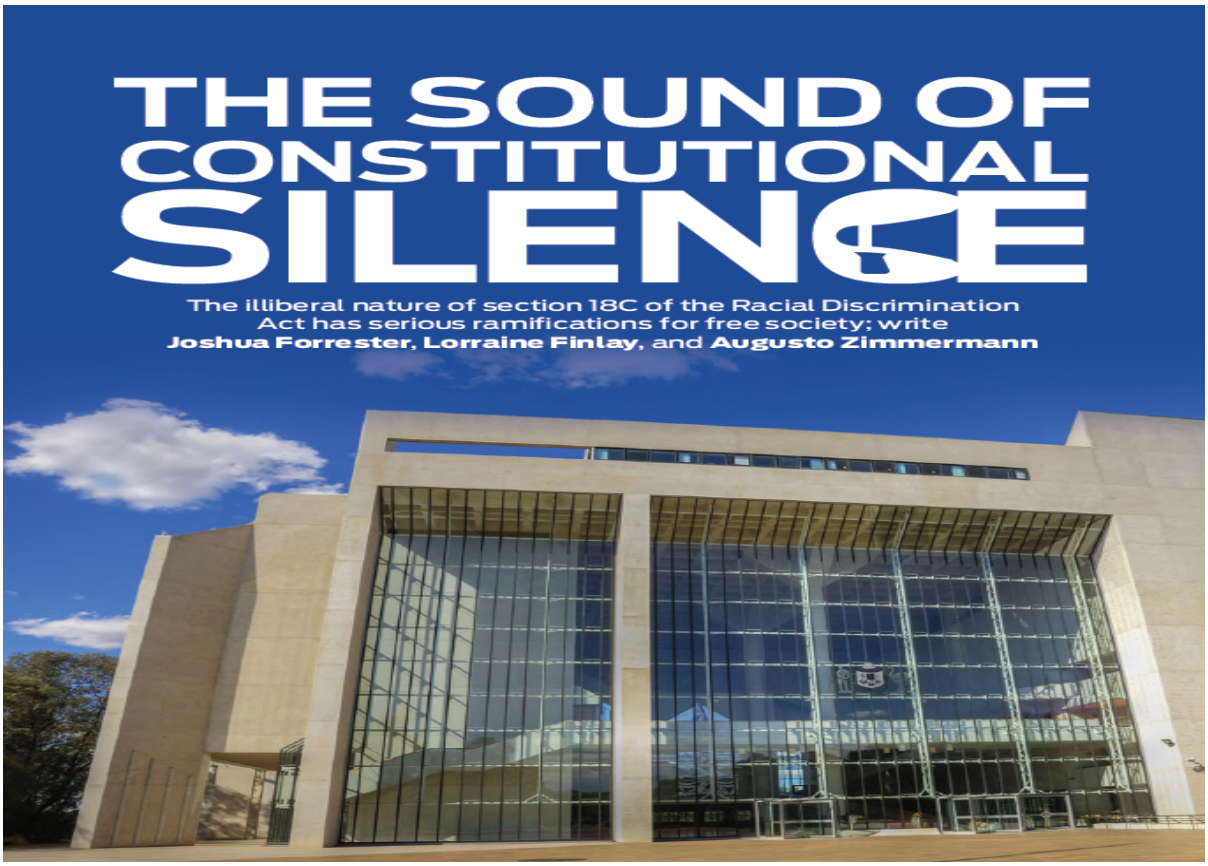

The Sound of Constitutional Silence

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The illiberal nature of section 18C of the Racial Discrimination Act has serious ramifications for free society; write Joshua Forrester, Lorraine Finlay, and Augusto Zimmermann

If a tree falls in a forest and no one is around to hear it, does it make a sound? The constitutional law equivalent of this philosophical thought experiment might be as follows—If there is an unconstitutional law and no one challenges it in the High Court, does that make it constitutional?

Section 18C of the *Racial Discrimination Act 1975* (Cth) was introduced over twenty years ago and has been part of the Australian legal landscape ever since. At the time of its introduction the Parliamentary Research Service warned that section18C may be vulnerable to constitutional challenge, and yet a High Court challenge has never materialized. While section 18C (and its possible repeal) has been the subject of considerable controversy and debate over the past few years, little or no attention has been paid to a fundamental question concerning this law—is it actually constitutional?

In *No Offence Intended: Why 18C is Wrong* it is contended that it is not, based on two arguments. The first is that 18C is not supported by the external affairs power found in section 51(xxix) of the Australian Constitution. The second is that 18C impermissibly infringes the freedom of communication about government and political matters implied from the Australian Constitution.

THE EXTERNAL AFFAIRS POWER

Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1975, giving the commonwealth government the constitutional power under section 51(xxix) of the constitution to legislate to incorporate those treaty terms domestically. It does not, however, give the commonwealth government *carte blanche* to introduce whatever legislation it likes that is tangentially related to the elimination of racial discrimination. To come within the scope of the external affairs power a number of requirements must be met, including the specificity and conformity requirements. In relation to 18C there are difficulties with both of these.

The specificity requirement provides that a treaty that is primarily aspirational and does not oblige state parties to meet reasonably specific legal obligations will not enliven the external affairs power. This stems from the *Industrial Relations Act Case* in which it was stated that a law relying on the external affairs power 'must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states' While some of the relevant Convention provisions do appear to meet the specificity requirement, others are so broadly framed that it is difficult to reach this same conclusion. For example, Article 7 of the Convention directs signatories to, amongst other things:

> …Undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups.

Article 7 is framed in primarily aspirational language and imposes open-ended commitments, with no real guidance concerning the tangible measures that signatories to the Convention might be expected to undertake.

The conformity requirement poses an even more serious problem for the constitutional validity of 18C. For a domestic law purporting to implement an international treaty to be validly supported by the external affairs power, 'the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty'. Section 18C goes well beyond both the scope of the Convention. Where 18C makes it unlawful to commit an act that is reasonably likely to offend or insult a person because of their race, Article 4 of the Convention imposes a higher harm threshold by focusing on conduct based on racial hatred or superiority, and conduct that incites racial discrimination or racial violence. There is a significant disparity between the extremely broad reach of 18C and the type of hateful activity that Article 4 seeks to prohibit.

Of course, there are other parts of the Convention that contain broader obligations. For example, Article 2(d) requires that:

Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.

However, the history and structure of the Convention means that the broader language employed in Article 2 must be read in light of the specific obligations contained in Article 4, and the express protection that Article 5 provides for freedom of expression. Again, the broad reach of 18C was neither mandated nor envisaged by the Convention. International law does not recognize an express right protecting people from being offended, insulted or even humiliated . Ultimately, section 18C is not reasonably capable of being considered appropriate and adapted to implementing the obligations contained under either Articles 2 or 4 of the Convention.The external affairs power does not provide the necessary constitutional support for 18C in its current form.

THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

Almost twenty years ago the High Court recognized an implied freedom of political communication in the Australian Constitution. The High Court has found that the right to speak freely on matters of public importance lies at the very foundation of our democratic system. Section 18C imposes a direct, sweeping and heavy burden on political communication by prohibiting offensive and insulting speech that is based race, colour, ethnicity or nationality. While promoting racial tolerance is a highly laudable objective, it is also true that many important political debates occurring at present in Australia involve issues of race, colour, ethnicity or nationality. The Australian Constitution provides that the Commonwealth Parliament may legislate with respect to (amongst other things) defence, immigration, external affairs and special laws regarding race. The discussion of issues relevant to these heads of power may involve discussing race, colour, ethnicity or nationality. Further, actions involving Australia's executive government may involve discussing race, colour, ethnicity or nationality. The simple fact that the Australian Government includes a Minister for Indigenous Affairs, Minister for Immigration and Border Protection, and an Assistant Minister for Multicultural Affairs is indicative of this. The Australian people need to be able to freely and robustly discuss political matters, including controversial political issues concerning race, colour, ethnicity or nationality.

The sweeping scope of 18C can be demonstrated simply by considering the terms of the section. For example, 18C does not require actual harm to be suffered but only that an act is *reasonably likely* to offend, insult, humiliate or intimidate another person. The section uses terms like 'offend' and 'insult' that are imprecise and largely subjective in nature. These issues are further aggravated by the fact that conduct under 18C is judged according to what a 'reasonable representative' of the relevant group would find offensive, insulting or humiliating, rather than a universally applicable reasonable person test. Another important consideration is that truth is not an exemption to 18C, resulting in this section being considerably broader than many other laws limiting free speech.

PAST LEGAL CHALLENGES

The constitutional validity of section 18C was considered by the Full Court of the Federal Court in *Toben v Jones* back in 2003. The Court held that the external affairs power supported 18C. This is the most authoritative decision to date concerning the constitutional validity of 18C, however it is contended that this decision contains significant errors and should be overturned. The Convention clearly sets a much higher harm threshold for legislative prohibition than that recognized by the Court in *Toben*, and 18C goes well beyond the intended reach of the Convention. The Convention does not go so far as to allow state parties to 'legislate to "nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination', as was suggested by Carr J in *Toben*. Such an interpretation fails to properly take into account the precise text and inter-related structure of the Convention and, in particular, the fact that it expressly requires state parties to pay due regard to freedom of expression when undertaking their Convention obligations.

Interestingly, the Court in *Toben* noted that no argument was raised concerning the implied freedom of political communication. While this issue has been raised in a number of past cases, it has never been properly scrutinized by an appeal court, and has (perhaps surprisingly) never been directly considered by the High Court of Australia.

Much has been said in recent years about section 18C, however little has been said about its constitutional validity. There are significant constitutional questions that need to be asked. In particular, the current sweeping scope of 18C goes well beyond the international obligations that Australia has accepted under the Convention and seems to place an impermissible burden on the implied freedom of political communication. While the simplest (and most democratic) answer to this would be to repeal 18C, in the absence of parliamentary action it seems to us that section 18C,in its current form, is vulnerable to constitutional challenge.