, the Canadian Supreme Court has found, on the basis of its Charter of Rights, supposed 'legal' grounds, among other things, to prohibit laws restricting tobacco advertising on grounds of unconstitutionally infringing the tobacco companies' right to freedom of expression, to extend the franchise to all prisoners, and to rewrite the marriage laws to include same-sex couples. These are matters better left to parliament or the people to decide. However, judges have clearly imposed their own political preferences, so it is not surprising that, in

Canada, the ideological beliefs of individual judges are considered much more important than the Canadian constitution itself.

By introducing its own Charter of Rights and Freedoms, Canada has allowed its unelected judiciary, rather than the elected parliament, effectively to decide on the most relevant matters involving public policy and morality. Of course, this fact appears to have done no more than simply replace anxiety about politicians with anxiety about judges.

The Canadian parliament eventually did the right thing by repealing their hate speech law in June 2013, some 30-plus years after it was first enacted. We just wished the Australian parliament had the same courage and appreciation for freedom of expression. Along with freedom of conscience, freedom of expression is the most fundamental right of the citizen. In a true democracy, every value and belief must be subject to public scrutiny, to competing perspectives, and to robust critical analysis. Given this, we agree with Professor Allan that it is 'pretty depressing' that the Liberal Party has abandoned its previous commitment to repeal s 18C. As he put it, one can more or less sum up the Liberal Party's attitude as: 'We used to believe in free speech but now we think it's over-rated—a second or third concern'. Former Prime Minster Tony Abbott now concedes that his failure to repeal s 18C was a mistake because it is 'clearly a bad law'. However, he appears to be in the minority within his own party (although we hope this is not the case).

If we wait for the Australian parliament to repeal s 18C, all current signs are that we will be waiting for a very long time. In the meantime, there are people who are forced to deal with the very real consequences of this law. These include the university students in Queensland who are currently before the courts fighting a s 18C complaint, or the university forced to defend complaints that an academic failed to stop inappropriate laughter in a lecture theatre quickly enough and that some histology slides were labelled in a way that suggested that 'Aboriginal skin' was routinely black. Indeed, over 800 complaints have been lodged in the past six years with the Australian Human Rights Commission (AHRC).

Most complaints do not make it to court and are settled behind closed doors, so people would not even be aware of how often s 18C has been invoked. However, even when a complaint is not upheld there are two particularly serious consequences that arise: firstly, those complained against are required to expend considerable resources defending themselves regardless of whether that complaint is ultimately upheld or not. Secondly, Australians increasingly fear discussing certain topics because they know that laws like s 18C can make what they say unlawful. Section 18C has a chilling effect on free speech and public debate, with the complaints lodged with the AHRC being just the tip of the iceberg. Those complaints, however, highlight that there are over 800 good reasons not to sit back and wait for parliament to finally see some sense, but instead to use the constitutional tools that the High Court has created to challenge a bad law.

It should also be noted that s 18C has now been in place for just over 25 years, yet racism has not been eliminated. Indeed, it is hard to see how s 18C is supposed to educate people about what they can and cannot say when most complaints before the AHRC do not even make it into the public arena. In any event, racist speech that does not incite violence but that may offend or insult is better countered informally by civil society using freedom of expression than formally by state-imposed restrictions on such freedom.

Conclusion

In short, we wholeheartedly agree with Professor Allan's democratic approach and justifiable aversion to judicial activism. And yet at some stage we also believe that freedom of expression needs to be protected as a pre-condition for constitutional democracy. Freedom of expression is essential to an authentic democracy. If freedom of expression is restricted too much (and the threshold here is not high) then democracy itself can no longer function properly. At best it would become little more than a disguised authoritarianism.

Endnotes

1 James Allan, '18C: Repeal It!', *Quadrant* (June 2016), pp. 73-76, https://quadrant.org.au/magazine/2016/06/18c-repeal/