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The Unconstitutionality of Outlawing Political Opinion

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In recent years there have been numerous legislative attempts to restrict and limit freedom of speech in Australia seriously. Some of these attempts were successful, others not so much. Invariably, they were all made in the name of encouraging tolerance, social harmony and "responsible" debate. Some examples of unsuccessful attempts include the media reforms proposed by the Finkelstein Report[1] and the proposed consolidation of Commonwealth anti-discrimination laws in 2012.[2]

If that 2012 bill had been passed, the scope of anti-discrimination laws would have been considerably expanded and greater restrictions on free speech imposed. At the same time, procedural burdens on respondents seeking to defend themselves against such complaints would be decreased and, for the first time

ever, discrimination on grounds of "political opinion" would be unlawful (clause 17). The scheme outlined was so draconian and oppressive that it even completely reversed the onus of proof.[3] The burden of proof would rest with those who had been charged rather than staying with those who felt offended or humiliated by the statement provided.

Had that bill been passed, anti-discrimination laws would have been expanded far beyond the Commonwealth's constitutional powers. It is doubtful whether any head of Commonwealth power can be relied upon to support such undemocratic changes. Moreover, the draft bill seriously violated the implied freedom of political communication derived from the Australian Constitution. As Simon Breheny pointed out, "[t]hat such dangerous and draconian legislation could even have been contemplated in a free and democratic country such as Australia is alarming. . . . No less alarming is that the bill was enthusiastically supported by the Australian Human Rights Commission".[4]

Thanks to widespread community outcry, the Commonwealth Government was forced to shelve that appalling draft bill. This was due in great part to the efforts of the then Leader of the Opposition, Tony Abbott, in exposing the dangers of the proposed legislation. In an address delivered to the Institute of Public Affairs in August 2012, Mr Abbott referred to free speech as "the essential pre-condition for any kind of progress".[5] Mr Abbott further observed that:

> Freedom of speech is an essential foundation of democracy. Without free speech, free debate is impossible and, without free debate, the democratic process cannot work properly nor can misgovernment and corruption be fully exposed. Freedom of speech is part of the compact between citizen and society on which democratic government rests.[6]

Following the Federal Election of March 2013, the newly-elected Abbott Government released an Exposure Draft for community consultation, outlining its proposed amendments to the *Racial Discrimination Act* 1975(Cth)(RDA).[7] Thanks to strong opposition of the Labor Party and the extreme Left, the proposed reforms proved to be highly controversial. After several months of intense public debate, the Government announced, in August 2014, that it would no longer pursue those necessary amendments.

This was done at a press conference which announced new counter-terrorism measures.[8] The Prime Minister, Mr Abbott, went on to claim that the proposed changes had to be abandoned because they were a "complication" in the relationship with the Muslim community, adding that this compromised the efforts of the Government to protect Australians from the threat of Islamic terrorism.[9] This was a strange statement because, as it currently stands, the RDA says nothing about religious discrimination but only discrimination on the grounds of race, colour and national or ethnic origin. Tony Abbott is a fine politician and he has admitted the failure of his government to amend or repeal section 18C of the RDA. He spoke about it at the 2016 Conference of The Samuel Griffith Society and in his "What Went Wrong" article in *Quadrant*. Section 18C is, he says, "clearly a bad law".[10]

Benefits of free speech

One important aspect of free speech is the ability to express ideas freely and attempt to persuade others of those ideas.[11] The right to think and to make decisions freely and for ourselves means that we must have access to arguments on all sides of an issue.[12] As Kent Greenawalt points out, "open discourse is more conducive of discovering the truth than is government selection of what the public hears. Free statement of personal feelings is an important aspect of individual autonomy".[13]

Free speech is particularly relevant in order to prevent the abuse of government power. When humans obtain power there is always a temptation to use that power for the benefit of themselves, not the community as a whole. Since power tends to corrupt and, as Lord Acton famously stated, absolute power tends to corrupt absolutely, if society safeguards freedom of speech, then its government becomes far more accountable to the people. It is this freedom which allows citizens to speak out and criticise their democratic government when they think it is doing something morally or legally wrong.[14]

This is why freedom of speech ought to be viewed as a fundamental right as well as an important mechanism against the concentration of power. Contrary to what anti-free-speech advocates argue, freedom of speech does not disadvantage minority groups nor does it favour those with more power. First of all, every totalitarian regime restricts speech as a matter of course.[15] By contrast, free speech has always been considered an essential element of every democratic society. Without free speech, a government can easily suppress criticism of its actions and prohibit its critics from expressing their views in public freely. A true democracy would cease to exist in that society.[16] Thus Tim Wilson is absolutely correct to state that:

> [I]t makes a foolish assumption that free speech favours those with power. Anyone who has studied a skerrick of history knows that protecting free speech is about giving voice to the powerless against the majority and established interests.[17]

Freedom of speech can never be absolute. There have been categories of speech that do not necessarily receive protection by the law and quite rightly so. There are demonstrable exceptions whereby reasonable limits to speech provide a greater service to

freedom in the broader sense than open discourse. Within the boundaries of speech that should enjoy protection, some limited categories of speech have a much lower value than others.[18] For example, speech that is patently false and objectively harms the reputation of an innocent person should not be acceptable. Laws against libel and slander fall under this category. The second category is incitement to violence that promotes riots on the streets and directly causes immediate harm to people.[19] To enable our government to be chosen by the people, every citizen should be able to express his or her political ideas freely. This is why the freedom of political communication is so important in protecting the democratic nature of our Constitution. Ultimately, the democratic process necessarily requires citizens to be strong enough to tolerate robust expressions of disagreement. If free speech does not really protect speech that others may find offensive or objectionable, then it is not free speech at all.[20] This *freedom to discuss different political opinions* is what allows citizens to work out these questions fairly and with no fear of persecution or retaliation.[21]

The suppression of free speech by anti-discrimination laws

In the past twenty years many Australian governments have enacted laws that severely restrict freedom of speech in various ways. Likewise, Australian universities have "speech code" policies that are used to restrict free speech severely. Whereas previous restrictions of freedom of speech were targetted against speech that could provoke immediate harm to other people (such as slander or inciting to violence), these new rules may restrict speech that merely causes "offence" to someone else. These new rules prohibit or penalise speech that might be regarded as "offensive" to anyone who may regard him/herself as belonging

to any particular race, gender, religion, disability, national origin, or sexual orientation.

The undesirable outcome is aggravated by the present notion of "feeling offended", which is a vague and highly emotive feeling. According to R. Albert Mohler, "desperate straits are no longer required in order for an individual or group to claim the emotional status of offendedness".[22] All that is needed is the vaguest notion of emotional distress at what another person might have said, done, proposed, or presented. Hence, Dr Mohler concludes: "Being offended does not necessarily involve any real harm but points instead to the fact that the mere presence of such an argument, image, or symbol evokes an emotional response of offendedness".[23]

While the idea of inciting violence links the expression of thoughts to personal actions, the existing anti-discrimination laws allow the state to demarcate the things that citizens are allowed to say. Such provisions link the expression of thoughts to no more than thoughts, and not to actions. This amounts to the recreation of a crime of conscience and opinion, which is analogous to those crimes committed by the "enemies of the regime" in the former Soviet Union. It is one of the greatest ironies of the recent past that neo-Marxists have convinced our governments to abandon free speech, whereas the oppressed people of the unhappy countries with official Marxist ideology have never achieved any reasonable form of free speech.[24]

Why section 18C of the *Racial Discrimination Act* is wrong

Passed with the pretence of inhibiting intolerance, one of the most effective means by which freedom of speech can be silenced is under the cover of laws against discrimination. A leading example is section 18C of the *Racial Discrimination Act* 1975 (Cth). Under section 18C it is unlawful for a person to do

an act (other than in private) if the act "is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate" a person where the act 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."

This is an extremely broad prohibition which represents an extraordinary limitation of freedom of speech. This "hurt feelings" test is far below the defamation threshold which applies when a person has been brought into "hatred, ridicule or contempt".[25] Rather, the key words used in section 18C – namely, "offend, insult, humiliate" – are imprecise and largely subjective in nature. Attempts to define them have become "a circular and question-begging exercise".[26] The courts have always struggled to provide a sufficiently certain standard for decisively identifying "insulting" speech, with Lord Reid concluding in *Brutus v Cozens* that "there can be no [such] definition".[27]

To make it worse, the courts have been instructed to approach the conduct in question not by community standards but by the standards of the alleged victim group.[28] Testing to the standard of the "reasonable victim" lowers an already minimal harm threshold, adding further imprecision and uncertainty to the provision's potentially chilling effect on free speech. This goes in line with the present tendency of Australian governments to "minimise cultural differences" as a way of "celebrating diversity". In my view, the use of ordinary community standards is a more appropriate test to be applied in this context.

The constitutional validity of section 18C has never been tested before the High Court of Australia.[29] The Parliamentary Research Service noted that the Government appeared to rely on the external affairs power under section 51(xxix) of the Constitution to provide a source of constitutionality for the *Racial Hatred Bill*.[30] Thus it concluded that the provision which eventually became section 18C was more vulnerable to

constitutional challenge than any other provision in the new legislation.

Although section 18D of the *Racial Discrimination Act* provides for a range of exceptions to section 18C, with the overriding qualification that the acts in question must have been "said or done reasonably and in good faith", such qualifications are "ambiguous terms of art a judge could use to decide some speech on political, social, or cultural topics didn't actually qualify for the exemption".[31] Without clear and defined legislative terms a judge may exercise an excessive level of judicial discretion. Of course, any person who truly favours free speech ought to be extremely sceptical of legislation which allows unelected judges to pass subjective judgments on the value, morality or ethics of any statement.

The reasons for amending the *Racial Discrimination Act* are numerous. Suffice to say the law is based on the assumption that *all* forms of discrimination are inherently unjust. The result is a remarkable expansion of government power, from the protection of special groups to the protection of specific activities. Citizens are punished for voicing comments perceived as "offensive" by any selected group, with such laws tending to create a more divisive society. They foster an environment of fear and intimidation on those who simply desire to express their ideas and opinions freely.

Since anti-discrimination laws connect the expression of thoughts to no more than thoughts, this is quite analogous to the commitment of crimes of conscience by the "enemies of the people" in communist regimes. That being so, perhaps it is important to underline the importance of debates prior to the drafting of international human rights covenants on whether there should be – when it comes to protection for freedom of expression – an exception for "incitement to hatred" as the Soviet Union and its bloc of totalitarian nations wished.[32]

According to Dr Chris Berg, the drafting history of the protection of free speech in these international declarations:

> . . . does not leave any doubt that the dominant force behind the attempt to adopt an obligation to resist freedom of speech under human rights law was the Soviet Union . . . . When it came to draft the binding International Covenant on Civil and Political Rights, this was not the ascendant view. The Soviet Union proposed extending those restraints to 'incitement to hatred' . . . . Suddenly, States were responsible for the elimination of intolerance and discrimination.[33]

Suppression of conservative voices by anti-discrimination laws

Various kinds of restrictions on the speech of citizens with conservative views have often been the result of anti-discrimination laws. Their offence is exercising and protecting their conscience by refusing to agree with something they consider to be morally objectionable. Because of such laws, however, citizens have been penalised for expressing their political opinions or attempting to share their personal beliefs with others. For example, they have been unfairly penalised for expressing conservative moral values, such as supporting the traditional definition of marriage as between one man and one woman.

Almost uniformly, these provisions amount to a wrongful restriction of freedom of speech. For the last twenty years or so these laws no doubt have contributed to a remarkable muzzling of conservative moral and political values. Such laws effectively indoctrinate society in left-leaning moral and political values. The dirty little secret is that these laws have little to do with stamping out unreasonable discrimination, or with reducing the number of murders and bigotry in this country. Far from this, such laws

were enacted to suppress conservative views as well as to give undue privileges to select constituencies which are "more valuable than others in the eyes of the law".[34]

This is why it is possible to sustain an argument that the existing anti-discrimination laws are morally wrong. These legal instruments not only violate freedom of speech, but they objectively constitute a gross violation of the implied constitutional freedom of political communication. If this freedom of political communication – which has been fully acknowledged by the High Court – does not protect public speech that other people find offensive or objectionable, then it is not freedom at all!

Failure to repeal section 18C is a failure to uphold the Constitution

As mentioned above, under section 18C of the *Racial Discrimination Act* it is unlawful for a person to do an act (other than in private) if the act "is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate" a person where the act 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."

On 30 March 2017, the Australian Senate rejected the proposed changes to section 18C of the Racial Discrimination Act. This failure to repeal the provision was another missed opportunity to restore freedom of speech gradually in Australia. Of course, reforming section 18C should be seen not as a sufficient step on its own, but as one step towards re-asserting the importance of free speech. The recent proposed amendment that the Senate has rejected was only a minor improvement.

The proponents of change to section 18C merely wanted to replace the words "offend", "insult" and "humiliate" with a higher threshold of "harass", which provided an incipient re-

orientation towards the protection of free speech. This is still well short of the original intent of the Labor Government when it enacted the legislation in 1992. Remarkably, any attempt to remedy this has been voted down by Labor itself together with the Greens and a couple of crossbenchers, including Nick Xenophon and the Tasmanian Independent, Jacqui Lambie.

One may attempt to find the reasons as to why the Labor Party stubbornly refused to restore free speech by amending a provision and returning it to the real issue of incitement of racial vilification. Ultimately, this failure to amend section 18C weakens our democracy and limits our ability to realise other human rights fully. Although the internal processes will now be more efficient, the Australian Human Rights Commission can still take a substantial amount of time before finalising any case and the accused person have the matter resolved.

This is not nearly good enough. A law which disallows a person from voicing comments deemed "offensive" to another person creates a chilling effect on free speech. As James Spigelman, QC, the former Chief Justice of the Supreme Court of New South Wales, points out, "the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception".[35] In many respects, "the process is the punishment" particularly in a context where an allegation of racism inevitably carries with it special opprobrium in the community whether or not such an allegation is proven.

Attorney-General George Brandis once notoriously stated that section 18C should be amended because he thinks people have a fundamental right to bigotry: "People do have a right to be bigots you know", he told the Senate.[36] No, I did not know this but I know very well that such a comment is extremely unwise and it reveals an appalling lack of understanding of the subject. First of all, Senator Brandis should know that the matter has absolutely nothing to do with protecting bigots. Instead, the

vast majority of supporters of the repeal of section 18C are not condoning bigotry or promoting any such behaviour. Nor do they fail to acknowledge the enormous harm that racial vilification causes both to individual victims and the broader community; quite to the contrary.

There are many good reasons to recommend the repeal of section 18C and a complete analysis of the constitutional invalidity of the provision is found in *No Offence Intended: Why 18C is Wrong*, of which I am co-author.[37] I strongly recommend that the Attorney-General read the book, as he may be able to learn something about the subject. First of all, our Attorney-General should know that there are serious doubts as to whether section 18C would survive a constitutional challenge in its present form. In our view, the low threshold set by the inclusion of the words, "offend, insult, humiliate", raises real questions as to whether this section would be supported by the Constitution of Australia. Why is it so hard for our political elite to protect free speech? Do they believe in free speech at all?

One thing is for sure: section 18C cannot be supported by the external affairs power of the Constitution. Under the conformity requirement, federal legislation must be reasonably capable of being considered appropriate and adapted to implementing the relevant treaty provision. We find that section 18C is not reasonably capable of being considered appropriate and adapted to implementing either the *International Covenant on Civil and Political Rights*[38] or the *International Convention on the Elimination of All Forms of Racial Discrimination.*[39] On the contrary, the United Nations Human Rights Committee has explicitly stated that "freedom of opinion and freedom of expression" are "indispensable conditions for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights". That same committee also stated:

> Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.[40]

As can be seen, the existing section 18C provision goes considerably further than the obligations imposed on Australia to protect against racial vilification and hatred under the international law. The external affairs power appears to be the head of power, but legislation must be capable of being reasonably "appropriate and adapted" to the treaty obligations, which is definitely not the case.[41] There appears to be a real issue as to whether section 18C in its existing form would be reasonably considered to be "appropriate and adapted" to Australia's international human rights obligations. By contrast, the proposed amendments rejected by the Senate in March 2017 appeared to be more directly tailored towards these international obligations and, therefore, fall more obviously within the scope of the external affairs power.

If this was not problematic enough, section 18C also impermissibly infringes the implied freedom of communication concerning political and governmental matters. Under the Constitution, Australians must be able to discuss controversial political and governmental matters freely, including those involving race, colour, ethnicity or nationality. Such discussion may at times involve employing language that some may find offensive. This is so because the High Court has found an implied freedom of political communication as a means of invalidating legislation on constitutional grounds.[42] In *Australian Capital Television Pty Ltd v The Commonwealth*,[43] Mason, CJ, held that

freedom of communication (and discussion) in relation to public and political affairs is an indispensable element in a democratic society. He argued for the "indivisibility" of freedom of communication as related to public affairs and political discussion:

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. . . . The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision . . . . The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion . . . .[44]

As for the validity of section 18C in light of our constitutionally prescribed system of representative and responsible government, Australians must be free to communicate about government and political matters fully and frankly. Such communication is critical to law-making, and to holding both the executive and the legislature accountable.[45] That freedom of speech is a fundamental aspect of democratic deliberation forms the basis of the High Court's implied freedom of political communication. In the words of the former Chief Justice, Sir Anthony Mason:

> Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives . . . . Absent

> such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives.[46]

Under the Constitution, sovereignty ultimately resides in the Australian people.[47] And, since we are a sovereign people, no government in this country should prevent us fully, frankly and robustly discussing controversial political matters, and such discussion may actually involve employing language that some (or even most) find offensive and even insulting. What is more, in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) French, CJ, stated:

> Freedom of speech is a long-established common law freedom . . . linked to the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information.[48]

Earlier, in *Coleman v Power*,[49] the majority decided that a law cannot, consistently with the implied freedom, prohibit speech of an insulting nature without significant qualifications. As noted by McHugh, J, "insults are a legitimate part of the political discussion protected by the Constitution".[50] Insofar as the insulting words are used in the course of political discussion, he concluded: "An unqualified prohibition on their use cannot be justified as compatible with the implied freedom".[51] Gummow and Hayne, JJ, concurred. According to them, "[i]nsult and invective have been employed in political communication at least since the time of Demosthenes".[52] Kirby, J, also concurred and added that "Australian politics has regularly included insult and

emotion, calumny and invective",[53] and that the implied freedom must allow for all of this.

And just how offensive can political communication be? This was considered by the High Court in *Roberts v Bass*.[54] During the course of that judgment, which dealt with untrue allegations made against a member of the South Australian Parliament, Kirby, J, stated that the implied freedom protects insults, abuse, and ridicule made in the process of the political communication. He stated: "Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest".[55]

The natural implication of decisions such as *Roberts v Bass*[56] and *Coleman v Power*[57] is that laws that prohibit "offence", "insult" or "humiliation", in the context of public affairs or political discussion, will infringe the implied freedom of political communication.[58]

The fact that our federal politicians can display such a blatant disregard for constitutional matters should be a cause of great concern. They should know the Constitution of Australia and respect it more properly but, unfortunately, I am not convinced that our current government is doing enough effectively to restore freedom of speech in Australia. Above all, it is important not to lose sight of the need to reform section 18C, even despite the rejection of proposed changes by the Senate in March 2017. In my view, repealing section 18C is the only possible way to respect the democratic nature of the Constitution and to restore the basic right to free speech in this country more gradually.

Labor's move to extend section 18C

If things were not bad enough the Labor Party now apparently seeks to extend the reach of section 18C to cover religious grounds. Labor's shadow Attorney-General, Mark

Dreyfus, has confirmed that Labor supports such changes to the Racial Discrimination Act.[59] Because the Leader of the Opposition, Bill Shorten, stubbornly rejects any changes to section 18C, there appears to be a strategy not only to consolidate all anti-discrimination laws, but to extend the controversial section to religious grounds, among other things.

The proposal comes from Labor member of the House of Representatives, Anne Aly, and it seeks to expand the scope of anti-discrimination laws to religion, while simultaneously imposing significant restrictions on free speech and religious freedom. The prospect of supporting such amendments emerged when Dr Aly said there was "scope to reassess" extending section 18C, arguing that "the racism debate" now "extends to religion". She contends that such an extension is necessary because, in her own opinion, "we have definitely seen an increase in anti-Islamic rhetoric".[60]

Dr Aly's proposal has been strongly denounced by federal MP, Tim Wilson, a former Human Rights Commissioner. He argues in strong terms that such a proposal is part of a "mad, ideological drive of the modern Labor Party to use laws to shut people up", which could "turn Australia into Saudi Arabia, where people can be hauled before courts for criticising religion".[61] Indeed, James Spigelman, QC, once stated that the introduction of such a law protecting religious people from strong criticism would have the practical effect of reintroducing the crime of blasphemy into Australia's law.[62]

Dr Aly's controversial proposal aims at applying to religion the same formulations which are applied to race. But religion, contrary to race, is basically a matter of choice, not an immutable genetic characteristic. In contrast to racial issues, where one finds no matters of "true" or "false", religious beliefs involve claims to truth and error. As Ivan Hare points out, "religions inevitably make competing and often incompatible claims about the nature

of the true god, the origins of the universe, the path to enlightenment and how to live a good life and so on. These sorts of claims are not mirrored in racial discourse."[63]

This is why Rex Ahdar, a Professor of Law, is correct to state that the laws of a democratic society "should be less ready to protect people from vilification based on the voluntary life choices of its citizens compared to an unchangeable attribute of their birth".[64] Indeed, laws that make it illegal to voice a comment that may be regarded as "offensive" to any religious group inevitably create an undue form of blasphemy law by stealth. Such laws unreasonably compromise our freedom of political communication, a freedom derived from our system of representative government and implied in our federal Constitution. Otherwise, are we really willing to create in this country the crime of blasphemy that the Organization of the Islamic Conference (OIC) proposes?

Naturally, radical Muslims living in western democracies have to find different ways to punish legally those who "offend" their beliefs. They will find in religious anti-discrimination laws a suitable mechanism to strike fear in the hearts of the "enemies of the faith." Not surprisingly, Dr Aly's idea has obtained enthusiastic support from the Federation of Islamic Councils. The President of this Islamic organisation, Keysar Trad, stated: "Of course we need religious protection. Section 18C should be strengthened and broadened . . . so that Australians can go about their legitimate daily business . . . free from persecution on the basis of their religious affiliation".[65]

Although it is not clear why such religious people should merit any form of statutory protection, even the slightest criticism of the most appalling beliefs might result in someone being dragged into a court and accused of "religious intolerance".[66] This assumption was proven correct when one considers what took place in *Islamic Council of Victoria v Catch the Fire Ministries*[67] in

Victoria, an episode which illustrates the full potential for Islamic extremists to abuse these laws because they are reluctant to endure any criticism of their beliefs.[68]

Australians must be entitled to manifest their opinion as to why they might regard any aspect of any belief as ultimately mendacious, retrograde and mindless. There is no apparent reason why speech in respect of religious matters should not simultaneously be characterized as a constitutionally valid exercise of free speech according to the implied freedom of political communication. Religion is rarely a private matter alone and the very nature of religious speech is often intertwined with "political opinions, perspectives, philosophies and practices".[69] Hence, as Nicholas Aroney, a Professor of Law at the University of Queensland points out, law which prohibits religious vilification may very well infringe the implied right to freedom of political communication.[70]

Final considerations

Any speech, in order to be properly restricted by law, needs to cause actual harm to another person directly, such as inciting violence or riots on the streets, for example. If properly construed, anti-discrimination laws might be constitutionally valid in limited circumstances; otherwise, these laws are constitutionally invalid due to inconsistency with the implied freedom of political communication. These laws must be tested according to principles that leave sufficient room for the expression of values and beliefs that are politically relevant. This means that any legislative prohibition on freedom of speech must always be interpreted narrowly, and the exceptions are to be construed widely so as to leave enough room for a free communication of political ideas.

At the same time, to the extent that any law is not or cannot be interpreted in this particular way, there is a good

reason to believe that such law must be held constitutionally invalid. The court must have the courage to do so. After all, the High Court of Australia has constantly relied on the implied freedom of political communication to declare that a fundamental right to speak freely on public affairs and political issues is a foundation of our democracy. Assuming that this implies that political speech can only be suppressed if it is likely to cause immediate violence, any suppression of other forms of political speech amounts to a violation of the freedom of political communication derived from our system of representative government and implied in the Australian Constitution.

Endnotes

1. *Report of the Independent Inquiry into the Media and Media Regulation*, Chair: Raymond Finkelstein, 28 February 2012, <http://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf> ("Finkelstein Report"). For a critical analysis of the Finkelstein Report, see Joseph M. Fernandez, "The Finkelstein Inquiry: Miscarried Media Regulation Moves Miss Golden Reform Opportunity" (2013) 4 *The Western Australian Jurist* 23.

2. See Human Rights and Anti-Discrimination Bill 2012 (Cth) – Exposure Draft.

3. Ibid., clause 124.

4. Simon Breheny, "The Case for Changing Section 18C of the Racial Discrimination Act" (2014) 26 *Upholding the Australian Constitution* 113, 115.

5. Tony Abbott, "Freedom Wars", Speech delivered at the Institute of Public Affairs, Sydney, 6 August 2012, <http://www.justinian.com.au/storage/pdf/Abbott_FreedomWars.pdf>.

6. Ibid.

7. George Brandis, "Racial Discrimination Act", Media Release, 25 March 2014. <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>.

8. The then Prime Minister, Tony Abbott, commented: "When it comes to counter-terrorism everyone needs to be part of 'Team Australia' and I have to say that the Government's proposals to change 18C of the *Racial Discrimination Act* have become a complication in that respect. I don't want to do anything that puts our national unity at risk at this time and so those proposals are now off the table. This is a call that I have made. It is, if you like, a leadership call that I have made after discussion with the Cabinet today. In the end leadership is about preserving national unity on the essentials and that is why I have taken this decision". – Tony Abbott, George Brandis and Julie Bishop, Joint Press Conference, Press Statement, 5 August 2014 <https://www.pm.gov.au/media/2014-08-05/joint-press- conference-canberra-0>. See also Jared Owens, "Tony Abbott Dumps Planned Changes to Section 18C of Racial Discrimination Act", *The Australian* (online), 5 August 2014 <http://www.theaustralian.com.au/national-affairs/tony-abbott-dumps-planned-changes-to-section-

18c-of-racial-discrimination-act/story-fn59niix-1227014479772>; Emma Griffiths, "Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws", *ABC News* (online), 6 August 2014 <http://www.abc.net.au/news/2014-08- 05/government-backtracks-on-racial-discrimination-act-changes/5650030>.

9. Emma Griffiths, "Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws", *ABC News*, 5 August 2014, at http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030#comments

10. Tony Abbott, "What Went Wrong", *Quadrant*, April 23, 2016, at https://quadrant.org.au/opinion/qed/2016/04/tony-abbott-went-wrong/ See also: Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, "Indeed, Mr Abbott, Section 18C is 'clearly a bad law' ", On Line Opinion, 6 May 2016, at http://www.onlineopinion.com.au/view.asp?article=18212

11. Wayne Grudem, *Voting as a Christian: The Social Issues*, Grand Rapids/MI, Zondervan, 2012, 171.

12. Ibid.

13. Kent Greenawalt, "Free Speech in the United States and Canada" (1992) 55(1) *Law and Contemporary Problems* 5, 16.

14. Ibid., 170.

15. Joe Dolce, "Free Speech and the Stokie Case" (2014) 53 (7-8) *Quadrant* 32, 32.

16. Ibid.

17. Tim Wilson, "Insidious Threats to Free Speech", *The Weekend Australian*, April 5-6, 2014, at 17.

18. To be sure, the American founders would be quite horrified and outraged that their First Amendment's free speech guarantee has today been used by the Supreme Court to declare invalid, for example, laws that regulate obscenity and laws that protect children from indecent materials on the internet.

19. Ibid., 172.

20. Grudem, 181.

21. Grudem, 184.

22. R. Albert Mohler, Jr, *Culture Shift: The Battle for the Moral Heart of America*, Colorado Springs/CO, Multnomah Books, 2008, at 30.

23. Ibid., 31.

24. Kent Greenawalt, "Free Speech in the United States and Canada" (1992) 55 (1) *Law and Contemporary Problems* 5, at 5.

25. David Flint and Jai Martinkovic, "Give us Back our Country", Ballarat/Vic, Connor Court Publishing, 2013, 177.

26. Dan Meagher, "So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia" (2004) 32(2) *Federal Law Review* 225.

27. *Brutus v Cozens* [1972] 2 All ER 1297, at 1300.

28. Anna Chapman, "Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People" (2004) 30 *Monash University Law Review* 27, at 31-32.

29. The interpretation of these sections has been before the High Court on two occasions, being special leave applications in *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] HCA Trans 132 (19 March 2002) and *Bropho v Human Rights and Equal Opportunity Commission* [2005] HCA Trans 9 (4 February 2005). In the former the constitutional issue was never raised. In the latter, special leave was refused by majority, although Kirby, J, would have granted special leave partly due to the possible significance of the constitutional issues potentially raised by the case.

30. Anne Twomey, *Bills Digest: Racial Hatred Bill 1994,* Parliamentary Research Service, 14 November 1994, at 11.

31. Chris Berg, "Politics stands in the way of a full 18C repeal", *The Drum,* 25 March 2014.

32. Wibke K. Timmermann, *Incitement in International Law*, Routledge, 2014, 109–15.

33. Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Melbourne/Vic: Institute of Public Affairs, 2012, 176.

34. Tammy Bruce, *The New Thought Police: Inside the Left's Assault on Free Speech and Free Minds*, New York/NY: Three Rivers Press, 2001, 38.

35. James Spigelman, "Free Speech Tripped Up By Offensive Line", *The Australian*, 11 December 2012, at http://www.theaustralian.com.au/national-affairs/opinion/free-speech-tripped-up-by-offensive-line/news- story/288163b1d375540054144a39e3bb8cfd

36. Emma Griffiths, "George Brandis Defends 'Right to be a Bigot' Amid Government Plan to Amend Racial Discrimination Act", ABC News, March 24, 2014, at http://www.abc.net.au/news/2014-03-24/brandis-defends- right-to-be-a-bigot/5341552

37. Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong*, Connor Court, 2016.

38. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976 ("*ICCPR*").

39. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965,

660 UNTS 195, entered into force 4 January 1969 (*"Racial Discrimination Convention"*).

40. Human Rights Committee, *General Comment No 34*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) (citations omitted).

41. *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, 86 (Barwick, CJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 138 (Mason, J), 259–60 (Deane, J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 289 (Mason, CJ, and Brennan, J).

42. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

43. (1992) 177 CLR 106.

44. Ibid., 139–42 (Mason, CJ).

45. *Unions NSW* [2013] HCA 58 [28]-[29] (French, CJ, Hayne, Crennan, Kiefel and Bell, JJ); *ACTV* [1992] HCA 45; (1992) 177 CLR 106, 138 (Mason, CJ).

46. Ibid., 138-39.

47. *Unions NSW* [2013] HCA 58 [17] (French, CJ, Hayne, Crennan, Kiefel and Bell, JJ).

48. *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, 43.

49. (2004) 220 CLR 1.

50. Ibid., 54 [105] (McHugh, J).

51. Ibid.

52. Ibid., 78 [197] (Gummow and Hayne, JJ).

53. Ibid., 91 [239] (Kirby, J).

54. (2002) 212 CLR 1.

55. Ibid., 63 [171] (Kirby, J).

56. (2002) 212 CLR 1.

57. (2004) 220 CLR 1.

58. The conclusion that the low harm threshold under section 18C establishes a disproportionate "overreach" that is problematic from the perspective of the implied right to freedom of political communication under the *Australian Constitution* is examined in more detail in, for example, Asaf Fisher, "Regulating Hate Speech" (2006) 8 *UTS Law Review* 21, 43–5.

59. Chris Merritt, "Labor Eyes Extending 18C Complaints", *The Australian*, 23 March 2017.

60. Chris Merritt and Joe Kelly, "Move for Blasphemy Law Could Turns us into Saudi Arabia", *The Australian*, 29 March 2017.

61. Ibid.

62. Spigelman said: "The inclusion of 'religion' as a 'protected attribute' in the workplace, appears to me, in effect, to make blasphemy unlawful at work, but not elsewhere. The controversial Danish cartoons could be published, but not taken to work. Similar anomalies could arise with other workplace protected attributes, e.g., 'political opinion,' 'social origin,' 'nationality.' "

63. Ivan Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" (2006) *Public Law* 521, 531.

64. Rex Tauati Ahdar, " Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 *University of Queensland Law Journal* 293, 301.

65. Merritt, above n.58.

66. Pascal Bruckner argues on the great importance of criticising Islam: "The process of questioning remains to be carried out by Islam, which is convinced that it is the last revealed religion and hence the only authentic one, with this book directly dictated by God to his Prophet. It considers itself not the heir of earlier faiths but rather a successor that invalidates them forever. The day when its highest authorities recognize the conquering, aggressive nature of their faith, when they ask to be pardoned for the holy wars waged in the name of the Qu'ran and for infamies committed against infidels, apostates, unbelievers, and women, when they apologise for the terrorist attacks

that profane the name of God – that will be a day of progress and will help dissipate the suspicion that many people legitimately harbor regarding this sacrificial monotheism. Criticizing Islam, far from being reactionary, constitutes on the contrary the only progressive attitude at a time when millions of Muslims, reformers or liberals, aspire to practice their religion in peace without being subjected to the dictates of bearded doctrinaires. Banning barbarous customs such as lapidation, repudiation, polygamy, and clitoridectomy, subjecting the Qu'ran to hermeneutic reason, doing away with objectionable versions about Jews, Christians, and gains and appeals for the murder of apostates and infidels, daring to resume the Enlightenment movement that arose among Muslim elites at the end of the nineteenth century in the Middle East – that is the immense political, philosophical, and theological construction project that is opening up. . . . But with a suicidal blindness, our continent [i.e., Europe] kneels down before Allah's madmen and gags and ignores the free-thinkers." See Pascal Bruckner,*The Tyranny of Guilt*, Princeton University Press, 46-7.

67. *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510.

68. The outcome of this controversial case bears out concerns that tolerance laws might be used to silence any strong criticism based on religious beliefs. In June 2002 three Victorian Muslims attended a Christian seminar on the topic of Islam. These attendees did not disclose their identity and were encouraged to attend this meeting by a member of the Executive of the Islamic Council of Victoria (ICV) *and* employed by the Victorian Equal

Opportunity Commission, the Act's primary administrative body. Pursuant to a deliberate plan, each one sat in at different times in order to ensure that the complete event was covered. The case had clear elements of a "set-up", including a pre-arrangement by the Islamic Council of Victoria to send anonymous informants to a seminar held privately, followed by the coordinated lodgement of a formal complaint with the Victorian Civil and Administrative Tribunal (VCAT). In December 2004, pastors Daniel Scot and Danny Nalliah were found guilty of inciting religious hatred against Muslims in Victoria. The evidence of vilification, however, was not based on whether the attendees felt hatred or contempt toward Muslims, but whether those Muslim attendees, who did not reveal their faith and were technically not invited, felt offended by the comments made during the course of the seminar. These pastors were condemned to post an apology on their website and in four leading newspapers to the Muslim community, at the cost of $90,000. The advertisements would reach 2.5 million rather than the 250 individuals who attended the seminar. Of course, the respondents appealed the decision and two years later the Court of Appeal overruled the decision on the grounds of numerous errors of fact by the judge who decided on the matter. There was no re-hearing and the case was closed through mediation, meaning that a case that lasted five years and cost several hundreds of thousands of dollars to the defendants, reached its final conclusion without a clear winning side. See Augusto Zimmermann, " The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification laws are Contrary to the Implied Freedom of Political Communication Affirmed

in the Australian Constitution" (2013) *Brigham Young University Law Review* 457, at 461-468.

69. Adrienne Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *Melbourne University Law Review* 374, 386-387.

70. Nicholas Aroney, "The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation" (2006) 34 *Federal Law Review* 288, 313. See also: Neil Foster, "Anti-Vilification Laws and Freedom of Religion in Australia – Is Defamation Enough?" Paper presented at the conference, "Justice, Mercy and Conviction: Perspectives on Law, Religion and Ethics", University of Adelaide School of Law, 7-9 June, 2013, 14.