The Repeal Of Section 18C

Publish Date:

November 2016

This article first appeared in the November 2016 Edition of the IPA Review and is written by Research Fellow at the Institute of Public Affairs, Morgan Begg.

The tide has well and truly turned in the free speech debate. In the space of just 12 months, the momentum is now undeniably in favour of reforming section 18C of the *Racial Discrimination Act.*

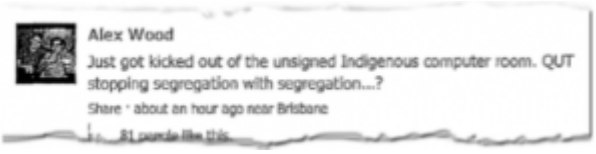
At the start of 2016, supporters of freedom of speech would be forgiven for being quite pessimistic at the prospect of reforming section 18C, which makes it unlawful to do an act that causes offence, insult, intimidation or harassment because of race.

The Abbott government's 2013 election promise to repeal section 18C in entirety was sound then and remains sound now. The prohibitions on offensive and insulting speech reduce the law to a protection of hurt feelings, and the prohibitions on intimidation and harassment are covered by a plethora of state laws regardless of any racial motivation.

The Abbott government's decision in August 2014 to abandon this promise not only hastened Abbott's downfall as Prime Minister 13 months later, it also stalled the movement to reform the restrictive law. His successor Malcolm Turnbull announced that the government he was to lead would be 'a thoroughly liberal government committed to freedom, the individual and the market'. Arguably, the Turnbull government up to this point cannot claim to have been 'thoroughly liberal' in most policy areas, but in particular, it has poured cold water on the suggestion that section 18C reform would back the agenda.

The only hope for free speech supporters was in the form of a private member's bill in the Senate but forward by Family First Senator Bob Day in September 2014. The bill, which proposed to remove the words 'offend' and 'insult' from section 18C and initially enjoyed the public support of Liberal senators Cory Bernardi and Dean Smith and Liberal Democrat Senator David Leyonhjelm, could only rely on the support of approximately a dozen senators prior to the 2016 federal election in June.

Post-election, the free speech debate has completely flipped. A number of significant events have highlighted how the debate has changed, and explain why the signs are so encouraging for free speech supporters.



Alex Wood's Facebook comment as tendered in court

THE QUT CASE

The most important development is not a political development, but an indefensible example of 18C at work. A baseless complaint against several university students in Queensland has led to a farcical three-and-a-half-year saga and a claim for approximately $250,000 in damages.

This complaint arises from an incident in May 2013, when several students at the Queensland University of Technology made comments on an unofficial student run Facebook page. The comments were made in relation to the eviction of 20-year-old engineering student Alex Wood and two other students from the QUT's 'Oodgeroo Unit', a QUT space on campus reserved for indigenous students.

The IPA's Simon Breheny visiting the Oodgeroo Unit at QUT

The students left the lab and, soon after, Alex Wood posted on Facebook page 'QUT Stalkerspace': 'Just got kicked out of the unsigned indigenous computer room. QUT stopping segregation with segregation…?'.

For that comment alone, Wood became the subject of a long-running complaint under section 18C by the staff member that evicted him, Cynthia Prior. The complaint against other students was on the basis of patently sarcastic or satirical comments.

For instance, the specific comments that brought another student, Jackson Powell, into Prior's complaint are, in context, obviously sarcastic: 'I wonder where the white supremacist computer lab is'; '… it's white supremacist, get it right. We don't like to affiliate with those hillbillies'; and after another student said 'We need a room strictly for white males, so i can wear my fedora and wallet chain without being mocked. I'm being oppressed here!' Powell said '… today's your lucky day, join the white supremacist group and we'll take care of your every need'. Another student, Chris Lee, allegedly made a quip about 'casual racism'. The comment attributed to education student Calum Thwaites came from a fake account bearing his name.

While many of the comments were crude, they were clearly little more than banter between university students that the government has no business policing. But what followed can only be described as punishment in the guise of a process.

THE PROCESS IS THE PUNISHMENT

In May 2014, almost a full year after Wood and the other students were evicted from the Oodgeroo Unit, Prior lodged a complaint against to the Australian Human Rights Commission against the students under section 18C. Even then, it was not until July 2015—14 months after the complaint was lodged— that the students were informed of the complaint made against them. Settlement discussions took place between Prior and QUT, but the students were not invited, with documents filed with the Federal Circuit Court suggesting this was at the request of the solicitors representing Prior.

In June 2015—as the students were still unaware of the complaint— the Commission organised a 'conciliation conference' between the parties listed on the complaint for 3 August. The students

were told of conference in an email dated 27 July, less than a week before it was scheduled to occur. On such short notice, several students were overseas and unable to attend, and only two attended.

Despite this, the Commission effectively concluded dispute resolution that day. With only two of the seven students then listed on the complaint in attendance, the delegate of the President of the Commission was ‘satisfied that there [was] no reasonable prospect of the matter being settled by conciliation’ and formally concluded the complaint in a letter to the students dated 25 August. It is not clear how such a conclusion could be reached when most students listed were not actually present to participate in the conciliation process.

With the complaint terminated, Prior was at liberty to take the complaint instead to the Federal Circuit Court. Three of the students have allegedly paid $5,000 to be removed from proceedings. In 2016 the remaining students are on the line for $250,000 for banter and debate on Facebook in 2013.

SENATORS BACK REFORM

As the QUT story continued to unfold, the most important political development in the 18C debate occurred. This was the unprecedented support for Senator Bernardi’s Notice of Motion to the Senate in August, declaring he was going to introduce a bill emulating Senator Day’s private member’s bill that lapsed at the end of the last parliament.

What as especially momentous about Senator Bernardi’s notice was that it was signed by 20 senators, including almost the entire Coalition Senate backbench, senators Day and Leyonhjelm, and the newly elected cross bench senators Derryn Hinch and all four members of Pauline Hanson’s One Nation Party.

The Bernardi amendments would remove the most restrictive elements of section 18C, and have the highest possibility of successfully passing through federal parliament.

A key reason for this is because conceptually, protection from offensive speech is not widely accepted as a legitimate part of racial discrimination laws. In a speech to the Samuel Griffith Society in August 2016, current Chief Justice of the High Court Robert French noted there ‘is no generally accepted human right not to be offended’ and that even if there were ‘the law alone cannot protect us from being offended.’

This view is shared not only on the conservative, liberal and libertarian right, but also by many members on the left, who are generally comfortable restricting free speech, but find protections from offence or insult a step too far.

In Australia, this view has been expressed by progressive organisations such as the Human Rights Law Centre and Liberty Victoria, as well as human rights lawyer Julian Burnside QC, Fairfax journalist David Marr, Guardian journalist Gay Alcorn, professor Sarah Joseph and former ABC Chairman Jim Spigelman.

This view from the left is perhaps best explained by Jeremy Waldron, professor of law and philosophy at New York University. Waldron, who supports restricting free speech to protect people from 'hate speech', recognises that conceptually, hate speech is substantially different offensive speech. As Waldron outlined in his 2012 book *The Harm in Hate Speech*, laws

> restricting hate speech aim to protect people's dignity against assault … it should be the aim of these laws to prevent people from being offended. Protecting people's feelings against offence is not an appropriate objective of the law.

The QUT case is a case study in why, as Professor Waldron argues and as Chief Justice French alludes, protecting merely being offended is an inappropriate part of any legal system.

GROWING SUPPORT FOR CHANGE

There are signs that the public support reform. A Neilson poll published in Fairfax media in April 2014 suggested 88 per cent of Australians supported prohibitions on offence and insult because of race.

More recently, an Essential Report poll published on 13 September 2016 suggested there has been a significant reversal on attitudes to 18C, with 45 per cent of respondents supporting amendments to remove the words 'insult' and 'offend' from the Act, while 37 per cent were opposed.

Such a substantial shift can be partly explained in the context of when the Neilson poll was conducted—at the height of the debate on the Abbott government's proposed amendments.

The climate is entirely different now: the QUT case has proven that 18C isn't about racism, but about how the hyper-sensitive can use the legal system against university students, causing immeasurable stress and reputation harm in the process.

Supporters of free speech have very good reason to be confident of significant reform in the future.