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Should we have the right to be bigots?

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Section 18C of the *Racial Discrimination Act 1975*

Most Australians had never heard of section 18C of the *Racial Discrimination Act* after its creation in 1995 and it had barely been mentioned in the mainstream media before 2011.

Section 18C became a serious and divisive issue of public contention after columnist Andrew Bolt was found to have breached this section in writing two articles published in a 2009 edition of the Herald Sun. This case launched s18C into the Australian consciousness and has created often hostile debate about the protection against racial vilification versus the protection of free speech in Australia.

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Following the 2016 federal election, Prime Minister Turnbull barely holds a majority in the Lower House, and the Senate is arguably controlled by an array of cross-benchers of disparate political persuasions. Some of these politicians in the new Parliament are using their political influence to strongly advocate for the abolition of section 18C, and the often farcical debate around this topic appears likely to continue into the future.

What is section 18C of the Racial Discrimination Act?

This section makes it unlawful for someone to do an act, in a way that is regarded as being not in private, that is reasonably likely to “offend, insult, humiliate or intimidate” someone because of their race or ethnicity. Within this section, “not in private” is regarded as words, sounds, images, or writing to be communicated to the public, or is literally in a public place.

Australia has numerous international obligations to implement protections including those against racial hatred under the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

Section 18 was introduced as a response to recommendations of major inquiries including the National Inquiry into Racial Violence and the Royal Commission into Aboriginal Deaths in Custody. These inquiries found that racial hatred and discrimination can lead to emotional and psychological harm caused to their targets.

A look at some s18C racial discrimination cases

The courts have tried their hardest to maintain a balance between freedom of speech and freedom from racial vilification when interpreting section 18C. It holds that for conduct to reach the threshold of s18C, it has to have “profound and serious” effects on the target(s), and cannot be “mere slights”.

For example, the case of *Toben v Jones* (2003) involved a complaint about the Adelaide Institute website which was argued as being anti-semitic and vilified Jews.

The Federal Court of Australia found that some documents on their website did vilify Jews for a number of reasons. For example, the website imputed that Jewish people who are offended by the denial of the Holocaust are of limited intelligence. Another example was that Jewish people exaggerated the number of Jewish people killed during World War II and have done so for financial gain.

As mentioned earlier, the most famous case relating to s18C is the Andrew Bolt case. In this case, nine Indigenous Australians brought action against Bolt and his employer The Herald Sun, over two articles published in the paper in 2009 and two posts on Bolt’s blog on the paper’s website.

The publications insinuated that lighter-skinned Indigenous people only identified as Aborigines in order to gain career, social or other advantages. Justice Bromberg stated that he was “satisfied that fair-skinned Aboriginal people (or some of them) were reasonably likely ... to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the newspaper articles”.

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It led Attorney-General George Brandis to publically defend the right of Australians to be ‘bigots’ through the lawful expression of their political beliefs. It was promised in the 2013 Federal election by the Coalition Government that a repeal of s18C was imminent following the Bolt case. Brandis stated that “never again in Australia will we have a situation in which a person may be taken to court for expressing a political opinion”.

What is the issue with section 18C?

According to opponents of s18C, the current law deals with racial vilification in the wrong way by political censorship. Within the draft bill of 2014, the proposed new section would make it "unlawful for a person to do an act ... that is reasonably likely to vilify another person or a group of persons or intimidate another person or group of persons". This means that there would no longer be any protections against offending, insulting, or humiliating someone.

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It is noted that many opponents of the section believe that it significantly restricts free speech in a way that all other anti-discrimination laws do not. One Senator is actually suing a newspaper under s18C for calling him an ‘angry white male’. This lawsuit is clearly a childish and cynical attempt to make some headlines and score some cheap points (which will accomplish nothing but wasting the time of the Australian Human Rights Commission). But more importantly, the frivolous lawsuit trivialises the serious issue of entrenched racial abuse and humiliation faced by many Australians every day.

What is missing from the public debate regarding section 18C?

Certain public figures including politicians like to rely on scare tactics to advance their political agenda. It is no surprise that these scare tactics have been utilised during the debates surrounding s18C.

What is often missing from the debates is any mention of section 18D. This section creates exceptions to the section 18C rule. Section 18D should quell the fears and anger of those who wish to change or remove section 18C from the legislation, as it clearly states:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

1. in the performance, exhibition or distribution of an artistic work; or
2. in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Therefore, if a racial comment resulting in offence or humiliation was made in good faith for a genuine purpose in the public interest, then the person making the comments would have a legitimate defense against an alleged breach of s18C.

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If you are the victim of racial discrimination or any other form of discrimination (including workplace discrimination) please contact today's blog writer, Associate in Employment Law and Civil Litigation, Michael Irvine. This blog was written with the assistance of PLT student Matthew Rismondo.

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