BOOK REVIEW: JOSHUA FORRESTER, LORRAINE FINLAY AND AUGUSTO ZIMMERMANN, *NO OFFENCE INTENDED: WHY 18C IS WRONG* (CONNOR COURT, 2016)

HEATH HARLEY-BELLEMORE*

So often in the discussion of human rights we find ourselves talking about 'freedom from'. Be it freedom from torture, slavery, wrongful imprisonment or any other number of rights. However, it seems the 'freedom to' rarely gets the same focus as 'freedom from'.

This 'freedom from' has become something of the dominant discourse in the realm of human rights, and freedom from discrimination seems to be at the forefront of this debate. One must ask however, at what point do 'freedom from' and 'freedom to' collide, and can they operate together?

Freedom of speech has seemingly become a 'freedom to' which has transformed into a 'freedom from'. That is to say, while we may have had a 'free speech', new laws have now given us 'freedom from' the free speech of others. Whilst there has always been to some extent a limit on free speech (defamation and slander for example), in the 21st century we have seen new laws implemented, however well intended they may have been when drafted, which have stifled free speech in the name of 'freedom from' discrimination.

Of course, one must prefix any discussion about free speech in Australia by noting that 'free speech' as it is commonly understood is not

* LLB Undergraduate, Murdoch University.

constitutionally (or in any other law domestically) enshrined. However, the *Universal Declaration of Human Rights*, of which Australia was one of eight drafters, acknowledges '… human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people …'. One must question how 'free' Australia intended speech to be when examining cases such as *Lange v Australian Broadcasting Corporation*, and this is the book to do it.

In 1975 following ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination*, the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth). Within this Act lives s 18C which states that (otherwise than in private) it is unlawful for a person to do an act which is 'reasonably likely to offend, insult, humiliate or intimidate another person or group of people' and is done because of the 'race colour or national or ethnic origin of the other person or of some or all of the people in the group'.

'From its inception' write authors Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, '18C of the Racial Discrimination Act … has been controversial'.

18C gained mainstream prominence in 2011 when broadcaster and journalist Andrew Bolt was sued over his comments in the Herald Sun newspaper regarding 'fair-skinned Aboriginal people'. Prior to the 2013 federal election, the then opposition leader Tony Abbott promised to repeal the controversial section if elected. In 2014, the now Abbott government announced they would not be repealing the section. It is from here the book begins.

At its crux, 'No Offence Intended' argues that s 18C is unconstitutional and therefore invalid for its failure in areas such as how it relies on the external affairs power and how the section infringes on Australia's freedom of political communication. However, this is not the entirety of what the book discusses.

Among the chapters the authors tackle four main problems with not only s 18C, but the very powers that allowed for its drafting. These are: the question of interpretation, the external affairs power, the implied freedom of political communication, and finally, a proposal for legislative reform.

The chapter of interpretation is of great assistance to the reader, and will give them a deeper understanding of the arguments and analysis later in the book. In this part the authors examine how the High Court of Australia would likely interpret the wording of s 18C. They do this in a number of ways, first by looking at the section itself, second by examining various examples of case law to show how the Courts have interpreted some words that are also found in 18C, and finally how these tie to the text and purpose of 18C.

The analysis of the external affairs power is one of the larger sections in the book; evidently it examines how the external affairs power was used (questionably) to bring these conventions into law. In addition to this the chapter also examines these conventions and the available commentary and interpretation of these documents.

'The Implied Freedom of Political Communication', the next chapter and largest portion of the book (albeit by a 2 page margin) deals with Australia's constitutionally implied right to freedom of 'political communication', and how a law such as 18C evidently (and perhaps

unjustly) burdens this right, namely by stifling debate on any matters which 18C aims to outlaw.

Of course this does not mean the authors argue for a 'freedom to' discriminate. Rather, this is an argument that bad ideas cannot be defeated in healthy debate if one is prevented by law from speaking about them.

In addition to the legal arguments, the book also argues within the context of Australian liberal democracy, that laws such as 18C are philosophically wrong and go against what was intended for Australia when our constitution was first drafted.

Finally, perhaps one should note that while any argument or analysis of this nature has a tendency to be highly academic, this book, while admittedly being so, does occasionally break the barrier of academic exclusion by providing the odd fun insight. For example, when examining what is meant by 'dignity' and 'equality' and the difficulties in ascertaining what they are and how may impugn on freedom of expression, the immortal words of Inigo Montoya start the section; 'You keep using that word. I do not think it means what you think it means'.

Ultimately the authors make a compelling and well supported argument against 18C. This book should appeal to anyone, academic or not, with an interest in law, politics, or freedom generally, and should be a bible for anyone who wishes to challenge this ill-conceived provision in the High Court of Australia.