THE CONTINUING FIGHT AGAINST 18C

WHERE TO FROM HERE?

The failure to protect freedom of speech weakens us as a democratic nation, argues **Lorraine Finlay**

In recent years, freedom of speech has been under increasing pressure in Australia. No issue exemplifies this more than the fight against s. 18C. This has become the totemic free speech issue in Australia, but in April the Australian Parliament rejected proposed reforms to s. 18C. Where does this leave us? Should supporters of free speech put s. 18C in the 'too hard' basket or is there still a realistic path for reform?

In my view, it is more important than ever to fight for freedom of speech and s. 18C is still the front line of this battle. Unfortunately, the momentum for reform has stalled, with some suggesting that the recent procedural reforms to the Australian Human Rights Commission (AHRC) have effectively dealt with the problem. If we want to continue to press for substantive reform, it is timely to reflect on where we have come from in this debate and where we stand now.

The past

Section 18C of the *Racial Discrimination Act 1975* (Cth) 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'.

This section was controversial when first introduced, however the case for reform has gathered pace in recent years with the complaints made against the Queensland University of Technology (QUT) students and the late cartoonist Bill Leak. These cases have particularly highlighted the impact of s. 18C both in terms of its individual cost and its chilling effect in restricting public debate about important issues. Yet the appetite for reform amongst our national leaders can be described as equivocal at best, and downright hostile at worst.

In our 2016 book, *No Offence Intended: Why 18C is Wrong,* Joshua Forrester, Augusto Zimmermann and I argue that s. 18C is constitutionally invalid. We reach this conclusion for two reasons. The first reason is that it goes much further than the international treaty on which it claims to be based, meaning that it cannot be supported by the external affairs power under s. 51(xxix) of the *Commonwealth Constitution*. There is simply no recognised human right at international law that protects you from being offended. The second reason is that s. 18C breaches the implied constitutional freedom of political communication because it disproportionately restricts freedom of speech.

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We also argue, however, that 18C is not just constitutionally invalid but, even more importantly, morally wrong. There are many reasons for this, but possibly the most important is as follows—if freedom of speech is only the freedom to say nice things about uncontroversial topics then it isn't a freedom worth anything. Free speech truly matters when you need to say difficult things about controversial topics. Yet this is the very speech that laws like s. 18C end up silencing.

The present

Only a few months ago there seemed to be cause for considerable optimism amongst those of us advocating for s. 18C reforms. The Parliamentary Joint Committee on Human Rights commenced its *Freedom of speech in Australia* inquiry, with the terms of reference specifically asking the Committee to report on '[w]hether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, [sections] 18C and 18D should be reformed'.[1] The Committee received over 400 written submissions and conducted a series of public hearings around Australia. The end result, however, was enormously disappointing to advocates for reform. Rather than making any definitive recommendations about s. 18C the Committee instead outlined a 'range of proposals that had the support of at least one member of the committee'.[2] This was a golden opportunity lost. In searching to find common ground, the Committee lost the opportunity to send an unequivocal message that change is needed.

Even worse, the compromise recommendations were themselves further compromised in an attempt to get the Parliament to pass some type of reform. This is not to say that there are no positives to be found in the recent reforms. The *Human Rights Legislation Amendment Act 2017* (Cth) does contain some significant reforms to the complaints handling procedures of the AHRC that will make it a lot harder for unmeritorious s. 18C complaints to proceed. This is a welcome reform. However, as I stated when giving evidence before the Committee, while passing procedural reforms on their own is a positive step, we are still left with a bad law in place. Procedural reforms on their own are not sufficient to protect freedom of speech. Section 18C itself needs to be changed.

A dissenting Committee report setting out a strong case for reform would have provided a more solid platform for the future. As it stands now, opponents of change can argue that a compromise has been reached, some change has occurred and that, despite an extensive inquiry, the case for further reform has not been established.

One key example that illustrates how tough further reform will be can be seen by looking at the proposals rejected by Parliament. The Bill that was originally presented to Parliament proposed an amendment to 'specify that the standard against which alleged contraventions of section 18C are assessed is that of a reasonable member of the Australian community'.[3] This would change the present approach, whereby judges assess the conduct in question by the standards of the alleged victim group rather than by Australian community standards. This lowers an already minimal harm threshold and also means that the law entrenches inequality. The present law judges what a person says based upon who the person is and who they are speaking to. Equality before the law is a fundamental human right, and yet this law treats Australians differently depending upon what racial or ethnic group they belong to. Attempts to remove this inequality failed. The Australian Parliament rejected the idea that Australian community standards should be applied when interpreting Australian laws.

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This is an Orwellian approach to fighting racism. You do not defeat racism by entrenching racism in the law. Parliament refused to change a law that considers the colour of a person's skin, rather than the content of their individual character. It is instead trying to defeat racism by focusing on race. What Parliament failed to realise is that freedom of speech is the best protection against racism. It is only through free speech that racist ideas can be identified, directly confronted and ultimately called

out for the rubbish that they are. Anything less is a merely cosmetic solution—banning speech may create the appearance of a harmonious society but, in reality, it fails to address the underlying issues or to change a single heart or mind.

A number of other points from the public hearings conducted by the Parliamentary Joint Committee are worth highlighting. The first concerns the attitudes of some (not all) Committee members to the question of constitutional validity. When this was raised before the Committee, some members expressed the clear view that constitutional questions are the exclusive domain of the High Court, and should be left to be worked out by the Court at some point in the future if a constitutional challenge is actually filed. While the High Court is certainly the final arbiter of any constitutional questions in Australia, to say that parliamentarians should have no interest in whether the laws they are passing are constitutionally valid is a complete abrogation of responsibility. Every Australian—and particularly our parliamentary representatives—has an interest in upholding our Constitution. If parliamentarians have any doubt about the constitutional validity of a law they are considering, this would be an entirely valid reason for reconsidering that law.

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Further, the fact that a constitutional challenge might be launched at some unspecified point in the future will provide no comfort at all to any individuals who happen to have had an 18C complaint filed against them in the meantime. Constitutional challenges take a great deal of money and a great deal of time. To suggest that during the intervening years people just need patiently sit back and wait for judicial intervention demonstrates a serious failure of political leadership.

The second point concerns a question that was repeatedly asked by the Committee to individuals giving evidence advocating reform; namely, what is it that you want to say? Exactly what offensive or insulting things do you want to say that 18C prevents you from saying? One answer to this would be to note that we simply want to be able to say things like 'you can't fight segregation with segregation', which paraphrases one of the comments complained about in the QUT case. It is important to emphasise that we are not calling for reform because we want to go out and say offensive or insulting things. Repealing s. 18C would not mean that Australians would suddenly be subjected to a tsunami of racist abuse. Being against s. 18C does not mean that you are in favour of racism.

However, my answer to the Committee when asked this question was to ask why the question was being asked in the first place? We don't ask this question of any other human right, so why is freedom of speech being treated like a lesser right? Could you imagine walking into a polling place to exercise your right to vote and being told that you would only be allowed to vote once you had explained who you were going to be voting for? A human right has inherent value, and having to justify what you want to use it for before the right is recognised fails to acknowledge this.

The future

When the Parliamentary Joint Committee was first announced I was cautiously optimistic about the prospects for reform. I am less optimistic now that the Committee Report has failed to unequivocally recommend change and the Parliament has failed to pass even compromise reforms to the terms of s. 18C. I am, however, more convinced than ever that change is desperately needed. So where does the fight for free speech go from here?

The first thing to note is that there are two prospective paths for reform—judicial and parliamentary. While I would undoubtedly encourage a High Court challenge to be pursued if an appropriate case emerges, the point that Professor James Allan has made about parliamentary reform being more democratic and therefore preferable has significant force.[4] Unfortunately, the prospects for future reform by Parliament seem more distant than ever before. This should not, however, stop us from pressing the case. Our parliamentarians should

be held to account for the way they voted when reforms were before the Parliament, and should be strongly encouraged to pursue reform in the future. When some senior government ministers are quick to point out that reforming 18C 'doesn't create one job, doesn't open one business',[5] we should be equally quick to point out that values matter, and that we expect our politicians to be able to do more than one thing at a time. Protecting freedom of speech can't be dismissed as just a second order issue. Ultimately our failure to protect core values like freedom of speech weakens us as a democratic nation.

Similarly, we should ensure that the Australian Human Rights Commission (AHRC) is accountable for the role that it plays in dealing with 18C complaints. The lack of transparency surrounding the AHRC complaints mechanism cannot be allowed to continue. It was only through freedom of information requests pursued by the Institute of Public Affairs that we came to discover that over 800 complaints had been laid under 18C over the past six years.[6] It is only through the bravery of individuals like Calum Thwaites—who has been prepared to speak publicly about his personal experience with 18C in the QUT case—that we have learned of the complete failure of the AHRC to accord basic human rights to the people it is dealing with. The Australian Human Rights Commission should itself be a model for human rights in its dealings with individuals, something which it most definitely was not in the way it failed to accord basic due process to the QUT students.

This is something that the Federal government can change and, as luck would have it, an opportunity to do just that is about to present itself. With the term of the current AHRC President, Professor Gillian Triggs, coming to an end, the Federal government will shortly be appointing a new President. We should be looking for somebody to drive fundamental reform, and to make the AHRC a champion for individual freedoms in Australia. We should be looking for somebody who has unashamedly and unambiguously shown the courage to stand up for fundamental values like freedom of speech. Too often, governments are tempted to seek a 'compromise candidate', whose key qualification is that they won't be controversial. We cannot allow this to occur. The AHRC needs fundamental reform, and this requires a President who is prepared to challenge the usual orthodoxies and fight for freedom.

When thinking about where we go from here it is also critical to realise that we need to reach out to the wider community. There is a real danger in the debate surrounding 18C that we are becoming an 'echo chamber'. Those of us who advocate change come together and agree furiously with each other, but fail to engage with people who are either hesitant about reform or opposed to it entirely. These are the people we actually need to convince if we are going to achieve substantial change. We won't change opinions on this issue by repeatedly telling 18C supporters that they are simply wrong. Instead, we need to actively engage with them and listen to their concerns. Rather than lecturing, we need to be part of a conversation about preventing racism in Australia, and try to convince the wider community that we are right to see free speech as key to achieving this outcome. We need to explain that we don't want to reform 18C because we are racist. Rather, we want to reform 18C so that we can prevent racism by actually having a grown-up conversation about it.

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The final point is that there is a growing urgency to this debate. While the present Federal government has been unfortunately equivocal in its support for free speech and reforming 18C, we know that the alternatives are even worse. The Shadow Attorney General, Mark Dreyfus QC, recently canvassed extending the reach of 18C to cover gender, sexual orientation, age, and disability.[7] Others go even further. Professor Gillian Triggs received a standing ovation in March when she spoke at a fundraiser for the Bob Brown Foundation and commented that '[s]adly you can say what you like around the kitchen table at home.'[8]

Freedom of speech is under increasing threat in Australia, and we shouldn't be naïve about the challenges that the future may bring. Australians should be free to say what they like around the kitchen table at home, and this should not be a cause for concern or sadness! For this reason, it is essential that we keep fighting to reform 18C and take every opportunity to defend and advance freedom of speech.

Endnotes

1 Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry report* (28 February 2017), 1.

2 As above, [2.139].

3 Senator George Brandis (Attorney-General), *Hansard (Senate) (Human Rights Legislation Amendment Bill 2017, Civil Law and Justice Legislation Amendment Bill 2017: Second Reading Speech)* (22 March 2017), 1857.

4 Professor James Allan, '18C: Repeal It!, *Quadrant Online (*2 August 2016), https://quadrant.org.au/magazine/2016/06/18c-repeal/, and for a response, see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, 'How to Repeal 18C', *Policy* 32:3 (Spring 2016), 62-64.

5 Michael Koziol, 'Scott Morrison warns against internal fight over free speech laws: "It doesn't create one job"', *The Sydney Morning Herald* (1 March 2017), http://www.smh.com.au/federal-politics/political-news/scott-morrison-warns-against-internal-fight-over-free-speech-laws-it-doesnt-create-one-job-20170228-gunoqu.html

6 Simon Breheny, 'Racial Discrimination Act: Turnbull should revisit 18C Repeal Case', *The Australian* (29 April 2016), http://www.ipa.org.au/sectors/freedom-of-speech/news/3460/racial-discrimination-act-turnbull-should-revisit-18c-repeal-case

7 Chris Merritt, 'Labor eyes extending 18C complaints', *The Australian* (23 March 2017), http://www.theaustralian.com.au/national-affairs/labor-eyes-extending-18c-complaints-to-gender-disability-and-age/news-story/366d04d0d5efb5fc6ef575e4e3550afc

8 Rachel Baxendale, 'Gillian Triggs gets standing ovation, *The Australian* (31 March 2017), http://www.theaustralian.com.au/national-affairs/gillian-triggs-gets-standing-ovation-at-bob-brown-foundation-fundraiser/news-story/a8366dc8d0e74cebf3f73d294971b8f7