Chapter 8

The Case for Changing Section 18C of the *Racial Discrimination Act*

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On 28 September 2011, a judge of the Federal Court handed down a decision which has had a larger impact on the debate about freedom of speech in Australia than any other decision in recent memory. That case – *Eatock v Bolt* – was a spark that lit a bonfire under section 18C of the *Racial Discrimination Act 1975* (Cth).

Section 18C makes it unlawful to say or do anything that is reasonably likely to "offend, insult, humiliate or intimidate" a person because of the person's race, colour or national or ethnic origin.

The Coalition's promise

Before the 2013 Federal election the Federal Liberal-Country Party Coalition promised that, if elected, it would repeal this provision. During an address to the Institute of Public Affairs on 6 August 2012, the then Leader of the Opposition, Tony Abbott, said: "So let me assure you, the Coalition will repeal section 18C in its current form."

The promise had earlier been made by the then legal affairs spokesman, Senator George Brandis, QC, in July 2012. In a speech to the Australian Liberal Students' Federation, Brandis had proclaimed: "If we win the next election . . . one of my first priorities will be to remove from the Racial Discrimination Act the provisions under which Andrew Bolt was dragged before the courts."

On 25 March 2014, the Coalition Government looked as though it would make good on its promise. Brandis, Attorney-General in the Abbott Coalition Government, released exposure draft legislation which substantively removed section 18C. The proposed provisions would have removed the words "offend," "insult" and "humiliate," added a provision against vilification, and tightened the definition of "intimidate."

Unfortunately, in August 2014, the Prime Minister, Tony Abbott, made a leadership call. In my view, it was not the right call. The decision the Abbott Government made is to abandon the repeal of section 18C. I believe this is a very grave error on the part of this new government.

Freedom of Speech in Australia

A very concerning reality now faces Australia. That reality is that freedom of speech and freedom of thought are under threat in this country.

The attempt of the Gillard Government to regulate the media was an attack, literally unprecedented in recent Australian history, on freedom of the press. Without freedom of the press there can be no freedom of speech. The attempt, also by the Gillard Government, to introduce the so-called Human Rights and Anti-Discrimination Bill in 2012 was likewise an unprecedented attack on the political freedom of Australians.

That bill proposed to make it unlawful to "offend" or "insult" someone on the basis of their "political opinion." Such a measure would have had an absolutely chilling effect on political

discussion and freedom of speech in this country. Furthermore, the bill proposed that individuals accused of unlawful behaviour were to be declared guilty unless they could prove their innocence, that individuals accused under the legislation would not have an automatic right to legal representation, and that the accused would be required to pay all the costs of their defence even if they were found to be innocent.

In the wake of a massive public outcry against the bill, led by the Institute of Public Affairs, the Gillard Government withdrew the bill. That such dangerous and draconian legislation could even have been contemplated in a free and democratic country such as Australia is alarming. Let us not forget that the Human Rights and Anti-Discrimination Bill would have handed very significant power over the lives of individuals to government. No less alarming is that the bill was enthusiastically supported by the Australian Human Rights Commission.

Opponents of Free Speech

Unfortunately, there are a number of opponents of free speech in Australia. The most significant is Australia's political left. Rather than defending free speech, the left in Australia only ever seem to defend polite speech, reasonable speech, or speech for those they agree with.

Aside from the political left, a number of ethnic community leaders in this country also oppose freedom of speech. Some organisations have specifically opposed the removal of section 18C of the *Racial Discrimination Act 1975*. Part of the argument for their position is that a prohibition against insulting or offending someone on the basis of their race is necessary to ensure that Australia is a tolerant, multicultural society. This argument ignores a number of key matters.

During the period of the successful settlement of millions of new arrivals in Australia in the 1950s and 1960s, section 18C did not exist. Individuals and their families coming to Australia from other countries for a better life sought to come to this country because of the freedoms available in Australia. One of those freedoms is freedom of speech. The freedoms that made Australia the country and society that it is are not a product of section 18C.

Australia's freedoms are the legacy of a centuries-old tradition of liberty which Australia was fortunate enough to inherit. It would be unfortunate if some of those who have come to Australia to gain the benefits of this country's freedoms were successful in removing the very freedoms they have benefited from.

Experience in the United States and Canada

The idea that government can restrict freedom of speech of its citizens in the name of tolerance is not one held in the United States – even by those on the left. The United States is a country that accepts ten times the number of new arrivals that Australia does. Yet, without the equivalent of Australia's section 18C, the United States is the country in which millions of people from ethnic minorities seek to live and bring up their families. As noted by Professor James Allan of the University of Queensland: "In the US there are no hate speech laws of any kind . . . Australians are no more prone to being sucked in by offensive or hateful speech than North Americans or those with multiple degrees. And if you don't believe that, then you can't really be in favour of democracy, it seems to me."

The difference between Australia and the United States is demonstrated by two cases, one very recent and one from the 1970s.

The Sterling case

In the first case, Donald Sterling, the owner of the Los Angeles Clippers basketball team, made a number of grossly offensive, racially-motivated comments. He told his partner to stop "associating with black people." The basketball Commissioner banned Sterling from the National Basketball Association for life, fined him US$2.5 million, and asked the NBA Board of Governors to vote on whether to force Sterling to sell the franchise.

President Barack Obama said on this issue, "when ignorant folks want to advertise their ignorance, you don't really have to do anything, you just let them talk. And that's what happened here."

It was civil society and popular opinion which deemed Sterling's actions unacceptable. It was not the state.

The National Socialist Party of America case

The other case is famous and controversial. In 1977 the National Socialist Party of America attempted to organise a street march through the suburb of Skokie in Chicago, a locality which was the home of many survivors of the Holocaust.

The American Civil Liberties Union defended the right of the Party to proceed with its march. Aryeh Neier, the National Director of the ACLU during the Skokie case, has said the following about freedom of speech:

> I think it is so important because freedom of speech seems to me the key to all other rights. If one can speak out about any abuse one has suffered, one always has the possibility of gaining certain relief or certain redress from any other kind of abuse. And I think people all over the world prize the ability to express themselves freely because they know that that is the way that they can protect themselves against other kinds of abuses of their rights.

David Hamlin, the Executive Director of the Illinois Chapter of the ACLU during the Skokie case, responded to those who said the ACLU should not be defending the ability of fascists to engage in such activity:

> "No free speech" is, of course, the hallmark of fascism. Advocating the revocation of free speech for Fascists is fascism itself, and roughly the same as advocating "no voting in a democracy." A surprising collection of leftists and others would eventually adopt the position represented by that slogan, most of them with a zeal sufficient to enable them to ignore the inherent contradiction of the position they had taken.

Canada

Canada is an example of where laws like section 18C have been repealed. Section 13 of Canada's *Human Rights Act* had been used in a similar way to section 18C, most famously against the commentator, Mark Steyn. In June 2013, the Conservative Government, led by Stephen Harper,

repealed section 13. The Canadian Parliament recognised that these laws are incompatible with freedom of speech. Steyn himself said recently:

> I heard a lot of that kind of talk during my battles with the Canadian "human rights" commissions a few years ago: of course, we all believe in free speech, but it's a question of how you "strike the balance," where you "draw the line" . . . which all sounds terribly reasonable and Canadian, and apparently Australian, too. But in reality the point of free speech is for the stuff that is over the line, and strikingly unbalanced. If free speech is only for polite persons of mild temperament within government-policed parameters, it is not free at all. So screw that.

Why is Freedom of Speech important?

There are three main arguments for freedom of speech. The first is a democratic one. Free expression is an institution that supports democratic deliberation. This observation forms the basis of the High Court of Australia's implied freedom of political communication. In the words of the former Chief Justice, Sir Anthony Mason:

> Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives . . . Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives.

The second is the "marketplace of ideas." This is most commonly associated with John Stuart Mill. In *On Liberty*, Mill argued for a discursive ideal of freedom of speech. Free speech allows individuals and society at large to interchange, test and confirm ideas. To censor speech is therefore to stifle this process. For Mill, free speech is really freedom of discussion. As he wrote:

> the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.

The third argument for freedom of speech is founded in moral autonomy. This places the argument for freedom of expression in freedom of conscience. This is the argument for freedom of expression defended in Chris Berg's *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*:

> Freedom of speech is a matter of individual agency, or personhood. It is an element of individual autonomy. The right to hold views that may be contrary to those of the majority, or of those in positions of power, is seen as quintessentially democratic. As we are all equal, we equally hold that right. This is a non-instrumental argument. Freedom of speech is a good in and of itself – it has intrinsic value.

Mill's famous argument was not limited to a defence of speech that assisted the pursuit of truth. Mill valued the expression of extreme and untruthful opinions for the benefits it gave true opinions. As he argued, unless truth is "vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds."

Section 18C of the Racial Discrimination Act is explicitly intended as a significant weapon in the battle against prejudice by restraining contrary voices. In the second reading speech for the Racial Hatred Bill 1995, Michael Lavarch, Attorney-General in the Keating Government, argued that section 18C "sends a clear warning to those who might attack the principle of tolerance."

Mill counsels that a tolerance which is only brought into being by legal force is a weak and fragile tolerance:

> the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.

Australia opposed the introduction of the provision against the incitement of racial hatred in the International Covenant on Civil and Political Rights, Article 20 (2), adopted in 1966. Making the case against this provision, which was proposed by a group of nations led by the Soviet Union, the Australian representatives argued that "people could not be legislated into morality."

This remains true today. A legislative prohibition on expressions of prejudice will not limit prejudice. Worse, a recurring phenomenon in the history of censorship and legal speech constraints is the counter-productive influence of such policies. Instead of achieving the legislative intent, censorship can grant platforms and create martyrs.

There are justifiable limitations on expression. Speech should be prohibited when it crosses the boundary from expression into action. Perhaps the most famous example of this is John Stuart Mill's famous corn dealer – where an opinion that corn-dealers starve the poor would be lawful speech if shared in normal conversation but unlawful if shared to an armed mob outside the home of a corn-dealer.

Eatock v Bolt

On 28 September 2011, Andrew Bolt, a News Corp Australia journalist, was found to have breached section 18C of the Racial Discrimination Act. The case concerned two articles which Bolt had written on a matter of public policy, and which were published in the *Herald Sun* in 2009.

The judge in the case, Justice Bromberg, also found that Bolt did not fall within any of the exemptions provided for in section 18D. Bolt had argued that the "fair comment" exemption should apply in his case as he was discussing an important issue in the public interest. The exemption did not apply because the judge held that Bolt's conduct was not done "reasonably and in good faith." Justice Bromberg held that Bolt had used "gratuitous asides" and a "mocking" and "sarcastic" tone in his articles, and that this was sufficient to deny the exemption.

The Bolt case is an example of the dangers of section 18C. It was used in that case as a political tool to censor a political enemy. The case demonstrates how serious a restriction on freedom of speech section 18C is, and exactly why the provision must be repealed in its entirety.

The Bolt case, and the problems it highlighted with the law, brought forth a number of supporters for change. Three of Australia's leading newspapers agreed that section 18C restricts freedom of speech.

The Age

> This newspaper has long argued that the Racial Discrimination Act should be amended to rebalance it more towards free speech. Specifically, we believe Section 18C should be abolished.

Herald Sun

> Gagging people from fairly and legitimately held opinions is censorship. It is a basic denial of freedom of speech . . . The underlying problem with the ill-considered effects of Section 18C is that if someone says they have been offended or humiliated, who is to challenge them? That is not what freedom of speech and the right to fairly voice your opinions is about.

The Australian

> Australia has no reason to be complacent about freedom of speech. Hundreds of prohibitions govern the things we are not allowed to know. And we rank 28th out of 180 on the World Press Freedom Index. The further erosion of freedom of speech is too high a price to pay for legislation erroneously intended to stifle the rougher edges of our robust debate. Trying to legislate for good manners or to prevent hurt invariably backfires. The government is right to abolish Section 18C of the RDA.

Conclusion

The operation of section 18C of the Racial Discrimination Act can be separated into two broad categories. Where section 18C covers conduct that offends, insults or humiliates it limits freedom of speech.

Making unlawful conduct that "offends", "insults" or "humiliates" a person restricts an individual's ability to engage in lively and forthright debate essential to the proper functioning of a democracy.

Where section 18C covers conduct that intimidates, it duplicates existing law. Every Australian jurisdiction has laws against intimidation:

- The Commonwealth Criminal Code, section 474.17, outlaws the use of a carriage service to menace, harass or cause offence; the *Crimes Act* (NSW) outlaws intimidation or annoyance by violence;
- The *Summary Offences Act* (Vic) outlaws obscene, indecent, threatening language and behaviour in public;
- Queensland Criminal Code, section 75, outlaws threatening violence;
- The *Criminal Code Act Compilation Act* (WA), section 338E, outlaws intimidation;
- *Criminal Law Consolidation Act* (SA), section 19, outlaws unlawful threats;

- The Tasmanian Criminal Code, section 192, makes illegal the causing of an apprehension of fear;
- The *Crimes Act* (ACT), section 35A, outlaws threats of violence;
- The *Criminal Code Act* (NT), section 200, outlaws threats.

Section 18D does not protect free speech. Section 18D theoretically provides exemptions for conduct caught by section 18C, including "fair comment". *Eatock v Bolt* demonstrates, however, that these exemptions do not provide an adequate defence for free speech.

Truth is no defence: The judge in *Eatock v Bolt* held that section 18D will not necessarily apply even to statements that are true. Bromberg J also held that the use of "gratuitous asides," and a cynical, mocking, sarcastic tone meant that Bolt's articles were not "fair comment" protected by section 18D.

Finally, it is important to note that Bromberg J held that Andrew Bolt's conduct met the threshold established by all four words in section 18C – according to the judge, Bolt "offended," "insulted," "humiliated" and "intimidated" the plaintiffs.

The only way to ensure that another Bolt case never happens again is to repeal section 18C in its entirety.

Where to from here?

South Australian Family First Senator Bob Day currently has a bill before the Senate which seeks to amend section 18C. The Racial Discrimination Amendment Bill 2014 is co-sponsored by New South Wales Liberal Democratic Senator David Leyonhjelm, South Australian Liberal Senator Cory Bernardi and Western Australian Liberal Senator Dean Smith.

Senator Day's bill proposes to remove the words "offend" and "insult" from section 18C. In my view, while this will not fix all the problems of section 18C, the bill is a significant step in the right direction.

I wish Senator Day all the best in his efforts to amend section 18C in this way. I very much look forward to the day when freedom of speech in Australia is restored.