BALANCING FREEDOMS AND CREATING A FAIR MARKETPLACE OF IDEAS: THE VALUE OF 18C OF THE *RACIAL DISCRIMINATION ACT*

by Marie Iskander

In recent months the issue of free speech rights in Australia has been given a lot of media attention, in particular, because the newly elected government appears to be in favour of changing 'the definition of racial vilification in what the government says is a move towards restoring free speech laws to their full power'.[1] Contrary to this hype, the current debate about the role that section 18C of the *Racial Discrimination Act 1975 (Cth)* ('RDA') plays in Australians' free speech rights is misguided.

Unlike other Western democracies, Australia has not codified a Bill or Charter of Rights which positively confers on citizens a right to free speech. Rather, this right in Australia is considered a residual right which arises from constitutional limitations placed on the government's power to create legislation, which burdens Australians' implied right to political communication.[2] As such, reforming section 18C would not restore 'free speech laws to their full power' but would merely permit the use of offensive and insulting language on the grounds of race, colour or national or ethnic origin without impunity. Such a result has the potential to frustrate political discourse, rather than promote it, thereby undermining the purpose of the implied constitutional right.

Further to this, section 18C plays a valuable role in protecting racial and ethnic minority groups, such as Indigenous Australians, who are often the target of unnecessary offensive and insulting speech. This provision is balanced with section 18D which provides exemptions to speech which may be objectively insulting or offensive on the grounds of race, but is communicated in good faith for academic, scientific or artistic reasons.[3]

Thus, if the Government is legitimately concerned about free speech in Australia, it should consider implementing legislation which positively protects free speech or freedom of political communication; rather than consider removing special legislative measures which exist to balance equally valid rights: that is the right to free speech and the right to be free from discrimination.[4]

INSULTING AND OFFENSIVE SPEECH, POLITICS AND THE ROLE OF SECTION 18C IN ENHANCING POLITICAL DISCOURSE

Free speech is classically defended on the grounds that the process of unrestricted discussion and dialogue facilitates the emergence of 'truth' in a marketplace of ideas.[5] This proposition however, is based on the false assumption that participants in an exchange of views "are of a roughly similar ability to speak and…understand"[6] and are given equal platforms to engage in this marketplace.[7] In Australia, the implied right to freedom of political communication in the Constitution, is said to be 'indispensable to the efficacy of the system of representative government'[8] and as such there must be a legitimate end satisfied when the government creates legislation which burdens political communication.[9]

18C plays a valuable role in protecting racial and ethnic minority groups, such as Indigenous Australians, who are often the target of unnecessary offensive and insulting speech.

In light of this, the Court in *Coleman v Power*[10] found that a law prohibiting insulting language could only validly prohibit 'political communication' in circumstances in which a violent response is either the intended or reasonably likely result.[11] This principle is justified in part because the 'use of insulting words is common enough in political discussion and debates' and 'insults are a legitimate part of the political discussion protected by the Constitution'.[12]

Although the Australian government should not play a role in 'civilising public debate' by preventing or proscribing offensive or insulting speech,[13] section 18C of the RDA can be seen as

legitimately burdening political speech which is offensive, insulting, intimidating or humiliating on the grounds of race, as it protects racial and ethnic groups from harmful acts which are not done in good faith.[14] This approach is in line with international law which protects freedom of expression[15] but proscribes racial hatred that constitutes incitement to discrimination, hostility or violence.[16] This was particularly evident during the drafting of these provisions, whereby it was proposed to address violence and harassment of minority groups, particularly Indigenous Australians who were identified as major targets of racist speech.[17] As such, this situation demonstrates that human rights and freedoms are seldom absolute,[18] and similar to the right to free speech, seeking to protect groups from racist and harmful speech is a human rights goal in itself.

For this reason, section 18C should be seen as a provision enhancing political discourse, as it proscribes unnecessarily offensive racist speech which could be seen as degrading the quality of public debate or discouraging political participation by some groups.[19] In echoing this argument, President of the Australian Human Rights Commission, Professor Gillian Triggs stated that it is 'hard to see how abusive and offensive speech can advance the right to participation in a representative democracy'.[20] Therefore the debates surrounding section 18C seem misguided, particularly arguments which claim that this provision is a threat to free speech in Australia. If anything, this provision should be seen as serving to enhance political discourse, in accordance with the purposes of the implied freedom in the Constitution, rather than frustrating freedom of political communication.

When read together with section 18D, it is evident that these provisions seek to strike a balance between protecting groups from discrimination and protecting free speech.

THE 'BOLT' CRUSADE

A majority of the publicity and debate surrounding section 18C arose after the judgment in *Eatock v Bolt,*[21] when Justice Bromberg ruled that *News Limited* columnist, Andrew Bolt contravened section 18C when he accused a number of prominent 'fair skinned' Indigenous Australians for embracing their Indigenous identities for 'political' motives.[22] Following from this, the media has misused the outcome of this case as evidence of the "unjust burden" that section 18C of the RDA has on free speech, whereby some have gone so far as to urge the government to repeal what is now known as the 'Bolt laws'.[23]

Contrary to this misguided perception, had Bolt written his article in good faith, it would have been considered a fair comment on a matter of public interest as per section 18D of the RDA. Justice Bromberg however found that the articles had 'contained erroneous facts, distortions of the truth and inflammatory and provocative language' and as such was not exempt from section 18C, under section 18D.[24] Rather than using this example to support the proposed reforms to repeal section 18C, the *Bolt* decision should actually be seen as celebrating freedom of speech and the balance of freedoms which exist in Australia as it recognises the explicit protection of free speech in section 18D.[25] Thus, while most commentators have seen section 18C as existing to 'protect hurt feelings and personal sensitivities', when read together with section 18D, it is evident that these provisions seek to strike a balance between protecting groups from discrimination and protecting free speech.

CORRECTING MISCONCEPTIONS ABOUT SECTION 18C OF THE *RACIAL DISCRIMINATION ACT*

While many involved in the current free speech debates are concerned that the use of the words 'offend' and 'insult' in section 18C means that this provision is purposed to protect 'hurt feelings and personal sensitivities', the approach taken by the Courts and the Australian Human Rights Commission prove that this is not the case.[26] If anything, the use of the words 'reasonably likely to offend [and] insult' demonstrate that the provision is applied objectively. This sentiment was evoked during the second reading speech, when Attorney-General Michael Lavarch at the time had stated that section 18C requires 'an objective test to be applied…so that community standards of behaviour rather than the subjective views of the complainant are taken into account'.[27] As a result, amending the section and removing the words 'offend' and 'insult' is unnecessary as they do not give rise to the subjective consideration of 'hurt feelings'.

CONCLUSION

The use of section 18C in the current free speech debate is greatly misguided. In light of the fact that free speech is not positively protected by legislation in Australia, the Government should look towards legislating to protect free speech, rather than seeking to amend or repeal an important provision which seeks to protect groups from racial vilification and discrimination. The purpose of the implied freedom of political communication provisions in the Constitution is to advance Australia's democratic values and to ensure that the public are well informed and are able to engage

in the political process and in political discourse. The proposed reforms to section 18C however, have the potential to degrade political participation, particularly by groups and individuals who are the targets of offensive and racist speech. If the section is repealed, this sends a message that racial vilification is tolerated and can be committed with impunity. Such an outcome would thus have a negative impact on the balance of freedoms in Australia, as well as the level of equality which exists in the current marketplace of ideas. For these reasons, this provision should be seen as 'more than just an instrument for guaranteeing equal opportunity', whereby according to the Racial Discrimination Commissioner, Dr Tim Soutphommasane, these provisions are a 'statement about racial tolerance'.[28] Therefore, as a society we should endeavour to celebrate what this provision represents rather than confuse it as a threat to free speech.

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Washpool Sunset, 2006
Bronwyn Bancroft
Linear Linkages
1500mm x 1500mm, Acrylic on canvas

1 Jessica Wright, 'George Brandis to repeal 'Bolt laws' on racial discrimination, *Sydney Morning Herald* (online) 8 November 2013 <http://www.smh.com.au/federal-politics/political-news/george-brandis-to-repeal-bolt-laws-on-racial-discrimination-20131108-2x50p.html#ixzz2rZljwBtpl>.
2 *Nationwide News Pty Ltd v Wills* (1992) CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Capital Television* (1997) 189 CLR 520, 562.
3 *Racial Discrimination Act* (Cth) s 18D.
4 Professor Gillian Triggs, 'We need more laws not less to Protect our Freedoms' *The Guardian* (online) 21 January 2014 <http://www.theguardian.com/commentisfree/2014/jan/22/we-need-more-laws-not-less-to-protect-our-freedoms>.
5 David Rolph, Matt Vitins and Judith Bannister (eds.) *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 24.
6 Frederick Schauer, 'Free Speech in a world of Private Power' in ibid.
7 Eric Barendt, 'Why Protect Free Speech?' in *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) 34.
8 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 140.
9 *Lange v Australian Capital Television* (1997) 189 CLR 520, 562.
10 (2004) 220 CLR 1.
11 Ibid, 53-4 (McHugh J); 77 (Gummow and Hayne JJ); 97-98 (Kirby J).
12 Ibid, 53, 330.
13 Adrienne Stone, 'Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication' (2011) 30 *University of Queensland Law Journal* 79, 80. See also: *Coleman v Power* (2004) 220 CLR 1.
14 *Racial Discrimination Act* (Cth) s 18C, 18D.
15 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(1).
16 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 20(2).
17 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, 29.
18 Professor Gillian Triggs, 'We need more laws not less to Protect our Freedoms' *The Guardian* (online) 21 January 2014 <http://www.theguardian.com/commentisfree/2014/jan/22/we-need-more-laws-not-less-to-protect-our-freedoms>.
19 See Justice Heydon's minority view in *Coleman v Power* (2004) 220 CLR 1, 330. See also: Stone, above n 13, 88.
20 Professor Gillian Triggs, 'Why Racial Hatred Laws are Vital to Australian Multiculturalism', *The Conversation* (online) 21 November 2013 <https://theconversation.com/why-racial-hatred-laws-are-vital-to-australian-multiculturalism-20015>.
21 [2011] FCA 1103.
22 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [452]-[453].
23 Chris Merritt, 'Attorney-General George Brandis's first task: repeal 'Bolt laws' in name of free speech', *The Australian* (online), 8 November 2013 <http://www.theaustralian.com.au/business/legal-affairs/attorney-general-george-brandiss-first-task-repeal-bolt-laws-in-name-of-free-speech/story-e6frg97x-1226755431421>.
24 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [8].
25 See: Dr. Tim Soutphommasane, 'Shared Memory and License to Hate' (Speech delivered at 75th Anniversary commemoration of Kristallnacht, The Great Synagogue, Sydney, 10 November 2013) <http://www.humanrights.gov.au/news/speeches/shared-memory-and-licensing-hate>.
26 Ibid.
27 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336, 3341 (Michael Lavarch, Attorney-General).
28 Soutphommasane, above n 25.