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Free Speech 2014

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free
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SYMPOSIUM PAPERS

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Message from the Commissioner



Tim Wilson
Human Rights Commissioner
Australian Human Rights
Commission

Free speech is essential for an open liberal democracy and society. It's the human right we use to defend our rights and freedoms. Being able to think and speak freely goes to the heart of individual autonomy and dignity. But it is also a human right we too often take for granted.

These are the reasons why the Australian Human Rights Commission (the Commission) held an important symposium – *Free Speech 2014* – on Thursday 7 August 2014 at the Aerial Function Centre in Sydney. As governments seek to legislate and regulate, they often limit the exercise of our freedoms in pursuit of otherwise worthy societal objectives, such as health, national security and social cohesion. It is important to take stock and reassess what limits exist and whether they are still justified.

Importantly, *Free Speech 2014* sought to reframe the discussion on free speech. Too often we debate the shortcomings of allowing freer speech. But it is important that we understand the merits of free speech as an end in-and-of-itself, as well as the broader benefit it provides to our society, economy and polity.

The symposium covered a number of core themes and unpacked the specifics. We are privileged to have heard from so many high calibre speakers from academia, business, government and civil society throughout the day. The input from attendees was equally important to drive constructive discussion and debate.

With approximately 160 people in attendance, the symposium proved successful in its overall aim of reframing discussion around free speech as a human right in Australia. More than 1000 people also accessed the event via captioned live streaming.

Particular thanks need to go to the AIMIA Digital Policy Group, the Attorney-General's Department, the Law Council of Australia and Sky News for supporting the conference. I'd also like to thank the Australian Human Rights Commission who organised and brought together this day, and also to the speakers who presented and provided wide ranging views and contributions.

This report is a collection of the presentations given by the various speakers at *Free Speech 2014*. These papers represent the views of the speakers, not the Commission. Whilst some minor edits have been made to the original transcripts, the Commission has maintained the integrity of the speeches as they were delivered on the day.

I sincerely hope you find this report challenging and interesting, and that it will prompt you to contribute to the important debate about free speech in Australia.

A handwritten signature in black ink that reads "Tim Wilson". The signature is written in a cursive, flowing style.

Tim Wilson
Human Rights Commissioner

1 Opening session

1.1 Emeritus Professor Gillian Triggsⁱ

President, Australian Human Rights Commission

Topic: Free speech and human rights in Australia

This will be an exploration of the nature of the right to freedom of speech and of human rights implementation under Australian law.

The timing of the symposium was impeccable. Over the last year we have had a national debate – termed the ‘freedom wars’ – prompted by an election promise to amend section 18C of the *Racial Discrimination Act 1975* (Cth), legislation the Australian Human Rights Commission administers through our complaints process. The key idea was to promote freedom of speech and restrict the current law prohibiting racial abuse.

Two days ago we learned that the proposed amendments to section 18C will not proceed. I both respect and welcome the decision by the Prime Minister. It is consistent with the submission of the Commission to the Government on the Exposure Draft and responds to the overwhelming rejection of the proposed amendments by the Australian community.

Instead, new laws will be introduced to respond to the terrorism threat that, it is feared, may be posed by Australians returning from fighting in the conflicts in Syria and Iraq. It is now proposed that to advocate the promotion of terrorism will be a new offence, retention of metadata for two years will be required, the burden of proof may be shifted to an accused in respect of new offences, the threshold for arrests without a warrant will be lowered and passports may be suspended. Seemingly overnight there has been a radical reversal of the public debate, from protection of the right to freedom of speech in our democratic, multicultural society to introduction of a suite of proposals to limit that right in the interests of national security.

It is accepted that freedoms are not usually absolute and there is no hierarchical order among them. It is the accommodation or balancing of freedoms that is central to understanding how freedom of speech and all human rights apply in practice. That is, for example, are anti-terrorism laws a proportionate measure to achieve a legitimate end? Can freedom of association be restrained to control criminal acts of ‘bikie’ gangs?

The current debate about freedoms has shone a welcome searchlight on how Australia protects human rights.

My task here is to provide a brief overview of Australian ‘exceptionalism’ in its approach to protecting human rights. By this I mean that relative to comparable common and civil law systems, Australia has adopted a multifaceted and unique regime for human rights protection. We have few constitutional or legislative protections for our traditional freedoms, such as freedom of speech or protection from arbitrary detention without trial. We have no Charter or Bill of Rights, unlike all other common law countries. For most legal systems, all domestic laws are viewed through the prism of the rights defined in either the relevant Constitution or legislative Charter or Bill of Rights. Australia has no regional court like the European Court of Human Rights or similar courts in Latin America, Africa and the Middle East. The consequence is that Australia is increasingly isolated from evolving jurisprudence and from the legal systems with which we share common values.

Despite this exceptionalist approach by Australia, it remains true that Australia has historically been a good international citizen. Australia has been closely engaged with negotiating the major human rights treaties that have evolved since Doc Evatt, as President of the United Nations General Assembly in 1958, successfully gained a unanimous vote for the *Universal Declaration of Human Rights*. But, and here is the fatal flaw in Australia’s regime for protection, most of these treaties have not been legislated by Parliament into Australian law.

The failure to implement the *International Covenant on Civil and Political Rights*, in particular, presents significant practical impediments for the realisation of fundamental freedoms in Australia such as freedom of speech and freedom from arbitrary detention.

ⁱ Prior to taking up her appointment as President of the Commission in 2012, Professor Gillian Triggs was Dean of the Faculty of Law and Challis Professor of International Law at the University of Sydney from 2007-12 and Director of the British Institute of International and Comparative Law from 2005-7. She is a former Barrister with Seven Wentworth Chambers and a Governor of the College of Law. Her focus at the Commission is on the implementation in Australian law of the human rights treaties to which Australia is a party, and working with nations in the Asia Pacific region on practical approaches to human rights.

In the absence of constitutional and charter based rights, how then has Australia, in practice, achieved a commendable human rights record?

The answer lies in a combination of elements:

- Culture built on a 'fair go', tolerance and equality of opportunity.
- Constitutional protection of the freedom of religion and interpretation of the Constitution to imply a freedom of political communication, as in *Australian Capital Television v Commonwealth*¹ in 1992 where a law prohibiting paid political advertising by a political party was held to be invalid. This is not, of course, the same as the right to freedom of speech in the sense, for example, of the U.S. First Amendment.
- Legislation dealing with specific issues such as fair trials, employment laws, landlord and tenant laws; and particularly anti-discrimination legislation on race, sex, disability and age, administered by the Commission.
- The role of our judges in developing the common law principles of legality and principles of statutory interpretation that presume that Parliament does not intend to violate Australian international obligations.
- Principles of administrative law that require due process and natural justice.
- The Parliamentary Joint Committee on Human Rights; the so-called 'Scrutiny Committee'.
- Complaints processes of the Commission and the advocacy work of its six commissioners.

While the High Court has stated that we are free except where Parliament passes a law to the contrary, the principle of freedom from government action has become hollow in our modern democracy – for Parliament so frequently covers the field with clear and unambiguous language that there is little room for any common law principles of statutory presumptions about fundamental freedoms.

The truth is that, without constitutional guarantees, the measure of our freedom of expression has become that which remains after all the laws that restrict the right have been taken into account. (*Al-Kateb*² illustrates this trumping of wider common law principles by Parliament where the *Migration Act 1958* (Cth) was interpreted to allow the executive to hold a stateless asylum seeker indefinitely as no other country would accept him.)

Every democratic society has recognised that there may be many restrictions on speech, including prohibitions on the planning of criminal acts and laws that restrict advertising, regulate political protests and prohibit treason. We have laws to protect privacy, to penalise perjury, or ban obscenity... But what about restrictions that prohibit copyright protections for 100 years, ban anti-abortion protesters in the vicinity of an abortion clinic, or prohibit advertising in residential areas?

These are not easy questions for a vibrant democracy such as ours to answer.

However, a useful way to think about laws that regulate freedom of speech is that they are designed to avoid harm or to assist in attaining a legitimate and important social goal. If we focus on what the freedom is for, it is easier to consider whether a regulation is a permissible limit on the freedom.

It is not always easy, in practice, to find an answer and the recent decision of the High Court in the *Monis* case³ provides a dramatic and controversial illustration. Here the accused used Australia Post to send letters to the families of Australian soldiers killed in the conflict in Afghanistan. The legal issue was whether the letters were protected by the implied right to political communication, in this case, to object to Australians fighting in that conflict.

The Court agreed that the operative principle was whether the law prohibiting use of the postal service to threaten another person was proportional to achieve a legitimate purpose. When it came to applying this principle to the facts the Court split 3:3, the three female judges concluding that the law was reasonably proportionate to the aim and the others finding that it was not, thus leaving the lower court conviction in place.

The 'freedoms debate' has exposed the weaknesses in Australia's exceptional and fragmented approach to human rights. If we are truly serious about securing the right to our fundamental freedoms in this country, as the Commission has consistently argued, we need comprehensive legislation to protect them.

It is time to reopen the public debate about a legislated form of human rights charter to ensure that neglected freedoms such as freedom of speech are better protected and that where the freedom is limited, we are in agreement upon principles by which to determine if the limit is fair, proportionate and reasonable.

I look forward to the discussions today and hope that it contributes to a balanced understanding of how freedoms are, and should be, protected in Australia.

1.2 Tim Wilsonⁱⁱ

Australian Human Rights Commissioner

Topic: Free speech stocktake

Reforming free speech laws will never be easy.

A uniting, not dividing, approach is needed to reform restrictions on free speech.

On Tuesday the Prime Minister announced the government would shelve its push to reform the *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act).

Section 18C of the Act makes speech unlawful if it offends, insults, humiliates or intimidates on the basis of race.

According to Tony Abbott, the debate had become a 'complication' in working in 'ever closer consultation with communities including the Australian Muslim community'.

Clearly the government decided to abandon its changes based on pressure from ethnic community groups. Discussion about the need for reform did not start well. The argument that people have 'a right to be a bigot' was neither the justification for reforming this law, nor is it accurate.

To be clear, there is a human right to freedom of thought and expression.

We use our freedoms to exercise these human rights. Freedom of thought is an unlimited right that ranges from the most wonderful to the most disturbing thoughts.

Freedom of expression, or speech, as it is commonly referred to, has a similar range but is restricted when speech conflicts with the rights of others, or causes explicit harm.

The justification for reforming the Racial Discrimination Act is because it encroaches too heavily on free speech.

One of the great myths was that there was not broad-based support for change.

Civil liberties groups, academics, lawyers, think tanks and people within ethnic communities acknowledge that the law should be amended. However, there was a diversity of views about how it should have been changed.

The diversity of support to change the law should not surprise. The provisions in the Racial Discrimination Act were preceded by three independent inquiries looking at how to tackle racism in Australia. None recommended the current law.

The first was the Royal Commission into Aboriginal Deaths in Custody. It recommended that there should be a federal civil offence against racial vilification, defined as speech that amounted to 'racial violence, discrimination or hostility'.

The second was the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence. Its report recommended the creation of a federal civil offence against 'incitement of racial hostility', 'an express prohibition of racial harassment' as well as a federal criminal offence against 'racial violence'.⁴

Third, there was the Australian Law Reform Commission's 1992 inquiry into Multiculturalism and the Law, which examined the issue of racial speech. This inquiry recommended a civil offence 'making incitement to racist hatred and hostility unlawful'.⁵

All three of these recommendations are significantly different from the current law we have.

The Parliamentary Library's Bill digest of the amendments to the Act put it best: 'It is often argued that these three reports are the basis for the Commonwealth's proposed legislation; however, the *Racial Hatred Bill 1994* (Cth) is in some respects completely contrary to the recommendations of these reports'.⁶

ii Tim Wilson was appointed Australia's Human Rights Commissioner in February 2014. Dubbed the 'Freedom Commissioner', Tim is a proud and passionate defender of universal, individual human rights. As Commissioner he is focused on promoting and advancing traditional human rights and freedoms, including free speech, freedom of association, worship and movement and property rights.

The Parliamentary Library also identified that the recommendations of the three inquiries 'involve(d) a high threshold of serious conduct', whereas the current law 'establishes a civil offence with the significantly lower threshold of conduct' based on whether speech offends, insults, humiliates or intimidates.⁷

The law was sufficiently controversial at the time of its introduction that even Greens senators opposed the law. But despite widespread support for changing the law, there has always been a diversity of views about how it should be changed.

Some argue that section 18C should be totally repealed because the sections necessary to deal with racial intimidation already exist in state laws.

Others, such as Monash University's Castan Centre for Human Rights Law, argue 'prohibitions on speech which offends and insults, even on the basis of race, go too far'.⁸ The Centre also argue that restricting speech that humiliated was a debatable point, but deferred to keeping it.⁹

Civil rights group Liberty Victoria argued in favour of simply removing restrictions on offending and insulting speech.¹⁰

The reality is that the law was controversial when it was introduced; it has been controversial in its operation and will continue to be controversial into the future.

The moment for reform clearly has passed, but lessons from the debate should not be forgotten.

In announcing the government's back down the Prime Minister appealed to the uniting idea that we should all be part of 'Team Australia'.

Yet the single most important reason for reforming the Racial Discrimination Act is a uniting one, not a dividing one. The single most important reason is to treat everyone equally under the law.

The problem with the Act is that it establishes legal recourse for offensive speech that does not apply to everyone. No provision exists to restrict speech that offends, insults or humiliates on the basis of gender, disability, age, sexuality or religion.

Yet, if we adopted the same standard for these groups, there would rightly be outrage. Opposition would almost certainly be mounted by many within culturally and religiously conservative communities that support the present wording of section 18C.

For example, if we made it unlawful to air offensive speech on the basis of sexuality it could restrict conservative religious preachers expressing their view that homosexuality is immoral.

Other existing anti-discrimination laws actually provide guidance to resolve this problem.

The *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) does not have anything like section 18C.

The Sex Discrimination Act has an uncontroversial provision that restricts workplace harassment on the basis of gender.¹¹

Ironically, the Racial Discrimination Act does not have a provision dedicated to workplace harassment. Instead the Racial Discrimination Act deals with it indirectly through section 18E that stipulates a 'vicarious liability' on employers to provide a safe workplace.

It would appear, in haste, the federal government's exposure draft to amend section 18C removed this provision under section 18E.

Yet workplace harassment could have been the basis for reform. There is no place for harassment in the workplace, racial or otherwise. A 'Team Australia' principle would have been to adapt a workplace harassment provision modelled on the Sex Discrimination Act.

From that basis the government also would have a body of uncontroversial case law to help interpret the provision. It then could have included a different public harassment provision that focused on intimidation.

On that basis a 'Team Australia' workplace harassment and public harassment provision could have replaced section 18C and appeased the vast majority of people concerned about racism and freedom of speech.

1.3 Professor Rosalind Croucherⁱⁱⁱ

President, Australian Law Reform Commission (ALRC)

Topic: ALRC Inquiry into Freedoms

I have been asked to speak today on the ALRC's newest inquiry. The Attorney-General, Senator the Hon George Brandis QC, has presented us with a wonderful project. It has two main tasks.

The first is to *identify* Commonwealth laws that encroach upon traditional rights, freedoms and privileges – such as freedom of speech, freedom of religion, and the right to a fair trial, with prosecutors rather than defendants bearing the burden of proof.¹² The Attorney has asked for a Domesday Book – a catalogue or survey of Australian law. (The Domesday Book was the great survey, completed in 1086 at the direction of William I 'the Conqueror', of the size and value of each English landholder's land and livestock – to establish the tax base to support his defence of his new kingdom.)

The second task we have is to critically *examine* those laws to determine whether the encroachment is appropriately justified. We have been asked to focus, but not limit our work, to three areas: commercial and corporate regulation, environmental regulation, and workplace relations.

Challenging? You bet. Interesting? Absolutely! We are calling it 'the Freedoms Inquiry'.

My interest in freedom as a concept in law

An inquiry like this draws upon both my own work in classical liberal thought and also a number of recent ALRC inquiries. It raises difficult questions of how fundamental rights and freedoms should be balanced in liberal democracies. I am a legal historian, with a particular interest in property law. Some years ago I wrote a doctorate on testamentary freedom, which naturally required a philosophical exploration of ideas of freedom in liberal thought. In the late 17th century, the great English philosopher John Locke thought about freedom and what it meant in the context of ideas of property. He said that:

Freedom is not, as we are told, a liberty for every man to do what he lists... but a liberty to dispose and order, as he lists, his person, actions, possessions and his whole property, within the allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.¹³

In my doctoral work I grappled with the idea of testamentary freedom as essentially reflecting a balance – between ideas of family and ideas of property – as expressed in laws.¹⁴ It was also about prepositions; 'freedom' is neither an abstract nor an absolute concept. It is about freedom 'from' and freedom 'for'.

The concept of 'testamentary freedom' or 'liberty of testation' was propelled by the same philosophical discourse that led to the ascendancy of concepts of freedom of contract and laissez-faire economics and was part of the 'liberty to dispose... what he lists' in Locke's thinking. Each expressed the idea of freedom from state control in favour of the power and choice of the individual. Locke was the English champion of the shift towards individual rights of property away from control of the King and feudal property structures. And it was Locke's advocacy for the protection of citizens in their 'lives, liberties and estates' that has formed the basis of modern discussions of freedom of property and individual rights. 'The end of Law', he stated, was 'not to abolish or restrain, but to preserve and enlarge freedom'.¹⁵ And it was his ideas that justified parliamentary supremacy over absolute monarchy in the 'Glorious Revolution' of 1688.

I could talk about this at considerable length, but this is not my task today. It does explain why I found the Attorney's inquiry both of great interest and a great challenge.

ⁱⁱⁱ Professor Rosalind Croucher was appointed to the ALRC in 2007 and President of the ALRC in 2009. Prior to this she was Dean of Law at Macquarie University from 1999-2007, where she still holds a Chair. At the ALRC, Professor Croucher has been the Commissioner in charge of seven inquiries and is currently leading the inquiry into legal barriers for people with disability in Commonwealth laws and the ALRC's new inquiry into provisions in Commonwealth laws that unreasonably encroach upon traditional rights, freedoms and privileges. Her paper was prepared with considerable assistance from Jared Boorer, Acting Principal Legal Officer at the ALRC.

Free speech in recent ALRC inquiries

Freedom of expression is one of the freedoms the ALRC is asked to consider in the Freedoms Inquiry. Although we will be looking at this freedom in a new and broader context in this Inquiry, this is by no means the first time the ALRC has had to consider freedom of speech. Reviewing some of the ALRC's recent law reform projects, I was surprised how frequently the ALRC has had to consider the importance of the right.

Perhaps unsurprisingly, we have often needed to 'balance' freedom of expression with other rights and interests. Rights will of course sometimes conflict with each other. Few, if any, rights are absolute. It's part of that approach signalled by Locke, namely that liberty sits within 'the allowance of laws' – or as the Privy Council said in 1936, 'free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law'.¹⁶ It therefore seems inevitable that freedom of expression will sometimes need to be 'balanced' with other interests.

I thought I would take this opportunity to highlight a handful of inquiries in which only recently the ALRC has had to think about how free speech might be weighed against other interests.

Privacy

Freedom of expression arose most recently in the ALRC's inquiry into how Australia's laws can be reformed to better prevent and redress serious invasions of privacy. The final report was completed in June, and is now with the Government, so I won't speak about our conclusions until it is made public through tabling in Parliament. But it will hardly surprise anyone that we heard many concerns that the introduction of a new cause of action for serious invasion of privacy would damage free speech. Media freedom in particular, we were told, would be undermined, if the media feared being sued for invading people's privacy. In designing the cause of action, as we were required to do under our Terms of Reference, the ALRC was constantly mindful of the need to ensure that free speech would not be unduly undermined.

In the United Kingdom, courts now explicitly balance privacy and free expression when determining whether a person has a cause of action for misuse of private information. The need for some sort of balancing exercise partly follows from the fact that both privacy and free expression are recognised as fundamental rights under the UK's 1988 (UK) (Human Rights Act).

An important case that marked a significant shift in the UK law on this point concerned, in the words of one of the Lords Justice, 'a prima donna celebrity' and 'a celebrity-exploiting tabloid newspaper'. In 2003, the House of Lords decided that although there was an important public interest in free expression and a free press, this did not mean that a newspaper could invade the privacy of the model Naomi Campbell by taking and publishing photos of her leaving a Narcotics Anonymous meeting. Interestingly, in coming to this conclusion, some of the justices discussed the relative merits of different types of speech. Baroness Hale said that there are 'undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others'. 'Top of the list', she said, 'is political speech'.

The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all.¹⁷

Political speech may also be 'top of the list' in Australia – at least, it is the type of speech that is most clearly protected by the Australian Constitution. But in designing a cause of action, we were also mindful of the need to protect other types of speech, including artistic expression.

It is interesting to compare the balancing of privacy and free speech that we now see in the UK courts since the enactment of their Human Rights Act, with the position in the United States. The law in the United States has recognised various causes of action for invasion of privacy for some time now, but some say the legal protection of privacy is often made impotent, because free expression is so fiercely protected in that country – protected not only legally, enshrined as it is in their Constitution, but also it would seem culturally.

It is also worth stressing that privacy and free expression do not always – much less *necessarily* – clash with each other. Rather, respecting a person’s privacy should more often than not give that other person the space to speak and act freely – and therefore, *promoting* free expression. There are no doubt exhibitionists who will comfortably be themselves in the Big Brother house for weeks on end, able to ignore the cameras and the fact that their every word is broadcast to the nation. But I imagine many of us would be fundamentally different people – and speak and act much less freely – if we lived under such conditions. Even the mere *fear* of public exposure can have a stifling effect on freedom of expression. Not knowing whether a camera in our lounge rooms is turned on, or whether one’s emails might one day be read, or whether the history of one’s internet browsing might one day be publicly revealed, can no doubt make us less free.

Where privacy and free speech do conflict, finding the right balance between them will, I think, only become more pressing in the future. The UK phone-hacking scandal perhaps suggests that beyond a certain point, invasions of privacy will not be tolerated by the public – even in the name of a free press.

Copyright

Freedom of speech also arose in the ALRC’s recent copyright inquiry.¹⁸ In the final report, we recommended the enactment of a fair use exception to copyright laws. By allowing the use of other people’s copyright material without permission or payment in some limited circumstances – when fair – this U.S. style exception to copyright infringement can allow people to use books, films, music and other material in the creation of new books, films, music and other works. Whether one supports the introduction of this contentious exception or not, it seems clear that overly confined or restrictive copyright laws can risk stifling free expression.

However, it is also important to stress that strong and enforced copyright laws are necessary to properly stimulate and reward creative expression. Many writers, artists, film makers and others might not create at all, if they cannot expect to be paid for their work, or to have some control over how their work is used. The ALRC was mindful throughout the copyright inquiry that both overly *permissive* copyright laws can undermine this incentive to create, and so inhibit free expression.

One might ask how Mozart would have fared today in writing his 12 variations in C Major K.265 – variations on ‘Twinkle Twinkle Little Star’. It’s not quite ‘Kookaburra sits in the old gum tree’, but analogous? Or Shakespeare in writing *As You Like It* – which owes much to a novel of Thomas Lodge, including all the main characters.

Censorships

Censorship laws perhaps more directly affect freedom of speech. In 2012, the ALRC completed a review of Australia’s censorship laws with the publication of the report *Classification – Content Regulation and Convergent Media*.¹⁹ The report recognised that classification standards should only be changed after carefully considering community standards, and our inquiry was largely focused on the framework of classification laws, but we nevertheless received enough submissions and community input to recommend that the Government at least consider the scope of the (oddly-named) ‘Refused Classification’ classification. This is the material that is essentially banned throughout Australia, and some people told us that the scope of the category was probably too broad.

Secrecy

In December 2009, the ALRC published the report *Secrecy Laws and Open Government in Australia*.²⁰ In this inquiry we considered, among other things, when public servants can be expected to maintain confidences. By restricting Commonwealth officers and others from communicating government information, secrecy laws can limit freedom of expression.

One interesting case that we considered concerned the now repealed regulation 7(13) of the *Public Service Regulations 1999* (Cth), which provided that an Australian Public Service (APS) employee must not, without the appropriate permission, ‘give or disclose, directly or indirectly, *any* information about public business or *anything* of which the employee has official knowledge’. Finn J of the Federal Court held that the regulation was inconsistent with the freedom of political communication implied in the Australian Constitution, and declared the regulation invalid. It burdened freedom of political communication and was not reasonably appropriate and adapted to serve a legitimate end compatible with maintaining the Australian system of representative and responsible government.

Finn J of the Federal Court held that, while there may be public interests or 'legitimate ends' that justify the burden that secrecy provisions impose on freedom of political communication – including national security, cabinet confidentiality, protection of privacy and the maintenance of an impartial and effective public service – a 'catch-all' provision that did not differentiate between the types of information protected or the consequences of disclosure went too far. 'Official secrecy has a necessary and proper province in our system of government', Finn J said, but a 'surfeit of secrecy does not'.²¹

The regulation was later repealed and replaced with another regulation that was limited to situations in which it is reasonably foreseeable that the disclosure of official information could be prejudicial to the effective working of government.

Other inquiries

There are quite a number of other examples of ALRC inquiries in which we have considered freedom of speech, including a 2006 report on sedition laws²² and a 2004 report on *Classified and Security Sensitive Information*.²³ If a broader view is taken of freedom of expression – and we were to consider laws more generally that affect people's *capacity* to speak freely, to live the sorts of lives that give some of us the freedom to speak – then other law reform projects might also be mentioned. For example, we have in recent years completed two inquiries about family violence;²⁴ and we are in the final stages of completing a report on disability and capacity.²⁵

Conclusion

Rights are rarely absolute and will sometimes conflict with each other. Few think that free speech is an absolute right. The *International Covenant on Civil and Political Rights* recognises that free speech carries with it special duties and responsibilities, and may be subject to restrictions – but only when necessary and as provided by law.

But the fact that few rights are absolute is not a good argument for too readily diluting one right in the name of another. Lord Hoffmann once said that one will find in the law reports 'many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word "nevertheless".' He went on to say that:

Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible.²⁶

It seems inevitable that freedom of speech must at least sometimes give way to other interests, but there is little point in calling it a right, if exceptions and excuses are found too easily. It is indeed a difficult challenge.

In the Freedoms Inquiry we will once more tackle this conundrum, as we identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges. We will produce an Issues Paper by Christmas and a Discussion Paper mid next-year – with lots of consultations and opportunities for submissions – concluding in a final report at the end of next year. We will convene an advisory committee of experts, consult widely, and of course engage with the Australian public, including through online forums.

The Attorney has suggested that he wants 'a Domesday Book, not a Magna Carta... a source of data, in other words, rather than a philosophical or a jurisprudential discussion'.²⁷ We won't end up with the Articles of the Barons signed by King John at Runnymede in 1215, which in its own way was a precursor to the Glorious Revolution of 1688, but in ending up with recommendations about when encroachments upon traditional freedoms are appropriate, we are likely to end up with a 'charter' of some kind.

What I can promise is that I will not paint my face blue, nor will I bare my bottom (in a William Wallace/Mel Gibson aside, prompted by his famous cry, 'Freedom!' as he led his force into battle against the English in 1297). When we first received the terms of reference I made this assurance to the excellent team at the ALRC. On further research, however, I discovered that Boadicea, Queen of the Iceni, also adopted the blue painting strategy and her example is quite inspiring. Apparently the Iceni were well known for using woad on their bodies before going into battle. Apart from looking rather intimidating, it was sensible as woad is an effective antiseptic and it may have been used to help heal battle wounds.

There will be lots of opportunities for involvement and I would encourage you all to do so. All ALRC inquiries start with lots of questions, never any answers and it will be a lively conversation especially throughout next year.

Onwards and upwards – as both William Wallace and Boadicea may well have said, blue-faced or not!

1.4 Andrew Greste

Brother of jailed journalist, Peter Greste

Topic: The human cost of restricting free speech

It is, of course, an irony and a consequence of the direct impact of free speech suppression that I'm here and my brother Peter is currently locked up in an Egyptian prison serving a seven-year jail sentence on terrorism related charges, and charges of spreading false and misleading news.

I don't usually find myself in front of a camera or a microphone. I am not a journalist and by no means an expert on free speech. I am a cotton and grain farmer from Wee Waa in north-west NSW, but I'd like to share with you my experience and the impact his arrest has had on our family.

Peter's arrest and incarceration has taken me to places a long way from home and away from the introverted lifestyle I normally lead. I have actually skipped out of a cotton conference being held in Queensland to be here, but obviously, at the moment, Peter's case has taken a very high priority in my life and the life of my brother Mike, and our parents, because we believe in Peter's innocence. He has no axe to grind or political agenda to push, which was often demonstrated in the way he conducted himself professionally, and the way he presented the stories he covered. We continue to fight for Peter's release because we believe in his innocence and feel we cannot leave a stone unturned in the campaign for his release.

I have had to try and get an appreciation for the art of diplomacy and foreign relations, putting myself in front of the media, and trying to relate our story in an honest way that does not jeopardise Peter's ongoing legal case. As a family, we have tried to present ourselves in the media in a way that does not impact on our ability to retain a physical presence in Egypt, with at least one family member always being on the ground. We have all wanted to maintain our dignity, try to accept the situation we are in, and work within a system that is foreign and very difficult for us to fully understand in terms of the existing cultural and moral differences.

I am sure most people are aware of Peter's case but here is a quick recap: he was arrested on 27 December last year and formally charged at the end of January. After 13 court sessions, where Mike and I were in attendance, on 23 June he was sentenced to seven years in prison. During this six-month period of court sessions, he was held in a small cell with his two colleagues for 23 hours a day, and for quite a few months without reading and writing material of any sort. As a family, we were not prepared for such a severe sentence and as you can imagine, it took a little time for everyone to re-group and think about the situation rationally. He has now decided to appeal the court's decision and the next step is for the appeal documents to be lodged, and the first appeal hearing date to be set.

Peter continues to remain mentally and physically strong and has been conscious of looking after himself. An Egyptian prison is not a place where you want to get crook. My brother and I have been visiting him regularly on a weekly basis since the middle of February – family visits, along with consular visits, being his only other source of contact with the outside world. He has very limited access to his legal representatives. Through this experience Peter has come to the realisation that he is powerless to fight from within. The number one priority for him has been to ensure this ordeal does not break him mentally, and to rely on those of us outside to fight the fight for him.

The challenge we face in seeking Peter's release has been – is being – fought on a number of fronts – legally, politically and publicly.

As a family we have felt our most effective role in this has been to try and keep his case in the media to maintain public pressure for his release.

We did not want to be months into his incarceration and have the case forgotten. We are not diplomats or politicians, and have therefore left this sometimes intangible art of cross-cultural diplomacy to the leaders and diplomats of our respective governments. I would like to thank both the Australian Government and the Latvian Government, as Peter is also a Latvian citizen, for their work in this area. It has been an effort conducted privately and behind the scenes and quite often has to go unnoticed, but we are truly grateful.

I am speaking on Peter's behalf, but I am sure he would gratefully ask for the following important messages to be passed on. Throughout his professional career, the idea of a constitutionally enshrined press freedom was an abstract, an idealised principle that he understood to be a fundamental legal cornerstone of both his trade and the wider concept of a free and open society. This only really existed in the realm of the constitutional courts and human rights conferences, and up until now he really took press freedom for granted.

After eight months in an Egyptian prison he now knows this attitude to be dangerously naïve, and that press freedom is a fragile thing, with deeply personal consequences when it gets broken.

It is also a painfully tangible thing to the families of journalists who are arrested, kidnapped and killed every year. While in Egypt, Peter and his colleagues were not doing anything particularly controversial. They were working as any responsible journalists would in covering a complex and somewhat messy political situation, and I quote, 'with all the accuracy and fairness that our imperfect trade demands'. They are not the only journalists who remain behind bars. There are many others who are often held in horrible conditions – out of sight – without the benefit of global pressure. That is why Peter believes it isn't enough to simply talk about press freedom; it must be defended loudly and vigorously in courts, in the streets and in the media.

If they are eventually acquitted, it will not only be a victory for press freedom, but also for the authorities who placed them there who will have achieved some of their objectives. Simply by arresting them they are warning journalists that contact with the political force of the previous government in Egypt could put you behind bars. And this is in a country that only in January celebrated a new constitution that enshrines some of the world's most pious commitments to free press. Peter's experience is then only unique in showing how quickly and dramatically arrest can happen.

Peter has also learnt that as journalists they have a duty of care, and responsibility to defend their craft to the highest level of professional integrity.

Throughout the course of the trial, investigators have searched their work for the slightest error of fact, slip of judgement, or example of bias that might support the claim that they were supporting the Muslim Brotherhood.

All three of them are very proud that investigators have found nothing. We have seen nothing presented in court that is remotely incriminating and importantly, this could be the difference between liberty and extended incarceration.

If this is the case in Peter's trial, it is similarly true in the arena of public opinion. When journalism gets sloppy and loose with the facts, when the medium becomes a pulpit for partisan politics, you lose the moral high ground and cracks appear in the ramparts used to defend your rights.

So when professional ethics slip, it gives those who wish to lock up journalists an excuse to do so.

And finally, Peter and the rest of our family are eternally grateful and humbled by the support we have received worldwide. Knowing there is huge support and interest in their case has helped lift them all, and us, his family, through our darkest times.

Being directly involved in and affected by the case, I have been exposed to the life of a foreign correspondent. I have come to understand some of the pressures, the dangers and risks taken in carrying out their day-to-day work to bring us news from around the world. The experience has certainly given me a new appreciation for the work of Peter and his colleagues and I am truly grateful for the assistance given to me by many of the journalists who have covered the story.

Seeing him locked in the defendants' cage dressed in white during each court session has been hard, and knowing the conditions inside the prison he endures has been difficult. If I focus on those aspects it becomes overwhelming, so instead, I think about him as my big brother, and focus on his dignity and strength.

These character traits of his have been inspiring to me and something I have tried to emulate through this continuing ordeal. His behaviour also demonstrates Peter's remarkable spirit and ability to adapt to adverse situations and conditions. He said to me during a prison visit that if he was told he would have to endure seven months in a confined cell with one hour out a day, extended periods without books or reading and writing materials, he would not have thought it humanly possible for him to cope; however, he has done so with dignity and humility, and has remained strong throughout. Obviously he has gone through some dark patches that he has had to work hard to overcome – but overcome them he has. Thankfully they are not prolonged and are not very often.

Of course, the impact on our family has been immense. My brother Mike has spent over two months in Cairo this year; I have spent nearly three months; Juris and Lois, who are in their late seventies and retired, are going into their second month. Mike and I both have wives and children who have been immensely supportive and also actively involved in the case. We also have fulltime jobs but have also had wonderful support from our employers who have shown a great deal of understanding. A family member has been in Cairo supporting Peter since mid-February. We have felt it important to do this as the visitation rules only allow immediate family members to visit, and it is an important communication link for Peter to the outside world, to his friends and family, and to legal representation.

While in Cairo we also try to get Peter various household items he requests – those which are allowed – to make Egyptian prison life a little more bearable.

I remember doing a phone interview with a journalist back in January and this particular journalist asking me what my motivation was for speaking out about Peter's case and what my hopes were. I remember answering that I wanted people to know about Peter's plight because I didn't want to be six months down the track with Peter still locked up and nobody knowing what had happened. Well, unfortunately, we are now eight months into this ordeal and Peter is still there. But now the case has become widely publicised, and thankfully, there has been a great deal of international as well as local attention given to his cause.

Please visit www.freepetergrete.org where we will update and provide current information about Peter's case, and what we are doing.

Please follow us on social media – on Twitter @petergrete – managed by Mike, and the 'free Peter Grete' Facebook page which has been wonderfully managed and updated by Mike's wife Nikki and my wife Kylie.

Peter has not sought the limelight – may his story, his truth, showcase his ability to let free speech shine.

2 Accommodating Rights (Session 1)

2.1 Chris Berg^{iv}

Director of Policy, Institute of Public Affairs

Topic: Free speech in a liberal democracy

Australia is a liberal democracy and liberal democracies are founded on freedom of speech.

This was the intuition behind the High Court's discovery in the early 1990s of our implied right to political communication.²⁸ That right, in my view, is deeply inadequate.

But for our purposes today, I'll point out that the right to political communication isn't really a 'right', *per se*, at least not in the way that we are used to speaking about human rights: as universal, based on fundamental moral principles, and innate to our personhood.

It's a more of a pragmatic legal workaround to a basic contradiction in Westminster government.

The Parliament gets its legitimacy from the fact that it is freely chosen by the conscience and debate of free citizens. But the Parliament is able to write laws that determine the rules under which that debate may be conducted and what consciences may be publicly expressed.

Then again, if the right to political communication is all we are offered, I'll take it.

Today I want to do two things. First, I want to briefly lay some foundations for the right to freedom of speech. These foundations are philosophical. You might even say ideological.

The last three years of free speech debate, beginning with the Andrew Bolt case, has been an ideological one, as it should be.

Pretending that free speech is just a matter for lawyers to negotiate competing rights claims in court – or, worse, for human rights technocrats to arbitrate between different international human rights 'instruments' – is to pay lip service to human rights.

Human rights are fundamentally political claims.

Second, I'll connect these principles to a few examples of what I consider to be the more interesting and concerning limitations on free speech today.

The great American legal academic Lee C. Bollinger once wrote that 'free speech is not just a practical tool for making systemic repairs, but an affirmation of what we value as a people'. He went on, 'the reason we shelter speech is as important as the speech we shelter'.²⁹

The popular free speech debate is mediated through a thicket of metaphors and analogies. One of the most common is that one cannot falsely shout fire in a crowded theatre.

It is astonishing anybody still uses this metaphor: it was conceived as a justification for the suppression of socialist anti-war dissent during the First World War. The 'crowded theatre' was the American war effort. To falsely shout fire was to contentiously object to that war.

If we insist on the use of metaphors to determine our ideas of free speech, then it is hard not to see the stubborn persistence of the crowded theatre as itself a metaphor for the way free speech limitations are almost always defences of the power of the state.

Freedom of speech is, ultimately, the outward manifestation of the deeper freedom of individual conscience, of thought.

It is our thoughts – our preferences, our ideas, our faiths, our internal differentiation from the collective – that make us individuals, that make us human. A recognition of that forms the basis of pluralistic liberal democracy.

^{iv} Chris Berg's latest book is *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*. He is a regular columnist with ABC's *The Drum*. A monograph, *The Growth of Australia's Regulatory State*, was published in 2008. He is also the editor of *100 Great Books of Liberty* (with John Roskam) published in 2010 and *The National Curriculum: a Critique* in 2011.

Free speech is not a tool to make the state function better, as the High Court's reasoning suggests it is. Rather it is fundamental to our individual moral autonomy.³⁰

I understand that's a bit wishy-washy. But talking about principles seems to be more productive than the opposite: the philosophically empty busy-work that constitutes most debate about human rights in Australia today – that is, measuring Australian law against international treaties and identifying where the two differ.

And on these principles Australia has a massive freedom of speech problem.

Our defamation laws are heavy-handed and have a demonstrable chilling effect on speech. Our sedition laws are excessive. Our classification scheme is effectively a censorship scheme.

Our communications regulator believes that its job is to adjudicate whether speech on radio and television is sufficiently balanced.

We were told that the federal government abandoned the internet filter a few years ago, but section 313 of the *Telecommunications Act 1997* (Cth) operates exactly as opponents of the internet filter feared Labor's policy would.

And last week we learned that a super-injunction can prevent us discussing the absolutely scandalous foreign activities of the most important economic institution in the country – a super-injunction that we are told is necessary to protect national security. Of course it is.

The bottom line from that super-injunction is this: I am unable to discuss the unlawful activities of a government department at a national conference on free speech.

Let me briefly mention a few policy proposals on the cards that have substantial free speech implications.

First is the government's proposed Children's e-Safety Commissioner. They will have the power to delete material from social media sites – the phrase is 'rapidly takedown harmful material'. Bullying is a serious issue. But the proposal will offer no material benefit to children who are being bullied. It is a strong example of how moral panics ultimately manifest in attacks on speech.

Second is the proposed anti-copyright infringement scheme, which would allow courts to block – that is, censor – overseas websites from being accessible in Australia. Once again, how does this differ from Labor's reviled internet filter proposal?

Finally it is worth dwelling on the new frontier in freedom of speech restrictions – government surveillance.

The sensation of being watched – and the fear that private speech or expression is going to be recorded or scrutinised – makes people more reserved and less willing to participate in discussion. As one significant study concluded, 'the threat or actuality of government surveillance may psychologically inhibit freedom of speech'.³¹

This is something to reflect on since the federal government announcement that it was seeking to require internet service providers to retain records of their customers' internet activity for two years.

What websites would you be reluctant to visit if you knew that they were going on your two-year activity record at your Internet Service Provider (ISP), for any of Australia's dozens of law enforcement agency or regulators or quasi-judicial bodies to trawl through years later? What would you decide not to read, or watch, or look at in the privacy of your home? What links would you regret clicking? What emails would you avoid sending?

Mandatory data retention is, and will be, a truly repressive attack on free speech. That's even before we start talking about its privacy implications. Or its cost.

The Abbott government came to the 2013 election promising to pursue what it described as a 'freedom agenda'. In August 2014 it also announced that it was abandoning its promise to repeal section 18C of the *Racial Discrimination Act 1975* (Cth). Apparently it would be too divisive to restore, in some small way, free speech, while introducing a policy, data retention, that will suppress free speech.

This is incredibly disappointing. So what is left of the freedom agenda?

For my organisation, the Institute of Public Affairs, and its thousands of individual members, section 18C is still an iconic and unambiguous limitation of free speech. We will continue to fight to repeal it, whether under this government or the next.

The Roman historian Tacitus defined the essential attributes of free Roman citizenship as one who 'can feel what we wish and may say what we feel'.³²

Without such liberties, liberal democracy is weak, and our human rights are without protection.

2.2 Dr Roy Baker^v

Macquarie School of Law

Topic: Does defamation law deserve ridicule?

The title that my paper has been given, not by me, is ‘Does defamation law deserve ridicule?’ It depends what we are talking about. If we are talking about the traditional common law cause of action, then if it doesn’t deserve ridicule, it deserves heavy reform.

In just about every common law jurisdiction across the world, each jurisdiction has seen the need to heavily reform the common law already. Normally that is done with a view to meeting the requirements of the Constitution or international obligations. In the case of the UK, it has been necessary to reform it with the *European Convention on Human Rights* in mind, while the United States had to take into account the First Amendment.³³

So many of the concerns we have taken into account so far have related to the right of free speech. This may be odd to say at a conference on free speech, but I think it behoves the free speech lobby to pay due regard to two things. One is the right to free speech, the other the right to reputation.

We should be guided by the interesting and I think productive new jurisdiction coming out of the European Court of Human Rights. But we have to be careful about distinguishing reputation as dignity and reputation as property.

When I talk about reputation as dignity, what I am alluding to is the type of defamation which goes to the heart of personal integrity and the dignity of the individual, as opposed to the reputation which is regarded as a property right, where the law should be far less protective.

What I am suggesting then is that first of all we should have due but measured regard to the right to reputation. The second one is that we have to have clear regard for the right of access to justice.

I can no longer see any merit in restricting legal aid when it comes to defamation litigation.

The fear, of course, is that by extending legal aid in order to create a level playing field between plaintiff and defendant, we are going to open the doors to a floodgate of litigation.

So what we need to do is vastly simplify defamation law so it is no longer the playground of the defamation lawyer. In fact, the rule of thumb I would take is that any aspect of defamation law that I have to explain to my student three times requires very careful consideration and reform.

One of the most useful reforms I think could be made of defamation law is scrapping the ‘single meaning’ rule. This is the legal fiction that any publication can only have one meaning.

There was a time when New South Wales had a ridiculous approach to defamation law, which thought that imputations could somehow be scientifically extracted from the publication and could be considered in abstract. We have to move away from that kind of pseudoscientific linguistic exercise and accept that reasonable minds can vary as to what publications mean.

By getting rid of the ‘single meaning’ rule, we open the door to what would be the single best way of dealing with the increase of defamation that we might expect if we extend legal aid to the plaintiff and the defendant.

Defamation law should be modelled around the right to clarification. So when the complainant claims that a publication bears a particular meaning, there should be the right for the defendant to say, ‘That is not what I meant. This is the meaning that should be given to the publication.’ And that should be the end of the matter as long as the clarification is a meaning which the original publication is reasonably capable of bearing.

What I have in mind is a right to clarification, as opposed to a right to correction. But informally, we could imagine that a right to clarification could easily be taken as an opportunity for the defendant to backtrack without losing face.

^v Raised in England, Dr Roy Baker worked for ten years at the BBC in London, both as a lawyer and program maker. He later moved to Sydney, becoming Project Director of the National Defamation Research Project. Roy joined Macquarie Law School in 2005, teaching across various areas of Australian, international and European law, as well as jurisprudence.

So to some extent the clarification might actually consist of the defendant who realises he or she has overstepped the mark, backtracking a little bit to save face, thus preserving the dignity of both sides.

I should also stress the right to clarification would require that the clarification is given promptly and with due prominence. The law would have to start to get serious about imposing that requirement of due prominence.

What I am hoping is that in most situations, having clarified the original offending publication, that would be the end of the matter. But there will still be situations in which the plaintiff, the complainant, will still feel that their reputation has been damaged. And in that situation, the matter may need to progress to litigation.

If it does, litigation will be based on the original publication read in the context of the subsequent publication so that the law of defamation would focus far more on discursive remedies, rather than the current system whereby reputations are compensated in monetary fashion. We move to a speech remedy, which is an argument that the free speech lobbies have been making since the beginning of time: that the remedy to bad speech is more speech.

There are going to be situations where the defendant realises they made an innocent mistake, in which case we need a right to correction. A correction should cover the defendant as long as it is published with due prominence and promptly.

That only leaves us with those situations where the plaintiff feels that the publication arises out of negligence, malice or recklessness. We still need a defence of truth. I think in that area, I wouldn't substantially change the law.

We probably need to distinguish between statements that can be properly regarded as statements of fact that have to be proved, and publication of statements that can be appropriately regarded as statements of subjective opinion.

All I would suggest there is tidying up Australian law more in line with the way in which honest opinion is now dealt with by the English *Defamation Act 2013* (UK) (Defamation Act).

Finally, we need a public interest defence. It is difficult for an Australian citizen with an English accent to so heavily sell the Defamation Act from the UK. But I would sell section 4. I think this section of the English Defamation Act has more or less got it right. It is a defence where the defendant had reasonably believed that the publication was in the public interest – you can strip it down to something as simple as that: did the publisher reasonably believe that they were publishing in the public interest?

Finally, we need to retain defences of privilege, probably extending them to cover scientific and academic discourse. Without doubt, we need to introduce a single publication rule so that we get away from this nonsense idea that every time a website is downloaded then that constitutes a fresh publication.

That has certainly been introduced in the United Kingdom. The act of publication should be publication as it is understood in the mainstream. When you upload to the website, that is the moment of publication.

We need to move to trial by judge alone. I don't see any need for a jury. It needs to be a streamlined defamation system.

The final thing that I might mention is the question of corporations – whether corporations should have the right to sue. I really sympathise with what Australia did when it removed the right for large corporations to sue. It was an egalitarian measure, though it was heavy-handed.

I think the answer lies in distinguishing between reputation as property and reputation as intrinsic to human dignity and therefore requiring special protection. Corporations cannot enjoy the latter type of right.

Thus, I would hugely curb the damages that a corporation could recover. That in a very sketched outline is what I would suggest. Thanks.

2.3 Dr Augusto Zimmermann^{vi}

School of Law, Murdoch University

Topic: Why free speech protects the weak, not the strong (and why the government's backtrack on RDA section 18C compromises our 'national unity')

The federal government has backtracked on its recent proposal to amend the *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act). Remarkably, the Prime Minister claimed that he was abandoning the proposed changes, which would have removed the most problematic sections of the RDA, because the proposal had become a 'complication' in the Government's relationship with the Australian Muslim community, adding that this would compromise the efforts to protect 'national unity'.³⁴ The repercussions of this development are two-fold. First, the government has disregarded the right to free speech, a right which exists at the centre of Australia's democracy. Second, the government has exhibited a lack of understanding of the Racial Discrimination Act, specifically that the legislation concerns racial and not religious vilification. In doing so, the federal government has disregarded the importance of freedom of speech and the role it plays in protecting the weak.

Racial Discrimination Act 1975 (Cth)

To better appreciate the government's proposal, some context of why the Racial Discrimination Act necessitated reform is appropriate. One of the most effective means by which free speech can be silenced is under the cover of laws against racial discrimination. A leading example is section 18C of the Racial Discrimination Act. Under the existing 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 and represents an extraordinary limitation of freedom of speech. The key words used in the existing section 18C, namely 'offend, insult, humiliate', are imprecise and largely subjective in nature. Attempts to define these words with any degree of precision quickly 'become[s] a circular and question-begging exercise'.³⁵ For example, courts struggle to provide a sufficiently certain legal standard for identifying 'insulting' speech, with Lord Reid concluding in *Brutus v Cozens*³⁶ that '[t]here can be no definition. But an ordinary sensible man knows an insult when he sees or hears it'.

The undesirable outcome is aggravated by the fact that the present notion of 'being offended' is dangerously emotive. 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. All that is required is often the vaguest notion of emotional distaste at what another has said, done, proposed, or presented'.³⁷ 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'.³⁸

To make it worse, under section 18C judges are instructed to approach the conduct in question not by community standards but by the standards of the alleged victim group.³⁹ Testing to the standard of the 'reasonable victim' lowers an already minimal harm threshold, adding further imprecision and uncertainty, increasing the section's potential chilling effect on speech. Of course, this goes in line with the morally relativistic tendency to 'minimise cultural differences' as a way of 'celebrating diversity'.⁴⁰ In our view, however, the use of ordinary community standards is a more appropriate test to be applied in this context.

Although section 18D of the RDA 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', the decision in *Eatock v Bolt*⁴¹ provides a clear demonstration of the subjective nature of the existing defence. Hence, to reach the conclusion that Mr Bolt's conduct lacked 'objective good faith' Bromberg J relied upon:

A lack of care and diligence [as] demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides.⁴²

vi Dr Augusto Zimmermann is Senior Lecturer and former Associate Dean (Research) and Director of Postgraduate Studies at the School of Law at Murdoch University. Dr Zimmermann is also a Commissioner with the Law Reform Commission of Western Australia.

As can be seen, the existing qualifications of ‘reasonably and in good faith’ have become ‘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’.⁴³ Without clear and defined legislative terms a judge may eventually exercise excessive judicial discretion. Any individual who favours the protection of freedom of speech ought to be sceptical of legislation that allows the judiciary to pass subjective judgement on the value, morality, or ethics of a particular statement.

When considering section 18D it is important to keep in mind that these are not, strictly speaking, ‘exceptions’ to acts that are otherwise unlawful. Rather, this section is itself a restriction on the right to freedom of expression. This point was made by French J in *Bropho v Human Rights and Equal Opportunity Commission*:⁴⁴

Section 18D places certain classes of acts outside the reach of section 18C. ... It is important however to avoid using a simplistic taxonomy to read down section 18D. The proscription in section 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions. It has also long been recognised in the common law albeit subject to statutory and other exceptions. ... Against that background section 18D may be seen as defining the limits of the proscription in section 18C and not as a free speech exception to it. It is appropriate therefore that section 18D be construed broadly rather than narrowly.

It is important also to consider that the constitutional validity of the existing sections 18C and 18D of the federal RDA have never been directly tested before the High Court.⁴⁵ When the current provisions were originally introduced, the *Bills Digest* produced by the Parliamentary Research Library noted that the government appeared to rely on the external affairs power under section 51(xxix) to provide a constitutional source of power for the Bill.⁴⁶ It expressly concluded that the provision that became section 18C was more vulnerable to constitutional challenge than other sections of the Racial Hatred Bill.⁴⁷ Consequently, the reasons for amending the RDA are numerous.

Misconceptions

The Prime Minister, in explaining his reasons for abandoning the amendments to the RDA, stated the changes would impact the government’s relationship with the Australian Muslim community. However, as noted above, the legislation has nothing to do with religious discrimination. Perhaps the Prime Minister is unaware that the proposed amendments could not be taken to promote any such behaviour. This is because the legislation simply does not address religious matters. The legislation exclusively concerns racial, and not religious, discrimination.

One must acknowledge the enormous harm that racial discrimination causes both to individual victims and the broader community; however, in a true democracy everyone must have the right to criticise religious ideas. The Prime Minister has mistakenly applied the same formula to religious beliefs as applied to racial issues. From a freedom of speech perspective this is problematic because religion, unlike race, is not an immutable genetic characteristic. One should expect the laws of democratic societies to be much less prepared to protect criticism of voluntary life choices, compared to unchangeable attributes of an individual’s birth.⁴⁸ While people cannot choose the colour of their skin, religion – to some degree at least – is a matter of personal choice. Thus, open and free discourse about religious ideas ought to be encouraged and not discouraged.

In contrast to racial issues where one finds no ultimate questions of ‘true’ or ‘false’, religion involves ultimate claims to truth and error that are not mirrored in racial discourse.⁴⁹ What is more, in a world where terrorism has become common, and where radicalised Muslims have expressed sympathy with terrorists, the ability of Western democracies to defend their own interests is weakened by hate speech laws that make citizens ill prepared to criticise or give warnings about the nature of religious beliefs, however well-based these warnings might be. This is the singular tragedy of hate speech laws that reduce free speech on some of the most fundamental issues of public morality.

Naturally, radical Islamists living in a Western democracy will discover different mechanisms to prevent people from ‘offending’ their radical beliefs. They will find in hate speech laws a suitable mechanism to strike fear and intimidation on the ‘enemies’ of their religion. Indeed, one of the greatest ironies of such laws is that their chief beneficiaries are a small but vocal group of religious fanatics, although it is not clear why such people should deserve statutory protection from ‘hate speech’.⁵⁰ Surely some of their bigotry is rather repulsive and deserves our criticism.⁵¹ Yet, because of laws of this nature even the slightest criticism may result in a person being dragged into court and charged with ‘religious hatred’.

It is for this very reason that the RDA ought to be given more clarity from the federal government. The distinction between racial vilification, being the object of the RDA, and religious vilification needs to be clearly defined. To this end, the Prime Minister's statements only evidence the misconceptions surrounding the legislation.

Benefits of free speech

Free speech does not disadvantage minority groups, nor does it favour those with more power. On the contrary, freedom of speech is a core principle of every democratic society. It is important to remember that all totalitarian governments restrict speech as a matter of course.⁵² Democracy naturally implies that both good and bad ideas ought to be allowed and encouraged in the marketplace of ideas.⁵³ Thus, under this democratic principle, religious debate ought to be encouraged. Free speech ensures that every individual within society has the capacity to voice their opinion. Arguably, this principle is essential to the functioning of a diverse society.

In contrast, political elites might feel tempted to limit and restrict free speech of the media, if such a restriction serves their narrow or self-serving interests. Those self-serving interests might well be 'the retention and accumulation of power and the financial advantage it brings'.⁵⁴ As Australian Human Rights Commissioner Tim Wilson remarked, 'it 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'.⁵⁵ Consequently, freedom of speech ought to be viewed as a mechanism against the concentration of power.

Naturally, absolute free speech under all circumstances can never be a possibility. There are easily demonstrable exceptions whereby reasonable limits to speech may provide greater service to freedom than open discourse. Within the boundaries of speech that should enjoy some protection, certain limited categories of speech have lower value, most notably sexually explicit speech that falls short of obscenity.⁵⁶ Further, direct acts of violence and direct attacks on the physical integrity of another person should not be protected. Speech can also be controlled to some degree in times of national crisis, such as in times of war.

If speech promoting subversion must be punished, as the current government intends under the new anti-terrorism legislation, then the danger has to be great enough and its occurrence proximately close. The test should require actual present danger that explicitly urges the commission of a particular crime. Such speech should only be punished if it poses some real threat to a considerable degree and in the not so distant future.⁵⁷

Amongst the most controversial questions about free speech is the proper treatment of hate speech. This is indeed a core question when considering the RDA. Many insults use coarse language in a highly derogatory way. Such insults contain language that can be deeply offensive and so have a negative effect on public communication by endangering the civility of discourse. However, the civility of discourse does not constitute a sufficient basis for general restrictions on the matter through which the free exchange of ideas is expressed. A democratic government, as law professor Kent Greenawalt puts it, 'may forbid uncivil remarks in formal settings like the courtroom, but expression in open public settings may not be curtailed on that basis'.⁵⁸

It would be undemocratic, therefore, to argue that mere verbal insults should be punished as much as actual urgings of illegal violent action. In a democracy, citizens must have the right to choose the words that best reflect their personal feelings, and 'strong words may better convey to listeners the intensity of feeling than more conventional language'.⁵⁹ Above all, a democracy requires that people must be strong enough to tolerate robust expressions of disagreement and personal opposition. Accordingly, the government may even permit such things as a ban on some words on daytime radio, and regulate the location of the sex industry and brothels, but it should not sustain any general prohibition of all forms of speech simply because they are thought to be offensive.

Of course, there will likely always be individuals making bigoted statements amongst us. To this end, one must consider that this is the basic cost of living in a free society.⁶⁰ However, the proposed amendments abandoned by the government on grounds of protecting national 'unity' (whilst moving to toughen the nation's security laws to combat home-grown terrorism) cannot be taken to promote such behaviour, nor do they condone racism. The question, instead, is not whether Australians have the 'right to be racists' but rather whether they have the right to sue each other for racism, and where the legal bar should be set – as was observed by Tim Wilson:

This isn't a debate about whether racial vilification is socially acceptable or not. It's about where the law sits. And part of the problem is that it fuses the idea of social acceptability as speech and the law, when there should always be a reasonable separation between the two.⁶¹

Racism must be confronted and defeated not by taking legal action against people, but by reasoned and open debate. As was famously noted by Brandeis J, ‘the remedy to be applied is more speech, not enforced silence’.⁶² Legislated silence won’t change the hearts and minds of racist individuals. Conversation and education are far more effective tools for the establishment of a tolerant and harmonious society than trying to ban racist speech. This point was eloquently stated by Ron Merkel QC when considering the need for racial tolerance laws in Australia:

Civil libertarians in the U.S. argue that attempting to bury racist speech underground may only make martyrs of the speakers and solidify the attitudes they express. History tells us that censorship invites – and incites – resistance. Nothing in our national experience suggests that silencing evil has ever corrected it. They add that to eradicate racism we need to listen to the words which are expressed, to delve beneath them, to find our own words of reply and explanation, before we can even begin to make the changes we seek.⁶³

In this sense, broad legal prohibitions on racially offensive speech will never alone be successful in eliminating racism from our society. They may even be counter-productive – when ideas are forcibly repressed they cease being exposed and challenged in the course of public debate. Perhaps the most compelling evidence to this point is pre-Nazi Germany. The Weimar Republic of the 1930s had several laws against ‘insulting religious communities’ and these laws were fully applied to prosecute hundreds of Nazi agitators, including Joseph Goebbels. Far from halting National Socialist ideology, those laws helped the Nazis achieve broader public support and recognition, and ultimately assisted the dissemination of racist ideas. As Brendan O’Neill points out:

The Nazis turned their prosecutions for hate speech to their advantage, presenting themselves as political victims and whipping up public support among aggrieved sections of German society, their future social base. Far from halting Nazism, hate speech legislation assisted it.⁶⁴

Naturally, nobody denies the harm of hate speech, but speech rights are most necessary for the weak, not the powerful. Conversely, the restriction of individual viewpoints is a serious infringement of democratic values, and the gains from hate speech laws are tenuous. Any possible benefit is outweighed by the chilling effects of such laws to democracy and freedom of speech. Under democratic theory, one might say, ‘open discourse is more conducive to discovering the truth than is government selection of what the public hears. Free statement of personal beliefs and feelings is an important aspect of individual autonomy’.⁶⁵

Unintended consequences

Although we should not allow our rights and freedoms to be undermined by the inflated sensitivities of any religious group, hate speech laws may actually serve the undesirable purpose of creating a new and more disguised form of blasphemy law, which allows religionists to make others keener to accept a vast range of religious restrictions to their freedoms in return for ‘being left alone’. This is particularly evident when one takes into account that the amendments to the RDA were abandoned following pressure from the Australian Muslim community.

Throughout the Muslim world, ‘accusations of blasphemy or insulting Islam are used systematically in much of that world to send individuals to jail or to bring about intimidation through threats, beatings and killings’.⁶⁶ It is applied against Muslims who are judged to be apostates and against non-Muslims when they are considered to have lost the ‘protection’ afforded to them under the *dhimma* pact, or covenant protection.⁶⁷ Under Islamic jurisprudence, any such transgressions, if performed by Muslims, are regarded as evidence of apostasy, a capital offense.⁶⁸ Conversely, if the transgression is attributed to a non-Muslim living under Islamic rule, this is interpreted as annulling their *dhimmi* condition, for which the death penalty is also applied. The offending *dhimmi* must be treated as ‘an object of war’, which according to Sharia law means ‘confiscation of property, enslavement (of wife and children), and death’.⁶⁹ As Dr Nazir-Ali points out, ‘there is unanimity among the lawyers that anyone who blasphemes against Muhammad is to be put to death, although *how* the execution is to be carried out varies from one person to another’.⁷⁰

Arguably, one of the greatest ironies of hate speech laws is embodied in the fact that their chief beneficiaries end up being a small but vocal group of extremists. Of course, it is not clear why such people should merit any statutory protection from 'hate speech'. Surely, some of their more obnoxious statements deserve our criticism.⁷¹ And yet to express any such indignation may incur the risk of being dragged into a court and accused of vilification under the existing laws.

Conclusion

The Bolt decision provides strong evidence of the attack against freedom of speech in Australia. It is alarming that an individual may be taken to court simply for expressing an opinion. This is scarcely likely to promote tolerance. As James Spiegelman QC points out, 'protecting people's feelings against offence is not an appropriate objective for the law'.⁷² As explained by him, 'the freedom to offend is an integral component of freedom of speech. There is no right not to be offended'.

To conclude, the government's recent decision to backtrack on its proposed changes to repeal section 18C of the RDA has ignored that at the foundation of Australia's democracy is a right of every citizen to speak freely on matters of public importance. Besides its misapprehension that the RDA is somehow related to matters of religious vilification, one must not lose sight that such laws have the capacity to unreasonably compromise free speech. At its core, section 18C of the RDA is a highly problematically worded provision. The government's decision, therefore, is truly regrettable as it signals a lack of understanding that such laws constitute an undue restriction of free speech, which is an essential characteristic of our democratic system of government.

2.4 Dr Kesten C. Green^{vii}

University of South Australia Business School & Ehrenberg-Bass Institute

Topic: Commercial speech: the valuable right to speak freely about matters affecting one's livelihood

Economic theory suggests that interfering with the right to speak freely about matters concerning livelihood will cause harm, and yet such speech is regulated and subject to other government influences. Speech regulation assumes accurate prediction of the costs and benefits of an intervention, and intervention only when the net is positive. The forecasting methods used make accurate forecasts unlikely, and the theory suggests regulation will fail. Unsurprisingly, then, there is no evidence that commercial speech regulation has ever been beneficial. Further, government interventions in the form of media and research funding and lent authority, crowd out commercial voices, amplify selected voices and quell others. Eliminating barriers to the free flow of speech would leave Australians better informed, and better off.

Experimental evidence on disclaimer removes regulation from the books

In 2007, I was involved in preparing evidence for a Florida court case on the effect of a government-mandated disclaimer on consumers. My colleague and I commissioned fieldworkers to show two advertisements to Florida shopping mall visitors. The ads were for implant dentistry services. One of the dentists made *no* claim to credentials for performing implants. The other advertised American Academy of Implant Dentistry (AAID) qualifications. One version of the qualified dentist's ad included the *Florida mandatory disclaimer*. The disclaimer stated that the American Dental Association does not recognise the AAID as 'a bona fide specialty accrediting organization'.

When asked, 'which dentist would you recommend to a friend who needed implant dentistry?', more of those who had seen the disclaimer chose the dentist without the credentials. The findings from our experiment convinced the judge that the disclaimer was inconsistent with the public interest and could not, therefore, be justified.

Experimental evidence fails to support speech mandates

We looked for evidence on whether the harm caused by the Florida disclaimer was unusual. Anecdotes abound. For example, when the U.S. Federal Trade Commission lifted their prohibition on comparative health claims, cigarette companies developed ways to reduce harmful tar and nicotine levels. Anecdotes and non-experimental studies cannot, however, disentangle long-run causes and effects in complex and uncertain situations, so we looked for experimental evidence.

We found eighteen studies. For example, more high school students exposed to 'DANGER, Shallow Water, You Can Be Paralysed, NO DIVING' signs dived into the shallow end. More people chose to watch violent movies when the description included a warning message. When M&Ms were labelled as 'low fat', consumers – especially overweight ones – ate up to 50% more. And people with health complaints who had seen TV drug ads including mandated product risk disclosures were *less* knowledgeable about the drugs' benefits.

The clear conclusion from the studies is that government mandated speech confuses buyers, and is either ineffective or harmful. As it happened, two law professors (Ben-Shahar and Schneider) had been reviewing evidence on mandatory disclosures at the same time as we were looking at speech restrictions.⁷³ They came to the same conclusion.

Experts fail to forecast the effects of speech regulations

Here is a challenging statement: experts are *useless* at making predictions about what will happen in complex uncertain situations. The conclusion, from decades of research on forecasting, is that experts' judgmental forecasts are about as accurate as those of novices, or just guessing.

vii Dr Kesten Green is a leading expert on forecasting. He has served as a Director of the International Institute of Forecasters, and is co-director of the Forecasting Principles (ForPrin.com) and Advertising Principles (AdPrin.com) Internet sites. Dr Green's research has been covered in the *Australian Financial Review*, *London Financial Times*, *New Yorker* and the *Wall Street Journal*. A founder of four businesses, his research spans diverse business forecasting problems as well as public policy issues affecting businesses including climate change, corporate social responsibility and government speech mandates.

This is a problem. Government attempts to regulate what can, cannot, and must be said are currently based on expert judgments of what will happen.

Scientific forecasting to help predict effects of speech regulation

There is an alternative to experts' judgments, and guessing: namely, scientific forecasting. Scientific forecasting is the product of evidence from decades of testing of alternative approaches in many disciplines.

We now have a *unifying theory of forecasting*: the Golden Rule of Forecasting. The Rule is to be conservative when forecasting. To put it another way: forecast unto others, as you would have them forecast unto you.

Conservative forecasting is simple in concept. First, you need to know everything worth knowing about the situation. Second, apply that knowledge using scientific forecasting methods.

Yes, the Golden Rule provides a high standard for would-be speech regulators to meet. But isn't that appropriate given that government regulations involve compulsion, and may cause harm?

To help check if the predictions of benefits from a speech regulation are sound, we've provided an online checklist of 28 guidelines at goldenruleofforecasting.com.

The Iron Law of Regulation foils regulators

The Iron Law of Regulation states that, 'there is no form of market failure, however egregious, that is not eventually made worse by the political interventions intended to fix it'.

The problem is that a regulator cannot know enough about the situation, and the preferences and circumstances of the citizens whose lives she wishes to regulate. This has been known for a long time – even before 1759, when Adam Smith referred to the conceit of the fellow who imagines he can arrange people as if chess pieces.

The natural role of sellers

Sellers provide buyers with products that they want at prices they can afford in order to be profitable. Sellers know more about their product, their market, and their customers than anyone else, and need to take care of their reputation for fair dealing if they are to survive.

The natural role of buyers

Buyers aim to use their money in ways that give them the greatest benefit. They know that sellers are motivated by self-interest and so are inclined to be sceptical about sellers' claims. Competing sellers, word-of-mouth and a vigilant media help buyers to beware.

All of us wonder sometimes at the way *other people* spend their time and money. We should nevertheless reject the illusion that some of us are so knowing, so clever, and so pure of motive that, by controlling speech, we can make other people happier than they would otherwise have been.

The natural role of the media

Commercial media organisations hope to make profits by providing information – in the form of advertisements, community announcements, warnings, news, commentary, discussion, political speech and investigative reports – that readers, listeners and viewers value.

In doing this, the media helps people make decisions that affect their livelihoods. Thanks to technological advances and economic growth, people have better access to information now than ever before.

Regulation and government provision subvert natural roles

In practice, we buy and sell and live and work in an environment in which the government regulates speech.

Sellers have to conform to regulations that dictate what they cannot say, and what they must say. Buyers know this and, especially when they see or hear government-mandated messages, assume that the government is looking after them and so are less vigilant and more rebellious.

Because sellers have the responsibility of free speech taken from them, they are less motivated to take care. If harm does occur, sellers can claim that they were 'just following regulations'.

For example, before governments mandated poisons labelling, sellers took elaborate precautions to avoid harming their customers. They used dark blue textured bottles in exotic shapes to warn all, including the illiterate and blind, that the contents were dangerous. Government mandated warnings needed a large smooth surface to display them. Sellers switched to plain clear bottles.

The Australian Broadcasting Corporation (ABC) crowds out free speech

The ABC quells speech. Commercial media outlets compete for the attention of Australians, but much attention is diverted to the ABC's advertising-free offerings. Commercial media, as a consequence, have a smaller and less diverse voice than would otherwise be the case.

Because the ABC is government owned, its speech is widely perceived to be less biased and more authoritative. The perceived authority of the ABC gives its staff considerable power over the content and the limits of the speech people hear in Australia. Our livelihoods are harmed as a result of the diminishment of alternative voices.

Conclusions and action steps

There is no clear basis for distinguishing between commercial and political speech. Both political decisions and commercial transactions affect people's livelihoods. As for importance, most people are more pressingly concerned about matters that directly affect their incomes and expenditures than political debates about, for example, border control.

In sum, the freedom of commercial speech is just as deserving of protection as that of any other speech.

Economic theory and experimental evidence both reject speech restrictions because they reduce welfare. Unfortunately, the weight of reason and evidence is often rejected with the unsupported claim that 'things are different this time'.

With that obstacle in mind, I propose that any speech restriction should be discarded, *unless* evidence, from scientific experiments and forecasting, of a clear net benefit is produced.

3 Free speech in the digital age

3.1 Professor Julian Thomas^{viii}

Director, Swinburne Institute for Social Research

Topic: Free speech and the internet

I'd like to thank the Commission for the opportunity to participate in this important and timely conversation.

The theme of my remarks is that we know the internet makes a huge contribution to freedom of expression and political debate in this country. We know that contribution is also extraordinarily conflicted and contested. But we also need to know a lot more about it than we do.

Commissioner Wilson has talked about the problem of complacency in Australia around free speech. If we look at the ingredients of complacency, one of those is a lack of knowledge. And a lack of knowledge, as I'm going to illustrate briefly, can also have other undesirable consequences.

Thirty years ago, the U.S. political scientist Ithiel de Sola Pool famously described communication technologies as 'technologies of freedom'.⁷⁴ His influential argument was that if we were able to free technology from the dead hand of government control, then the electronic communications of the day – he was writing about video disks and cable TV – had the potential to open up politics, culture and enterprise in unprecedented ways.

The idea of the internet as a *liberal machine* continues to powerfully shape our expectations of what it can do or should do. But that image of technologies of freedom has been complicated dramatically by recent and very hard experience. Liberal uncertainties have replaced liberal confidence.

First of all, we've discovered that the technologies of freedom can also be technologies of unfreedom. We know the internet can be used as a system for control and suppression. Our free communication can become an information resource for others, for purposes we know not. That level of surveillance has taken many of us as naïve, trusting users of the internet by surprise.

In Australia, scholars like Mark Andrejevic, formerly at the University of Queensland, have begun tracing the trajectories of what they call sensor societies, where we the users are better understood as elements in information-gathering systems rather than Sola Pool-type subjects with the power to manage our own communication systems.

The second thing that has happened is that the social distribution and adaptation of the internet over the last couple of decades has been extraordinarily rapid. In the last decade, we have gone from a low speed, dial-up information and text communications system to mobile broadband, and the internet of images and video. Meanwhile, Schumpeterian disruptions have become endemic in industries that are important for freedom of expression, especially journalism, with outcomes that remain far from settled.

Our knowledge of the net – together with our policy assumptions about it – have not kept up with the pace of change. When we began seriously researching Australians' uses of the internet in the early 2000s, sample surveys were our main research tools. We asked users how many times a day they checked their email; we asked how many times they logged onto the internet. Now those questions are meaningless, and the telephone surveys that we used to ask them are also becoming obsolete.

viii Professor Julian Thomas is Director of the Swinburne Institute for Social Research and a Professor of Media and Communications at Swinburne University of Technology, Melbourne. His research interests are in new media, information policy and the history of communications technologies.

A further complication from the recent history is that internet policy itself is a space now occupied by an increasing range of players. Some of them are quite new, some of them are old, but the players in the ‘ecology of games’ that comprises internet policy now include multiple government agencies and regulators, NGOs, community groups, international bodies, internet service providers, telcos, interest groups of all kinds, other kinds of technical and business intermediaries.⁷⁵ They all have different objectives and policy goals. They deal with common subject matter and the same basic problem — how and to what degree should we regulate the internet — but they are players in separate, albeit parallel, policy arguments, defined by issues such as digital rights, hate speech and child protection.

Lastly, the liberal vision of technologies of freedom has been complicated by the new kinds of public space being produced by the internet, which shape political discussion in ways we have only just begun to understand. These spaces provide the locations for the parallel policy games. Take Twitter as a simple example – a platform that didn’t exist ten years ago is clearly a powerful element in contemporary Australian public political discourse, but for now it is a medium we don’t know much about, despite its openness to exciting but so far undeveloped new research methods.

Twitter started in July 2006, and now has something like 700 million current accounts worldwide. We can estimate – with the help of colleagues such as Axel Bruns and Jean Burgess at Queensland University of Technology, who are pioneering scholars in this field – that in late 2014 there might be between 2.5 and 3 million Australian Twitter account holders, generally well-educated, mainly located in the south-eastern Sydney, Melbourne and Canberra triangle, more urban than not. There are slightly more male than female Twitter users. These are the basics — we need to go much further before moving into a regulatory mode with these new technologies.⁷⁶

A well-known cultural critic some time ago observed that every successful new technology creates new kinds of accidents. You can see these accidents very often on Twitter. Email, which barely still qualifies as new, continues to produce them. Regulatory accidents arising from new technologies are generally more serious. Let me mention one example, which I hope demonstrates the need for more knowledge about the internet and, axiomatically, regulatory forbearance in the absence of knowledge. The example I have in mind is the Commonwealth’s 2007 Northern Territory ‘Intervention’, or ‘National Emergency Response’, enabled by the suspension of the *Racial Discrimination Act 1975* (Cth).

One element of the intervention that has received little attention was the requirement for auditing of what were called ‘publicly funded computers’ in prescribed areas. Those rules imposed a set of obligations on the users and administrators of those computers, which applied to no other Australians.

The provisions in question went well beyond the concerns about pornography articulated in the *Little Children are Sacred* report.⁷⁷ The Northern Territory intervention targeted a range of remarkably broadly defined speech acts including harassment, vilification, defamation, annoying people, abusing people, being offensive, being obscene – all of those things were proscribed.

My colleagues and I at Swinburne’s Institute for Social Research have recently investigated the administration of this aspect of the Intervention and its consequences. Our study will be published shortly, but I can summarise our findings here.⁷⁸ It has been difficult to escape the conclusion that the auditing provisions and the system intended to enact them was not well designed, well communicated or well understood. Several key points can be briefly made:

- The Intervention’s auditing regulations had a very broad scope. The category of ‘publicly funded computers’ was never clearly defined. It appears that, for the purposes of the regulation, almost any computer in a prescribed area may have been regarded as a public computer.
- The funds devoted to implementing this aspect of the Intervention could have been invested in more productive ways, building digital capability and literacy in the communities concerned.
- Remote Aboriginal communities have some of the lowest rates of access to internet in Australia. The auditing regulations exacerbated Australia’s digital divide by imposing additional costs and risks for those extending digital inclusion in those communities.
- Lastly, the changes to freedom of information were only available in computers that were located in government offices with shared facilities. It was the digital divide between indigenous Australians and other Australians that made the policing of that particular policy possible.

The Intervention has left a complex legacy in the Northern Territory. In the domain of the internet, there can be little doubt that it prejudiced the freedom of some of Australia's most disadvantaged citizens, people with very few of the communication rights and capabilities that we take for granted in Australia's cities.

What lessons should we draw from that case? Australians have little in the way of constitutional protection for freedom of expression. There is therefore no cause for complacency, and every reason for regulatory forbearance in matters where that freedom is at issue. Where we believe we need it, regulation should focus on specific risks rather than broadly defined ones. It should avoid large, symbolic targets. Finally, its effectiveness should be tested and weighed against alternative forms of intervention and management.

3.2 Dr Monika Bickert^{ix}

Head of Global Content Policy, Facebook

Topic: Combating online harassment

My team at Facebook is responsible for managing the standards for how people can use the product. And that means, especially relevant to today's conversation, what people can share and what people can post when they are on Facebook.

This is truly a global task because Facebook's community is increasingly a global community, with people all over the world engaging within their own countries and with one another.

We currently have over 1.3 billion people regularly using the product. The vast majority are outside the United States and Canada. So this company may have started in the U.S., but make no mistake about it, it is definitely a global company and a global community.

Our policies and the way we think about speech on Facebook have to reflect that. And that is one of the reasons that my team, and the teams who are crafting and enforcing or applying the policies, are global in terms of their location and reviewing content in different languages, but at the same time, we have to have one set of policies.

That is in part because of the way that the product works. One person in Australia writes something, somebody in Germany comments on it, a person in Canada likes that comment. So that is something people may not realise about Facebook.

The challenge for my team is how to write a set of policies that can be applied globally, taking into account the many different cultures, backgrounds and legal landscapes of the countries where the people that use Facebook live.

We try to do it through a three-pronged approach. The first prong is transparently telling people what we expect when they use Facebook. That is our community standard, which I'll talk a little bit about in a second.

The second prong is giving people the tools they need to control their experience. Because there may be a piece of content that is upsetting to somebody that does not violate our principles and standards, but we want to make sure that the person has the ability to control their experience.

The third prong is giving people the tools to resolve disputes among themselves and to speak up productively and positively against speech that they find offensive.

The first prong is a community standard. You can see a screenshot here. If you go to our site, the link is at the bottom, you can see the standards in more detail. But these lay out the basic areas or issues that our standards govern.

You note that we have a section on bullying and harassment, which we do not welcome on our platform. Some of these are what we would call no-brainers. Nobody wants child exploitation imagery on the site. I would think that we all agree that we do not want that.

There are some other areas where people think that they may be ok or they may not be. That is where global policy comes in.

Here is what we think about it. Facebook's mission is to help people connect and share, and they are only going to do that if they feel that the platform is a safe place to be. So our number one priority is making sure that people are safe on the site.

At the same time, we want to make sure that people have the freedom to engage in debate and discourse, to share and connect in real, meaningful ways and to raise the awareness of society about issues that are important to them.

^{ix} Dr Monika Bickert is Facebook's head of policy management. Her global team writes and interprets policies governing what content people can share on Facebook and how advertisers and developers can interact with the site. Dr Bickert joined Facebook in 2012 as lead security counsel, advising the company on matters including child safety and data security. She previously served as assistant U.S. attorney for the Department of Justice for eleven years, prosecuting federal crimes ranging from public corruption to gang-related violence. Dr Bickert also spent several years serving as resident legal advisor at the U.S. embassy in Bangkok, Thailand.

You can see the pillars on the right and the left. We have safety and free expression. In the middle, we have this area where we want people to engage productively. We want them to be civil and respectful. It is not always going to happen on the site. That is not always the way that people talk to one another, and it is not always the way that awareness is raised or issues are discussed, but there are ways that we can foster civility.

We have found that when people are required to put their real name next to their speech, there is a feeling of accountability and they are more likely to engage in a civil manner.

You can see again the three prongs here. When we craft the standards, we communicate through our public facing site and our community standards and each piece of content on Facebook is usually up in the right hand corner in a way that you can report it to our teams. Then they will look and see if the piece of content violates our policies. If it violates it, it is removed. If it doesn't, it stays on the site.

It is important to know that when we are crafting those community standards, we are not just engaging with the teams on Facebook. We do this any time we are thinking about refining policy. The policies are an evolving landscape, just as Facebook is an evolving product and the way that people use the internet is evolving as well.

When we refine these policies, we discuss it internally with a number of teams. We want to make sure we understand what the Australian team is telling us, what the situation is in Australia. We also talk to NGOs, advocacy groups and others who have experienced these issues.

We communicate our standards and what our policies are, and make them easy to report. That is prong number one.

Number two is giving people tools to control their experience on Facebook. I don't know how many people here in the room are on Facebook, but you may have had the experience of blocking somebody, unfriending somebody or hiding specific content from your timeline. You don't want to report it; you just don't want to see it. That's fine.

The other thing we want you to do is have the control of the audience with whom you are sharing. So you can go into your privacy settings, set your general privacy settings and then you can also go to each piece of content you are sharing, including each photo in each album and specifically adjust the audience, so you are controlling exactly with whom you are sharing.

And then finally, the third prong is giving people the tools to speak up to resolve their own disputes. If people report something to Facebook, it is routed to a team with special knowledge and training to deal with that particular policy.

All of our people who apply the policies when they review the content are trained in all of the policies, and that is not just a one-time training. That is something they go through again and again.

But we also have teams such as our safety team, so they understand for instance that bullying is not just an online phenomenon. In fact, often the context is offline. Things are happening in school, in the community. And with something that's reported to us as bullying, our reviewers have to understand that they might not have the entire context. They have to make the best decision they can with the context in front of them, but learning about how these behaviours take place and affect people is very important for our reviewers.

And then finally, I thought I would share with you a bit about what we are doing to help people resolve disputes. We've now had this social resolution tool on the site for a few years and to be clear, this is definitely a tool we are continuing to build, so I will present to you a snapshot of how it is right now, but this is a tool we are continuing to improve and roll out.

The basic idea is, when we get a report like this – here is a photo, it looks like a nice photo – somebody reports it as bullying and we don't have the context to understand why that person feels bullied. We can try to make a guess, but the better option is if we can empower people to actually resolve this themselves.

So we started looking at our reporting flow and when I say 'we', I mean the company. I wish I could claim the credit, but I wasn't directly involved. We started looking at the language used by people when they report something.

And we realised language really matters. If people were saying they didn't want to see something on Facebook, often it was because they didn't like the photo of themselves. But when we asked them, 'why don't you like this post?', we realised that the language, even just changing one word, could make a huge difference as to whether they felt empowered to do something.

So in the first version of this social resolution tool, we asked people, 'why don't you like this photo?' And it had a drop-down menu with a list of characteristics and one of them was 'embarrassed'. And about 50% of the people would complete that flow.

We started working with some researchers at Yale and Berkeley that are emotionally rich language specialists and we found that if we made it more conversational and if we said, 'I don't like this photo because it is embarrassing', that one little tweak led to a much larger percentage of people completing the flow and sending something in.

The other thing we noticed is that we could give people a dialogue box that suggested language they could use to reach out to the person that posted the photo and ask her to remove it.

So when we started this social resolution tool, we gave people an empty box. Basically, the way it would work would be: I post a photo, you don't like it, you are presented with an option to ask me to remove the photo and we give you a blank box that says, 'type a message to Monika to say that you don't like the photo and ask her to remove it'. About 20% of people were doing this.

After working with the researchers at Yale and Berkeley and also testing some different flows, we found that if we provided text, suggested text – and they could change or edit that if they wanted to – with a message like, 'Monika, this photo makes me uncomfortable. I really don't like it. Would you mind taking it down?', then people were more likely to complete the flow.

We were finally starting to understand that there is value in understanding the different ways that people talk in different countries. We are exploring this now, but we are realising that the way people think in India is not necessarily the way people think in Australia when they want to approach somebody about removing content. But our data shows these tools are working and in the majority of cases, when a person receives a message asking her to remove a photo, she will engage in a dialogue and in many cases she will remove the photo voluntarily, which results in a better experience for everyone.

And finally, it is very important to us that people understand that Facebook can be a tool for engaging counter speech. And this is an example I wanted to share with you from the Bullying and Harassment contact.

This was a young high school student in California who was being bullied for a poor soccer performance. In the wake of someone posting mean photos of him missing a goal – he was a soccer goalie – his teammates posted a photo of him with the caption, 'we are all Daniel Cui', and it went viral. Suddenly all the students were doing it and other people in the community were doing it.

This is available on our Facebook page and it features Daniel Cui talking about the way this made him feel empowered and feel strong enough to stand up against bullies. So counter speech is very important to us and we have the platform for it.

3.3 Trish Hepworth^x

Executive Officer, Australian Digital Alliance

Topic: Reforming intellectual property

Free speech is an essential human right in a liberal democracy. It is the extension of the absolute human right of freedom of conscience and thought.

In a liberal democracy we must approach free speech as a blank canvas where restrictions must be justified; we do not seek permission. In a liberal democracy all speech is legal until it is made illegal, and not the other way around.

That is clear articulation of the classic liberal approach to free speech. However, if I express it in those words, I risk infringing copyright. Because those words were already used by Mr Tim Wilson,⁷⁹ back in May this year. If I want to explain the concept, I need to use different words, words that Tim Wilson and others haven't used before me.

And here is the fundamental tension between copyright and free speech. In giving a copyright owner the right to control the use and reproduction of works, it constrains the speech of others.

I was invited here on the promise I would be practical, not overly legalistic. And what I hope to do is show some illustrations of the areas of tension in Australia and overseas at the moment, in expression and in enforcement.

But firstly, just to ensure we are on the same page, copyright is a property right over the expression of ideas, not the ideas themselves.

x Trish Hepworth is the Executive Officer for the Australian Digital Alliance (ADA), the peak body representing copyright users and innovators in the digital world. The ADA specialises in copyright policy on behalf of the education sector, internet industries, cultural institutions, libraries, consumers and organisations assisting the blind and visually impaired. She is also the Copyright Advisor for the Australian Libraries Copyright Committee.



So Millet in 1866 doesn't own the idea of two people sleeping in a field.

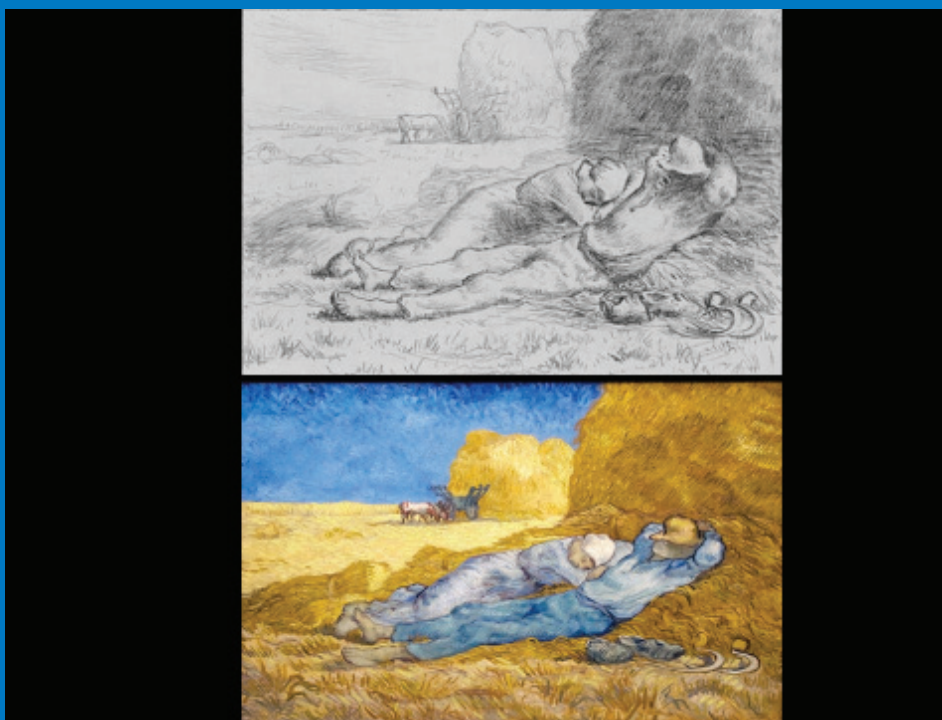


Sargent in 1875 cannot stop others from painting two people in a field.



Van Gogh, Noon: Rest from work
1890

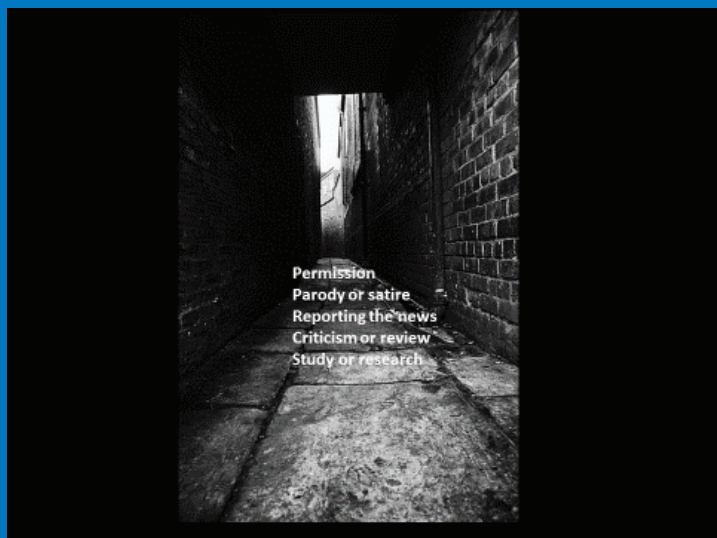
But this acknowledged masterpiece by Vincent Van Gogh in 1890 is most probably a flagrant breach of copyright, taking not just the central idea of painting people in a field, but lifting the entire design.



And nowadays Sargent may have slapped Van Gogh with a lawsuit and collected damages and demanded he destroy that and all other derivative works.



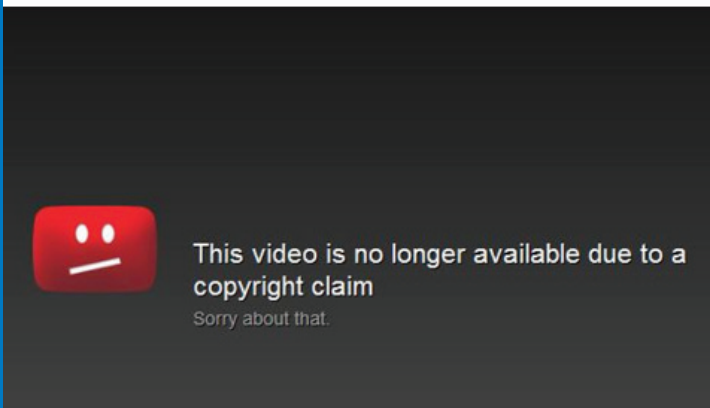
Now I am not going to discuss the merits of a lawsuit between two acknowledged artistic masters, or whether Van Gogh would have painted something just as good if he'd gone and found his own people sleeping in a field. But I hope that this illustrates two points. One is the central legal difference between ideas and the expression of those ideas. The second is how creation is built upon and comments on that which has gone before. And this is the central tension in copyright. By giving copyright owners the exclusive right to control use and reuse of their works you constrain the speech of others.



Meanwhile, in the present day Australia, you can build upon an existing work in two ways. The first is to ask permission, as I, the cautious lawyer, did with the quote at the beginning of the speech. Unfortunately, permission is not always forthcoming. A prominent figure who has written an anti-Semitic work is unlikely to give permission for his work to be copied and distributed at a local shopping centre for people to view and criticise. They are even more unlikely to give permission for it to be turned into a meme, pasted into blogs, translated for greater accessibility or undergo text and data mining to find those 'grains of gold' referenced earlier.

The other way you can use a work is with the use of an exception. In Australia we have four fair dealing exceptions: parody or satire, reporting the news, criticism or review and study or research. Free speech has some protection obviously within that list – reporting the words a politician says in a speech will fall under reporting the news in most cases, a criticism of a book can use text from the book. But much falls outside of this 'protected' speech.

Liberal complaints see Labor parody ad removed from YouTube



Liberal ad pulled from YouTube over copyright breach

In the last election, a Labor party ad that was based on material screened by the liberal party was yanked for copyright infringement,⁸⁰ and recently a liberal party ad in Victoria was pulled⁸¹ after it used broadcast news footage without permission, while making a point about corruption.



One proposal that has the potential to allow free speech considerations to be taken into account is the recent proposal from the Australian Law Reform Commission (ALRC) to introduce a flexible 'fair use' exception.⁸² Fair use is a flexible exception that asks a court to judge fairness according to four main factors: the purpose of the use, the type of work used, the amount used and the impact of the rights holder's legitimate property rights.

In the U.S. fair use is considered, in most judicial opinions at least, as the safeguard that balances copyright and free speech – to the point where many judges have declared they don't consider there to be a conflict.⁸³ This is questionable, especially in regards to third party enforcement, but it would be fair to say that free speech is more considered and protected under the U.S. fair use system than under our current system.

Australia lacks the constitutional protection for free speech that the U.S. has, and that appears in U.S. copyright cases. However, fair use would give more flexibility to the copyright system to allow uses with important social benefit, such as promoting free speech. It would also assist with many of the current problems for people who cannot access information because it needs to be translated or because permission is withheld.

And it would give some legal support to the way that people are already communicating online. Legitimately communicating.



This brings us to the issue of piracy. Technological advances have given people new ways to communicate and express themselves, and have made copying and dissemination of content easier. How to adequately protect intellectual property rights online is the subject of the government's recently released discussion paper.⁸⁴

Chris Berg has already spoken a bit today about the impacts of the proposed website blocking mechanism. The other mechanism in the paper is the extension of authorisation liability. Authorisation liability at heart defines the situation where one person is liable for the infringements of someone else. The paper is aimed at making Internet Service Providers liable for the infringements of their users, but it would stretch further and wider the legal responsibility for other intermediaries, libraries, schools, universities, cloud services and online platforms.⁸⁵



Lacking the ability to control the actions of their users, intermediaries will be incentivised to shelter in the extended safe harbours, safe harbours that require disconnection for repeat offenders and removal of infringing content.⁸⁶

Leaving aside issues about the appropriateness of third party enforcement of private property rights, safe harbour schemes can have chilling effects on free speech. As Alfred Yen, writing on the arguably less stringent U.S. standard of secondary liability discusses, third parties do not really have a vested interest in protecting free speech⁸⁷ apart from some general obligations or relationships with their clients. Given the choice between protecting free speech and legal safety, they are likely to remove material first, and question later. If at all.

La Grotta di Byron by Andrea CC BY 2.0 altered by addition of Pirate Bay logo by Trish Hepworth

And we see this in the U.S., where the Digital Millennium Copyright Act (DMCA) provides similar safe harbours. As the number of requests to remove infringing content has increased, the systems have had to become automated to deal with these requests. To give you some idea of the figures, the Chilling Effects project⁸⁸ keeps records of the rate of take-down requests:

Year	Google	Twitter	Yahoo	Digg	Others	Total
2007	177	0	0	1	57	235
2008	62	0	4	27	52	145
2009	4,275	0	23	33	56	4,387
2010	16,827	307	508	21	65	17,728
2011	67,571	4,138	0	13	76	71,798
2012	441,370	6,646 ⁶⁷	0	2	120	448,138

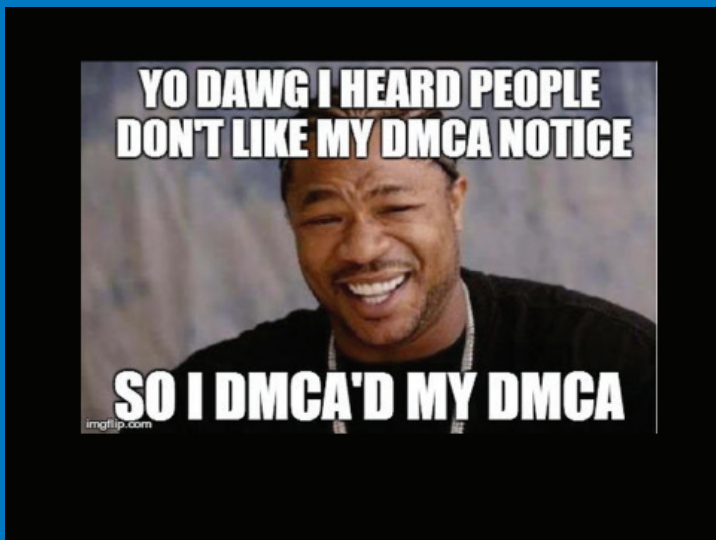
So far, in 2014 Google has been asked to remove 26,895,765 URLs, Twitter 9,199 and Twitter reports 76% compliance, suggesting a high number of inaccurate requests. Some of the recent wrongful takedowns they note include:

The screenshot shows the Spanish Wikipedia page for "Juego de tronos (serie de televisión)". The page includes a navigation bar with "Artículo" and "Discusión" tabs, and a search bar. A red warning box indicates that the current view is an old revision from 2011. The main text describes the series as a medieval fantasy created by David Benioff and Dan Weiss for HBO, based on George R. R. Martin's "A Song of Ice and Fire" novels. A sidebar on the right lists the genre as "Fantasía medieval", the creators as "David Benioff" and "Dan Weiss", and the novels as "George R. R. Martin". The cast list includes Mark Addy, Aile Allen, Sean Bean, Emilia Clarke, Nikolaj Coster-Waldau, Peter Dinklage, Michelle Fairley, Aidan Gillen, Jack Gleeson, Ian Glen, Kit Harington, Lena Headey, Isaac Hempstead-Wright, and others.



HBO asked to take down the search result for the Spanish version of the Wikipedia Game of Thrones page, saying it infringes the TV show.⁸⁹ The Wikipedia article as it appeared at the time is still available,⁹⁰ and we can't see anything infringing about it.

Similarly, Sony sent a takedown for the search result⁹¹ of the Wikipedia page on the Swedish film *The Girl Who Played with Fire*,⁹² saying it infringes the copyright in the 2011 *Girl with the Dragon Tattoo* film. It is hard to see how: the thumbnail of the movie poster is not only a fair use, but also of a different film.



And the cases continue. A recent one wandering around Twitter centred on the creator of a blog looking at the overly sexualised imagery of women in comics. An artist sent the blogger a copyright infringement for a picture she used in her criticism (fair use in the U.S.). She blogged the takedown notice, and received another copyright infringement notice for publishing the infringement notice. As well as a base misunderstanding of who holds copyright in computer generated notices, it shows the chilling effects that copyright enforcement can have.

These inherent tensions have always existed, but the digital advances have added new dimensions. Copying something and distributing it to thousands, once a laborious task, is now the work of seconds. And conversations that may have been had over lunch in person now happen in the digital sphere, taking untraceable derivative conversation and making it highly traceable permanent copyright infringement.



Marilyn Randall and Drew Hansen are amongst the scholars who have noted that Martin Luther King's famous 'I have a dream' speech liberally plagiarised and sampled earlier works.



And the people commenting on the work, in the internet's recognised language of kittens, face the probability of their work being censored.

We need copyright. In providing the economic incentive to create and distribute many categories of work, it arguably promotes free speech and it adds to our cultural and economic wellbeing. But it needs to rest in a system that also protects free speech. Australia has a chance, with the reviews of copyright exceptions and enforcement, to ensure that we have adequate safeguards to protect free speech and freedom of expression. And to ensure going forward we have the right policy framework to support both people's property rights and people's right to free speech.

4 What are the limits of free speech and how should it be protected?

Debate & questions

The Hon Dr Gary Johns – Director, Australian Institute for Progress^{xi}

Professor Suri Ratnapala – Professor of Public Law, TC Beirne School of Law, University of Queensland^{xii}

Professor George Williams AO – University of New South Wales School of Law^{xiii}

Professor Spencer Zifcak – Liberty Australia^{xiv}

Moderator: Tim Wilson, Australian Human Rights Commissioner

Tim Wilson:

The next session will focus on the limits of free speech and how it should be protected.

We needed a robust session after lunch to wake you all up, if the food and cheese has not done that already. We also need to hear the conflicting views on how we preserve and protect free speech, in a country where we don't have constitutional or legislative protections.

The role of our culture, and the citizen, is a very important part of reform. Should we be looking towards the United States or New Zealand for a system to protect free speech? We have four fantastic panellists.

Firstly, Professor Spencer Zifcak from Liberty Victoria and Professor George Williams AO, a prolific writer with Fairfax press and with the University of New South Wales.

We also have with us Professor Suri Ratnapala from the TC Beirne School of Law, University of Queensland.

We also have Dr Gary Johns, Director of the Australian Institute for Progress.

We thought we might kick off with a question, and then invite questions from the audience. Put your hand up and we will acknowledge that once we get a microphone to you.

Spencer, what are the limits to free speech and how should it be protected?

Professor Spencer Zifcak:

Thank you Tim, and thank you everybody for coming. I don't think anyone at this conference would disagree that free speech is a political principle of fundamental value.

From where I stand, there are two important reasons for that. The first is that freedom of expression is essential for the maintenance of democracy, and for the effect of participation of citizens in democracy.

People cannot participate in democracy unless they have a reasonable understanding of political issues. Open debate about political and government affairs is essential.

Secondly – not my argument, originally of John Milton and John Stuart Mill – freedom of speech is crucial to the pursuit of the truth. Society will more accurately attain facts in an atmosphere of free and uninhibited discussion, criticism and debate.

xi Dr Gary Johns is a director of the Australian Institute for Progress and DonorInform Limited.

xii Professor Suri Ratnapala is Professor of Public Law at the TC Beirne School of Law at the University of Queensland. He teaches constitutional law and jurisprudence, fields in which he has published widely.

xiii Professor George Williams AO is the Anthony Mason Professor, a Scientia Professor and the Foundation Director of the Gilbert+Tobin Centre of Public Law at the Faculty of Law, University of New South Wales.

xiv Professor Spencer Zifcak is Allan Myers Professor of Law and Associate Dean (Research) at the Academy of Law at the Australian Catholic University.

It is also well accepted, however (and Chris Berg has alluded to this already), that freedom of expression should, in certain circumstances, be limited. As the jurisprudence around free speech has developed, a number of reasonable limits have been identified.

Freedom of speech may be limited, for example, in the interests of national security, public order, proper enforcement of law, for the sake of public health and, in certain circumstances, in the interests of public morality.

On a more traditional level, it can be restrained to protect the rights and reputation of others, for reasons of privacy, and to ensure a right to a fair trial.

In each of those instances, the political and social value of free speech must be weighed in the balance against competing and compelling public interests.

There are not any clear rules that enable us to adjudicate these competing claims. Decisions about balance will always be influenced by specific circumstances in which competition takes place. What we can say, however, is that political speech should be relatively immune from proscription because it constitutes a dialogue between citizen and citizen, elected and elector, and between government and the governed.

It is speech that is conducive to the effectiveness of constitutional democracy. So a special place should be reserved for speech that is of public or political concern. Limits should be kept to a minimum. The position is different, however, for speech that only has a tenuous connection to democratic deliberation. Racially hateful speech is an example of that kind. That is because racial hatred is, fundamentally, an attack on a tolerant society and the right of everyone to equal respect and concern. For that reason, limits to it may more easily be justifiable.

It is considerations like that I had hoped might predominate in our recent discussion about the balance between freedom of expression, on the one hand, and the provisions of the *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act) on the other.

It is regrettable, in my view, that debate over the last two and a half years became ideologically driven, focused on personality, and essentially pugilistic in nature.

Because of that, I think we lost an important opportunity to make a modest set of reforms to the RDA, which would have created a more sensible balance between freedom of speech and the rights of people of racial minorities.

Professor George Williams:

I will start with the obvious proposition that when it comes to protection of freedom of speech, Australia has a legal problem. If you look at how well it is protected in this country, in ranges from weak to non-existent.

We do not have any general protection. We have an implied freedom of political communication in the Constitution but it would be a brave and rich person that would try and indicate their rights based on the precedent. In 22 years, only on two occasions has the High Court ever exercised that freedom,⁹³ and in a litany of other cases, it has refused to apply it.

This means that the High Court has restricted journalists from interviewing a range of people on parole, and a range of measures that impact on the freedom of the press. The problem is not just a matter of legal protection but also, in Australia, we have developed a permissive culture in the making of new laws that infringe on freedom of speech.

You only have to look at the litany of new anti-terror laws, and realise we may be reviving some of the sedition debates. People could be jailed purely on their speech on terrorism, not their actions.

We have an Australian Security Intelligence Organisation (ASIO) law that says journalists cannot disclose 'operational information' about a person's detention by ASIO within two years of that person being detained, or they can be jailed for up to five years.

There are much tougher examples that show a great willingness on the part of our politicians to pass laws that dramatically infringe on basic free speech rights.

What should we do about it? What is the answer, in a country like Australia? It falls into two categories. The Australian approach – let's trust our elected representatives to pass and write laws, let us trust them to put political opportunity aside, let's trust them to act according to basic democratic values.

What we know from that system is that it often works but in key cases the system lets that freedom down.

We are the only democratic nation that puts all our eggs in one basket. In other countries where you ask how free speech is protected it goes to a very general protection of free speech – the UK *Human Rights Act*,⁹⁴ the United Nations *International Bill of Human Rights*⁹⁵ and the United States Constitution all reflect a willingness to pass the laws I have talked about.

Australia should move on from being a nation that takes the approach that our political culture will fix it. If we value freedom of speech and need to overcome a legal problem, given the laws that have been passed, we need a legal solution. That means protection for freedom of speech in the Constitution, along with existing rights, or as part of a Human Rights Act. These can be invoked to provide protection that has been shown to be absent.

Dr Gary Johns:

Everyone here should be aware that the new Chief Justice of the Supreme Court of Queensland, Tim Carmody, was appointed under difficult circumstances. At his ‘un-welcome’ last week, Tim made the following statement: ‘to be truly free you have to forget what other people think or say about you’. That is my starting proposition and I agree with it entirely.

To particularise it, I think speech in Australia is less free because of the 1994 amendments to the Racial Discrimination Act,⁹⁶ which I and two others in caucus opposed at the time.

But, of course, caucus, once they made the decision, you go into Parliament and vote with the party. I understand those rules.

But the Abbott government has decided to drop its amendments to the Act. If I were Mark Latham I would describe it in crude terms; I would say it is ‘weak’ to have walked away from a perfectly reasonable proposition.

The political ploy of dropping their amendments to 18C under cover of introducing other terrorist-related laws could be tested – for instance, why didn’t they drop the paid parental leave when they knew the budget was failing? Why don’t they drop the RET (renewable energy target) under cover of the complete, known ineffectiveness of a carbon abatement strategy?

I think they just didn’t believe firmly enough in the fact that the ‘94 amendments have curtailed freedom of speech.

The key quibble that I have with the Racial Discrimination Act as it stands is that in the one celebrated test case, the Bolt case,⁹⁷ the substance of the critique of Bolt is missed. The substance was that a group of people maintained their Aboriginal heritage but you couldn’t know it to look at them. They are quite entitled to maintain it and Andrew was asking why they were even competing for prizes that are for Aborigines.

The question was, why does the benefit exist for a particular group of people? And I think the judge became a literary critic at the time rather than a judge. But, to be fair to the judge, he had a lot to work with.

The amendment was that the words ‘vilify and intimidate’ would be a replacement. Many of us, including many here, would agree. To vilify or intimidate are serious matters. To offend or humiliate are not.

If you forget those who offend or humiliate you, then you are free, in the words of Tim Carmody.

Tim Wilson:

Suri, what are the limits of free speech? How best should we protect it?

Professor Suri Ratnapala:

Let me first emphasise the importance of free speech. Free speech is part of freedom. Freedom of speech is part of individual freedom; it cannot be removed without harming freedom generally. The person who is free has the freedom to eat, breathe, drink and express oneself.

Freedom of speech has been the cornerstone and the basis of every great revolution of humankind. We would not have had the Hellenic civilisation without freedom of expression and the Roman liberties; we would not have had the Reformation, the Counter-reformation, the Enlightenment of the 17th and 18th centuries and we would not have the kind of commercial society that we have today.

One other reason that I think has not been, perhaps, emphasised sufficiently: information is not the monopoly of any one authority. It is not the monopoly of government; information is scattered among millions of individual persons. How a society can harness that information for the benefit of society is through what we know as the market process and the price signal.

That can only happen if there is freedom of expression, freedom for individuals to use the knowledge they have in expressing their wishes and choosing the way they want to live.

What is the principle by which this freedom should be limited? The general principle has twice or thrice been referred to – John Stuart Mill's 'Harm Principle'. The problem is, there is no agreement about what harm is.

A previous speaker in relation to the law of defamation said that defamation should not have as its objective the protection of property but of dignity. I take the opposite view. Defamation law, as well as every other law, indeed any limitation on free speech should be focused on a person's individual rights and property.

In the case of defamation you have to quantify the harm, whether it is to dignity or to reputation. Damage to reputation can be quantified, for example in relation to income loss. There is no way to quantify damage to dignity.

Defamation law should compensate only quantifiable harm and not harm to a person's emotions because it is not possible to do that, to calculate how much harm someone's emotions or sentiments have suffered.

This has been the basis of the common law and the civil law of defamation. Emotional hurt should not be a justification to limit free speech.

I also think that it is not possible – as pointed out by previous speakers – to separate commercial speech from political speech and I also agree that it is not possible to limit freedom to express opinions about a religion from other freedoms such as the freedom to make political statements.

How do you protect it? There has to be legislative vigilance and there is of course a question of entrenching these freedoms in the Constitution.

We heard a very good exposition of the different sides of this debate. The fear that some of my colleagues have of entrenching or constitutionalising these freedoms is that it would further increase the power of judges to make decisions that are essentially moral or political.

Professor Williams was clearly right in saying that we are the only country that does not have some form of a Bill of Rights. I might also add – and this is a point I would like everyone to keep in mind – that the existence of a Bill of Rights or a constitutional statement of our rights and freedoms does not necessarily guarantee them.

Zimbabwe has a fine Bill of Rights; North Korea has a fine Bill of Rights in its Constitution. Most nations have a Bill of Rights in the Constitution but that does not mean that those rights exist in the lives of the people.

What is the basis on which rights can be protected? I don't disagree that it would be good to have rights entrenched in the Constitution, if that was possible, but that is not the end of the story.

Countries have two kinds of constitutions – the paper Constitution and the living Constitution. What matters is whether the living Constitution in the country is robust enough to protect the rights of the people and their liberties.

I have been living in this country for 30 years. As you can all see my skin is pretty dark. I have been waiting for someone to call me a 'monkey' or a black man, but I have still not been told that.

I am disappointed because I have a good answer, suggested to me by my wife, in case someone calls me a 'monkey'. The answer is, 'hello, cousin!'

(Laughter)

That is not quite accurate. We are apes, not monkeys.

My point is this: Australia has a living Constitution which is quite robust. That does not mean it cannot be improved or that we do not need vigilance. What it means is that political culture, informal institutions and etiquette play an important role in protecting our freedoms and liberties.

It is not enough to focus on the formal provisions of our Constitution. It depends on the culture of the people – and for that, all of us are responsible.

Tim Wilson:

With the idea of culture as an important part of protecting free speech in the Democratic tradition, we are talking about things that are very philosophical. How do we make them real and tangible for people? Any takers?

Professor Suri Ratnapala:

The culture of liberty and freedom in England did not happen overnight. It happened over centuries of development through historic processes. We have, to some extent, been the beneficiaries of that legacy. Civil society and private institutions can play a very important part.

I can give you a very good example while we are in the middle of the football season. The Australian Football League (AFL), the National Rugby League (NRL), and the Australian Rugby Union (ARU) are private bodies based on contracts amongst hundreds of organisations and players. They do not permit any member of any club to engage in racial vilification. It is not the law that prevents this happening – it is contract and the culture that has been developed within these organisations.

What are churches for? There are churches, religious organisations, sporting bodies that are giving some leadership. It is possible to develop this culture from the grassroots; it is already there, quite strong in this country, that's why we do not have racial conflict.

Professor George Williams:

I'd like to make a couple of comments about Australia's culture when it comes to free speech. Australia's culture is very tolerant of high levels of government intervention in free speech.

That is one of the greater concerns we have to deal with. The law has limits. The other thing I want to say about culture is that it is shaped by knowledge. I am always struck by how little Australians know about the legal system.

I went on a bit of a road show as we were drafting legislation in Victoria. One of the most common answers I got was that we just don't need it. It is already protected by the Australian Constitution and our Bill of Rights.

This was backed up in a survey that Newspoll did a number of years ago – 61% of people said our rights were enshrined. We are dealing with a culture based on an overwhelming majority of Australians who believe that freedom of speech is well protected in this country.

That has an impact on shaping the views of voters, because they see it in the light of strong protection.

The other thing the community came up with, knowing their Bill of Rights, was their ability to 'take the fifth'. It shows how much our legal knowledge is based on United States cop shows. We are a confused culture when it comes to freedom of rights because it is based on not just ignorance, but false knowledge, which is a problem for educators and people looking for strong free speech protections.

Tim Wilson:

The suggestion is to go to various television shows, and for them to possibly reiterate the point that we do not have freedom of speech protection?

Professor Spencer Zifcak:

We have a bit to learn from the Canadian spirits. In the 1980s, the Prime Minister of Canada, Pierre Trudeau, tried to think of a strategy to bring the nation together.

What the study came up with was to repatriate the Constitution from the UK to Canada, and to include in the Canadian Constitution the Canadian Charter of Rights and Freedoms. The strength of the dedication of Canadians with the Constitution, and more particularly their Charter of Rights and Freedoms, was extraordinary.

Compare that to Australia. A survey of civics a decade or 15 years ago done by Stuart McIntyre discovered that only 10% of Australians know that we have a Constitution. If we are serious about protecting free speech then I agree with George: let us look at legal protection, first through a Human Rights Act and eventually through providing it with constitutional protection.

In that way, Australians may come to know a bit about the form of the Constitution and the sorts of values to which most Australians might commit.

Tim Wilson:

There is a component of the mob that can develop. We saw this recently on the subject of honour killings. How much can we rely on fellow citizens not to behave like a mob and shut down debate?

Dr Gary Johns:

The notion that we could educate the electorate to the satisfaction of three professors of law has flaws.

(Laughter)

My father died at 93 and I'm 61. If I spent the next seven years I've got trying to educate the electorate...

It was that ignorance that destroyed the attempts to have Australia become a republic because so many on the republic side wanted a direct elect president because that's what they had seen on television. Sensible republicans, like myself, who didn't want a direct elect president, had to fight against such ignorance.

Ignorance or knowledge is not the test here. I think the point Suri is making is that it is in the habits – free speech has been one in this country and has been for a long time. Its threats are specific, I agree, and they often come from government.

But by the time you get the generals together, the professors of law, to win the great battle of constitutional change, we will all be dead. Meanwhile, Attorneys-General will have come and gone and written and tweaked and moved freedom of speech against our broad interests.

I will finish on this point: it is a delight that at the completion of each election in Australia the losing leader rarely complains about the electoral process – 'we were robbed' – as would take place after an election in Indonesia.

To save face you have to say the other side cheated. There is only one person who has done so recently in Australia and that is Clive Palmer. He needs some education and enculturation.

Tim Wilson:

Did anyone else want to answer the question about public pressure?

Professor Spencer Zifcak:

It depends what public pressure you are talking about. Our whole system of government depends to some extent on what kind of parliament and parliamentary representatives we have elected, and we can't call that mob rule. It is a normal part of democracy.

But if we are talking about small pressure groups speaking intensely and, to some degree, threateningly, the answer is a mixture of further expression of contrary views and courage.

Professor George Williams:

The main driver of expression is media reports. It worries me, the number of restrictions we have as journalists. Think of the enormous debate in the U.S. because of media reporting due to leaks and other concerns.

In Australia we have a bill that means that if a journalist reports the same information here, he or she may be jailed for a decade. I think we should ask ourselves, is it right that we will jail a journalist in those circumstances? We should look closer to home. Laws are already on the books to head off any capacity we might have to bring about those changes. It is not debated in this country, partly because the laws are so effective in cutting the debate off before people are even worrying about what they lose.

Tim Wilson:

You should wait for the discussion with Bret Walker this afternoon. Suri?

Professor Suri Ratnapala:

I wanted also to mention the fact that there is a fairly strong interconnection between economic, progressive austerity and the strength of the institutions, cultural institutions.

In many countries it is not that the people are less moral than, say, Australians or Englishmen or New Zealanders. It is because of poverty that they behave in the way that they do.

It is a question of the chicken and egg; which comes first? The strong institutions promote economic growth and economic strength promotes strong institutions.

If we don't know what comes first, perhaps there is a lot of luck involved, but we do know that there is a strong link. I come from a country in which you couldn't leave goods outside a shop without them disappearing in two minutes. One of the culture shocks I got when I came to Australia 30 years ago was to see these goods outside, unguarded and people simply going into the shop and paying for it.

I don't think there is a moral difference between Australians and Sri Lankans. Sri Lankans in their current state are very poor and the incentive to take it and not pay for it is too great. There is a close nexus.

One of the ways to protect liberty is to protect the economy. If you destroy the economy, undermine the economy, you also undermine the liberties and the Constitution.

Tim Wilson:

If you were to name your major concern in terms of free speech restrictions in Australia today, what would it be? Anyone want to jump ahead? Something practical. Go, George.

Professor George Williams:

Where do you start? I could give you a long list.

Tim Wilson:

Give us the top five.

Professor George Williams:

I would certainly start with some of the national security laws that prevent things coming to light, including the misuse of power. I would also turn to some of the provisions in the electoral laws.

Albert Langer went to jail for advocating a formal vote. The law makes it a criminal offence to cast the vote and Amnesty declared him to be the first Australian prisoner of conscience in over 20 years.

I would also put on the table a bill in the Tasmanian Parliament that will mean a mandatory jail sentence of three months for people who engage in speech through protest.⁹⁸ It goes further than any other bill I've seen and it is directed particularly at the environmental movement, encompassing even protest on a footpath that might disrupt business. It looks like it will get through.

Let's look at the Queensland bikie laws.⁹⁹ I could give you a large number of examples – wearing a certain shirt could land you not just in jail but attract mandatory minimum sentences of a couple of decades.

We have long lists of concerning laws but no remedies in sight.

Tim Wilson:

Spencer, do you want to add something to the list?

Professor Spencer Zifcak:

Yes, I do. I live in North Carlton, not far from the proposed freeway, a very controversial proposal. They have an election coming up in November. The government has been so concerned to reduce protest and opposition to this particular road that it has introduced legislation which shuts down a protest in certain areas in the immediate vicinity of the proposed link route.

Not only that. In the course of the consultation, which was compulsorily required by the government, it took off the table certain kinds of criticism and certain forms of – how shall I say – certain kinds of arguments that were not essentially economically founded from consultation meetings.

The chairs of the meeting were simply able to rule certain kinds of objections to the road off the agenda and consequently those views were not capable of being heard by the consultation and review panel. We have a Charter of Rights and Freedoms in Victoria.¹⁰⁰ It seems to me that both those pieces of legislation were contrary to the Charter. But you need to have money and nobody at this point had the money or capability to challenge...

Gary Johns:

Can I just ask, so the Charter did not save the right of the protesters? It would have saved the rights of the protesters, had they had the financial resources?

Tim Wilson:

Isn't this one of the challenges where you have a parliament that legislates a Charter of Rights and they are able to override that through legislation? Its efficacy makes it significantly diminished, so that means the only game in town is a constitutional revision?

Professor Spencer Zifcak:

I think most people on the panel agreed that the Constitution makes it desirable.

Professor Suri Ratnapala:

Compulsory voting is a long-standing component of free speech.

But, it is still not recognised that the right not to vote is part of freedom of expression. That is an important thing.

One of my students went to jail, unfortunately, having refused to vote. He did so – I feel a little guilty about it - having listened to my lecture criticising the High Court decision on compulsory voting.

Tim Wilson:

Apart from the Racial Discrimination Act, do you have anything else on your list?

Dr Gary Johns:

The Premier has said he will withdraw the legislation fairly soon because he copped an 18% swing against him in a recent by-election, in an adjoining seat. It is possible for people to speak out, at little cost, even compulsorily, when they vote, to straighten politicians out.

It is a job with bits and pieces. I don't think it is a job with a grand design, I think we have to fight this in the trenches. With various groups around the country, you have to battle this one by one.

We are getting to the point where governments themselves are the problem, not laws that keep people in check. I remember a lovely phrase that Donald Horne left us, all about inclusion and so forth: 'we don't have to love each other, we don't even have to like each other, it is really a question of not tearing each other apart'.

Just make sure we are all ready and armed to make sure that those who seek to take our liberties from us know that we will come to get them, eventually.

Tim Wilson:

One final question. People are drawing a distinction between free expression, which may include commercial expression, various types of language we do not like, and what we have in terms of political speech.

Based on discussion so far some view political speech as taking precedent in a liberal democracy and other forms of speech are not equivalent.

Political speech is often informed by other forms of speech outside of political speech. How do you justify that when there are other types of expression that underpinned the development of it? How do you separate political and non-political speech?

Professor Suri Ratnapala:

I don't think you can separate them. I will give you an example; a case concerning the prohibition of advertising by lawyers for their services. The High Court upheld that prohibition which was put in place by the disciplinary authorities of New South Wales.¹⁰¹

How much closer can we get to the rule of law and democracy and how the Constitution works, than by going to a lawyer and getting legal services? For the High Court that was not a sufficient connection to governance, for them to say you cannot limit advertising of legal services.

Coming back to my main point, the information that is essential to the functioning of a free society does not belong to any one authority, it belongs to all the people, scattered over millions of people.

The only way that information can be processed, and be made to work for society, is through free expression. That includes free expression in commercial matters. The market processes must be allowed to work, otherwise the entire edifice collapses.

Professor George Williams:

It's a nonsensical distinction that no other country maintains. What we have in Australia is the fledging of political speech and, conversely, if you are only engaged in what the court might regard as artistic speech you are seen as non-deserving of protection.

You look at the debate around the Bill Henson photos, and other debates around artistic speech – in those cases an absence of protection has impacted on the willingness of the community to say that it is justified, more than it should be.

These are too perverse outcomes. I was giving advice to the Eros Foundation on the freedom of speech regarding pornographic films. I suggested they make a pornographic film where the actors were portraying politicians...

(Laughter)

... As I said, nonsensical.

Tim Wilson:

It sounds like three versus you, Spencer?

Professor Spencer Zifcak:

I wouldn't say versus me. I would privilege political speech while recognising that, at the edges, political speech is blurred. Having said that, let me make it clear: I believe in free commercial speech, and I believe in free economic, scientific, cultural, social speech as well.

The answer is that we should take freedom of all kind of speech seriously. However, given the centrality to the preservation of constitutional democracy – generally accepted as the least worst form of government we have – we should remain committed and vigilant.

Tim Wilson:

It seems to be emerging as the theme of the day. Thank you to our rock stars of free speech. Ladies and gentlemen, could you please give them your thanks.

5 State of a free media

5.1 Megan Brownlow^{xv}

Executive Director, PricewaterhouseCoopers

Topic: Is the media playing field level?

Outlook
Australian Entertainment & Media 2014–2018

*Revolution
not evolution*



Megan Brownlow

Outlook | Australian Entertainment & Media 2014–2018

1

I should probably explain why I have been asked to talk today because I'm not a lawyer, I'm not an academic, I'm not a government employee nor government funded and I'm not funded by a specific sector. I'm not even an accountant, even though I work at PricewaterhouseCoopers (PwC).

I'm a former journalist who moved into an internet investment company, and now I am in an industry advisory and research role at PwC. Jana outlined some of the work we do.

I have been asked to answer this question of whether the media is a level playing field, and the answer of course is *no*. As soon as you add regulation you change a market's structure and players do not operate by the same rules. The answer is clearly *no*, but should the media be regulated? Actually, *yes*.

The media holds a very distinct place, a unique place in the hearts and minds of Australians. It is very powerful, particularly mass media, even though it is less mass than it used to be. Some of you may remember that Paul Keating famously said, 'If you speak to John Laws you speak to middle Australia'.

The media can shift election outcomes. It's why journalists are courted by politicians and that influence still holds. That is the reason media needs to be regulated.

Is the current suite of regulations correct? That would be a resounding *no* from everybody, even the regulators.

When we look at the long list of complaints by the media about the nature of their regulation however, they are generally more excited about regulation that constrains their ability to commercialise, rather than freedom of speech. Freedom of speech is in there but further down the list. Let's look quickly at the main regulatory issues affecting them.

xv Megan Brownlow is an entertainment and media industry specialist at PwC where she undertakes strategy, due diligence, forecasting, and market analysis work for clients. Megan is the Australian editor of PwC's annual market-leading publication: *The Australian Entertainment & Media Outlook* which provides forecasts and commentary on eleven media segments covering advertising and consumer spending.

If you are a subscription TV company, you feel life is unfair. The anti-siphoning rules restrict your access to exclusive sports rights. If you are free to air television – a heavily regulated sector – you are restricted geographically because of the 75% ‘reach’ rule and you have content obligations regarding content that is hard to monetise, such as children’s shows. Also, there are limits on the amount of advertising you can show.

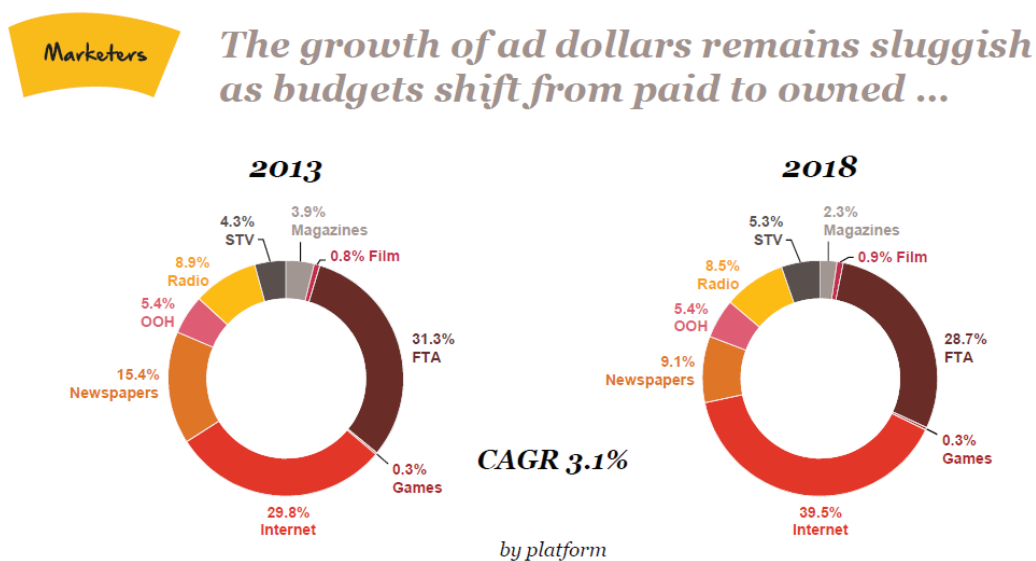
Radio has strict rules about the provision of local news and current affairs. They have rules about how they handle complaints.

Newspaper publishers can’t own radio stations and television networks in the same market.

So it seems most media sectors have some regulatory constraint they find onerous and are vocal about it. What about the internet? They stay mum and just quietly count their cash.

Media regulation is such a big issue now because of money. Let me explain with numbers. Here are the revenues we are forecasting for media businesses over the next five years.

First up let’s look at the advertising pie altogether – what it is now and what we expect it to be by 2018.

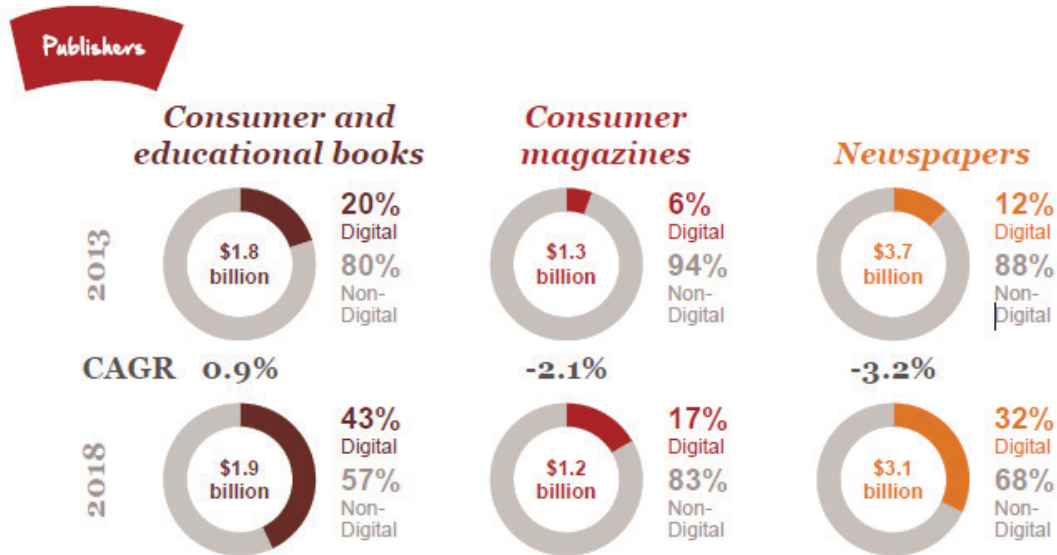


PwC Outlook | Australian Entertainment & Media 2014–2018

The important thing to notice is the sluggish growth rate. We are expecting only a 3.1% compound annual growth rate, that is, the advertising market will grow by only 3.1% on average each year over the next five years.

You can see the big section at the bottom is the growth in internet. The proportion of advertising revenue going to the internet will grow to be 40% of the overall market by 2018.

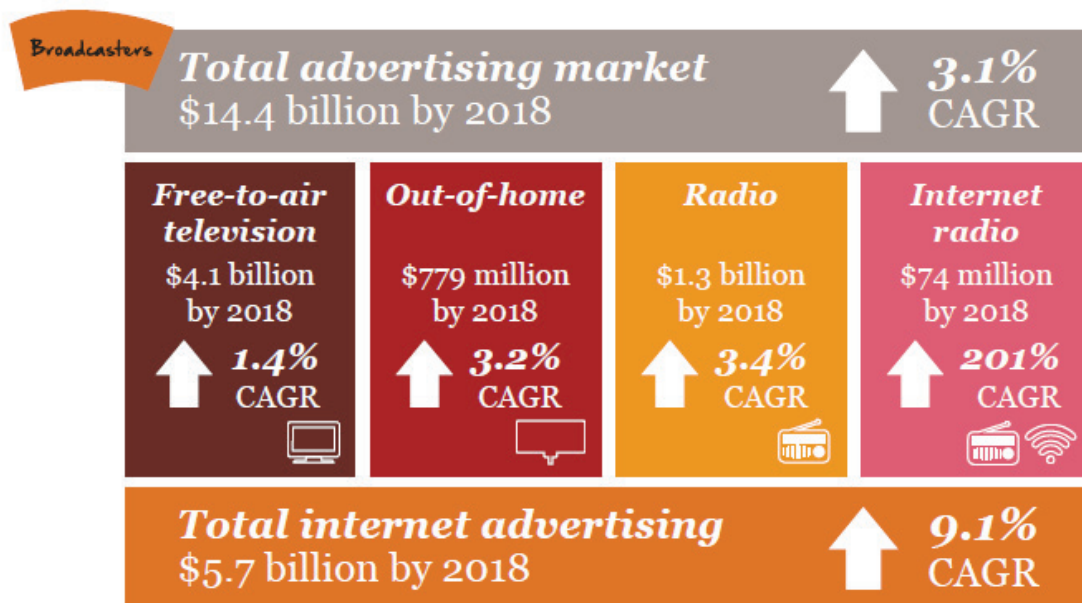
If we drill down and look at specific sectors and how we expect them to do, you can see things are a little bit flat, if not negative.



PwC Outlook | Australian Entertainment & Media 2014–2018

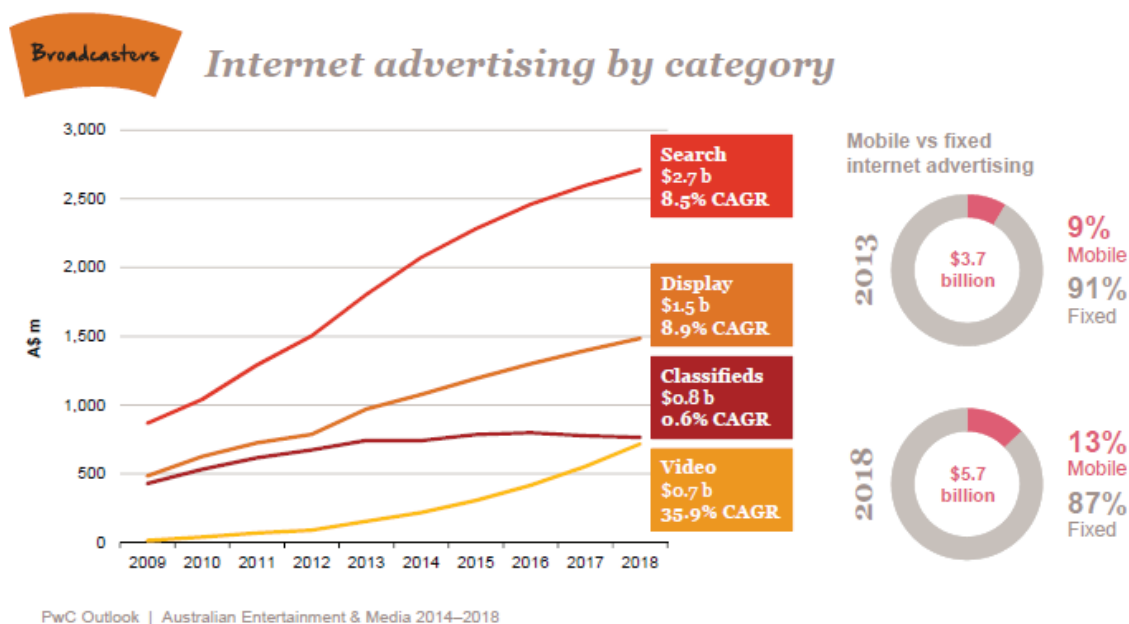
We expect newspapers to continue to go backwards in revenue, both in circulation and advertising. If you think our -3.2% annual decline seems kind, I have to tell you this includes digital revenues as well.

These forecasts are not adjusted for inflation. Once you factor in inflation, some sectors – including the powerful free-to-air television sector – will be going backwards over the next five years. So you can see why there is such sensitivity around media regulation.



PwC Outlook | Australian Entertainment & Media 2014–2018

The strip at the bottom is internet advertising. Yes, Australian media businesses are in this market too. In fact, newspaper publishers developed a very strong, early footprint in the internet. They now have enormous online audiences, which are not monetised adequately.



In internet we have a sector that is taking the lion’s share of the advertising dollars and is expected to grow at nearly double-digit figures each year over the next five years.

Australian media’s active involvement in the internet is a good thing, but if we drill down into the internet advertising pie, it’s not divided equally. The line at the top is search. In Australia about 95% of dollars going to search advertising go to Google.

Where Facebook plays is in display advertising, alongside the Australian media companies. The bottom line is online video advertising. Online video advertising is what you see when you watch ‘catch up TV’ on your tablet or laptop and you are served advertisements, sometimes the same ad three times in a row (they haven’t quite got that right yet). This is a big growth area for internet revenues.

Currently the media companies are competing for online video advertising revenue against amateur content on YouTube; so 55% of the online video advertising market is also Google’s.

A trend we are witnessing in many countries, except perhaps China, is the globalisation of the media market. The migration of advertising revenue towards the internet and away from traditional media properties is essentially the movement of dollars from Australian media companies to big, global media companies, most of them U.S. based.

These companies behave differently from Australian businesses. They invest in and build their knowledge economy while we have been focused on cost-cutting. Cost-cutting is fine if the money you save is redirected into growth areas but that is not what’s happening in Australia.

Our view at PwC is that we – Australian businesses – have become very good at cost-cutting and it is getting in the way of our ability to strategise. Cost-cutting is not strategy. You cannot cut costs to greatness.

If we are not to become a society of worker bees – sales outposts for global internet businesses – we are going to have to rethink and adjust many things.

We cannot make those adjustments through regulatory levers alone. Today we have heard many fine examples of unintended and negative consequences of regulation. We cannot just reach for regulation. Here's a good example why.

Have you been watching Spain and the so-called 'Google Tax' they've just brought in? It's a reform to their intellectual property laws that allows news publishers to charge any business that links to their content.

It puts Google, Facebook and Twitter in the firing line. The law is largely unenforceable however because these companies sit outside Spanish jurisdiction.

What is more likely is that these companies will encourage their millions of users not to link to the Spanish publishers. Spanish viewers and readers will look for alternate news sources. One truism about the media now – scarcity is not a problem.

You can see why media regulation is such a touchy subject at the moment. You can see why there are strong and voluble expectations from media businesses for reform.

It is summed up by that old saying: 'when things are good, business does business, and when things are bad, business does government'. That's what we are seeing now.

5.2 David Leyonhjelm^{xvi}

Senator for New South Wales, Federal Parliament

Topic: Open and transparent government

During my first sitting week in the Senate, I was waiting in line for a daily ritual known as the doorstep – where politicians talk to the media before entering the Parliament for their day’s work.

The Government Senator before me kindly mentioned to the journalists how much he had enjoyed my first speech that I made the previous afternoon. One journalist took it upon herself to ask him, ‘Do you ever wish that you were able to say whatever you want, just like Senator Leyonhjelm does?’

The Senator replied that in some ways he did, but that there were advantages to belonging to a major party that made up for it.

I don’t think anything makes up for the inability to speak freely. Senator Jacqui Lambie has experienced the kind of fuss that can arise in the media after saying something a bit naughty. When she told a radio breakfast show that she was looking for a partner with certain endowments, it made the front page of metropolitan newspapers, and she eventually felt compelled to apologise.

We could argue about whether or not Senator Lambie should have apologised, but I would be more inclined to argue whether this should have been news at all.

The implication seems to be that Senators should operate to a higher standard. Yet we can bet that the same journalists who suggest that Jacqui’s comments caused offence will complain that the language of politicians is dominated by bland responses generated by spin doctors.

One of the many perks of being a Senator is the range of free character assessments I receive. These come in the form of phone calls, emails, letters both signed and anonymous, and on tweets and blog comments shared with thousands of people.

I choose not to be offended. I also choose not to identify as a victim. I understand that the rights that make it possible for people to speak freely about me and my policies are the same rights I use to speak about them and their policies.

It is in the area of interpretation where it can get all messy. In the Australian vernacular, being called a bastard can be intended as a serious insult, a minor criticism or a term of endearment, yet someone may find the term offensive irrespective of the intent.

People can choose how they respond, and some might choose to be offended in order to use their offence against an ideological foe, or to receive ‘go away’ money.

Section 18C of the *Racial Discrimination Act 1975* (Cth) is not really about the expression of speech at all – it’s an attempt to prevent people thinking racist thoughts. But to believe our thoughts can be regulated by restricting our speech is delusional. No law will stop people from thinking things we disagree with, and banning their expression will only deny civilised public debate and encourage them to resort to non-traditional media.

This week has been bad for freedom of speech. Under the guise of national unity, the Government dropped its plan to repeal or amend 18C. Under the guise of national security, it announced plans to force ISPs to store our emails, web browsing, tweets and other stuff for two years so ASIO and other agencies can trawl through them. And there is a bill already introduced that will restrict our right to talk about ASIO’s activities.

That bill, the National Security Legislation Amendment Bill,¹⁰² creates an offence of disclosing information relating to a special intelligence operation.

There is no public interest restriction on the offence, and it is not limited to disclosures about identities and current operations.

xvi Senator David Leyonhjelm has had an interest in politics since the early 1970s. He has a classical liberal outlook, favouring individual choice and freedom over government intrusion, and is the first person elected to an Australian parliament on this platform. David was elected to the Senate representing the Liberal Democrats in September 2013 and commenced his term in July 2014.

In fact, there is little preventing the bulk of ASIO operations being classed as special intelligence operations. That means the provision could restrict a broad range of speech, including all information about ASIO.

If it is the role of ASIO to serve the public, not the role of the public to serve ASIO, this strikes me as profoundly wrong.

The penalty is up to ten years in jail, and there is no provision to distinguish between disclosures having adverse consequences for the Australian public, rather than the Australian Government. And adverse consequences could range from military and economic consequences, to the diplomatic or merely embarrassing.

The legislation does not provide any exemptions, meaning it could apply to anyone including journalists, bloggers, lawyers and other members of the public. In effect, it gives ASIO immunity to be incompetent.

The intention of this law is to prevent whistleblowers undermining national security, as Edward Snowden and Wikileaks are claimed to have done. But the Government has failed to outline adverse consequences from these disclosures.

No comfort is provided by the *Public Interest Disclosure Act 2013* (Cth) which was supposed to create scope for whistleblowers but omits disclosures about intelligence agencies or politicians. It requires public servants to make their disclosures to other bureaucrats, and its vague protections have the effect of discouraging whistleblowing.

Of course, there would be less need for whistleblowers if the operations of governments were more plainly visible to their owners, the taxpayers. If the Government routinely puts its activities in the public domain, there are no revelations to be made.

There is very little the Government does, across the entire public service, which should be shielded from public scrutiny. Taxpayers have every right to know how the \$350 billion they are contributing to the Government is being spent, including the processes. Down to the last dollar, if necessary.

But given the size and reach of government, transparency involves more than just flooding taxpayers with detail. Governments also have an obligation to make clear the big picture of their interventions. Simple websites outlining where your tax dollar goes should be commonplace. And the burden of regulation should be added up and presented simply.

Above all, governments need to do less, so that voters can understand and make informed decisions about what governments are doing on their behalf.

But instead of the public seeing reforms to increase the transparency of government, there are reforms coming that increase the transparency of the public to the government.

The proposal to introduce data retention will restrict free speech. Once it is known that our emails, calls and other communications on the internet are subject to interception, we will not speak freely.

The bigger issue is one of legitimacy: why should our security agencies be given the power to treat us all as potential criminals? If they can't catch terrorists with their existing powers, and they have not made that case, does that signify they are incompetent?

There is also a question of practicality. If catching terrorists is like finding a needle in a haystack, how does it help to create a much bigger haystack? The needle is the same size.

The proposed law will oblige ISPs to store data they do not currently retain for two years. They will need to set up the resources to do this, which will cost them money and will be passed on to their customers. One ISP estimates the cost at \$300 million a year.

We will all pay for the privilege of having ASIO, plus a whole host of other organisations, trawl through our communications. And don't be fooled at the claim that it's only metadata; in an email, metadata includes who it's from, who it's to, the copy list, and the subject heading. In a tweet, it's everything.

The ISPs also have no experience or expertise at keeping data safe. There is enormous potential for it to be accessed by people who are not entitled to use it.

As I said, I don't think anything makes up for the inability to speak freely.

We must never forget the words of H L Mencken that 'the urge to save humanity is almost always a false front for the urge to rule it'.¹⁰³

5.3 Michael Sexton SC^{xvii}

Solicitor-General for New South Wales

Topic: Media regulation in Australia

The two different worlds of the title are electronic media – radio and television – and the print media – newspapers and magazines. The former is the subject of highly detailed regulation in Australia through the medium of federal legislation, while the latter remains essentially unregulated (except insofar as newspaper proprietors may encounter restrictions on their ability to own electronic media outlets at the same time as their print publications). Each of these sectors will be considered in turn, although there will obviously be an emphasis on electronic media because of the volume of regulation to which it is subject.

Broadcasting Services Act 1992 and the establishment of ACMA

The *Broadcasting Services Act 1992* (Cth) (BSA) regulates electronic media in Australia. It is 1067 pages in length and extends to almost every aspect of this sector of the media. The body responsible for administering this system of regulation is the Australian Communications and Media Authority (ACMA), which is established by the *Australian Communications and Media Authority Act 2005* (Cth).

Operating licences and conditions attached to them

Under the legislation the following categories of broadcasting services are required to obtain licences under the authority of ACMA in order to operate their activities:¹⁰⁴

- commercial television
- commercial radio
- subscription broadcasting services
- subscription narrowcasting services
- open narrow casting services
- international broadcasting services
- community broadcasting services
- datacasting services.

The Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) have their own legislation and are not in general governed by the BSA.

Each commercial television and radio licence is subject to a set of conditions set out in the legislation and to any other conditions that may be imposed by ACMA.¹⁰⁵ It might be noted that a breach of any of the conditions set out in the BSA is made a criminal offence and may also attract a civil penalty.¹⁰⁶ Licences may be suspended or cancelled for the breach of a condition.¹⁰⁷

One of the conditions applicable to commercial television and radio licences is a requirement that the licensee comply with program standards developed under the legislation.¹⁰⁸ The commercial television and radio industries have formulated codes of practice that include program standards. In theory this is a voluntary exercise, although the legislation provides that, if no code of practice is supplied to ACMA, the authority itself may determine a standard in relation to any aspect of the codes referred to in the legislation.¹⁰⁹ Amongst the matters that can be covered by codes of practice are:¹¹⁰

- preventing the broadcast of programs that, in accordance with community standards, are not suitable to be broadcast
- methods of classifying programs that reflect community standards
- promoting accuracy and fairness in news and current affairs programs
- amount of time devoted to advertising.

xvii A graduate of the law schools of the universities of Melbourne and Virginia, Michael Sexton SC, spent some years as an academic lawyer before taking up practice at the NSW Bar. Since 1998 he has been Solicitor General for New South Wales. He is co-author of the Australian text on defamation law and the author of several books on Australian politics and history. In the area of public administration he has been chairman of the NSW State Rail Authority and a board member of the NSW Public Transport Authority, the NSW Library, the Sydney Writers' Festival and the University of Technology Council.

In relation to the first two matters, community attitudes to a number of matters are to be taken into account, including:¹¹¹

- portrayal of physical and psychological violence
- portrayal of sexual conduct and nudity
- use of offensive language
- use of drugs, including alcohol and tobacco
- matters that are likely to incite or perpetuate hatred against, or vilify, any person or group on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability.

Local content and classification requirements

There is a local content requirement under the BSA for commercial television services that effectively amounts to 55% of viewing time over any particular year.¹¹² Yet another area of regulation is the cooperative scheme between the federal, state and territorial governments for the classification of publications, including films and computer games, by way of two federal bodies, the Classification Board and the Classification Review Board.¹¹³

Complaints to ACMA

Complaints may be made to ACMA in relation to program content or non-compliance with a code of practice, and in the case of the ABC and SBS, about non-compliance with a code of practice.¹¹⁴ A complaint can only be made to ACMA if an initial complaint has been made to the relevant organisation and a response is not received within 60 days, or the response is considered by the complainant to be inadequate.¹¹⁵

Investigations by ACMA

ACMA is authorised by the legislation to conduct investigations in relation to any of its functions and may conduct public hearings in these areas if it is so minded.¹¹⁶ For the purpose of an investigation ACMA may summon a person to attend and produce documents or answer questions under oath or affirmation.¹¹⁷ In the case of hearings, ACMA may summon a person to appear to give evidence on oath or affirmation or to produce documents, or to do both.¹¹⁸

One such investigation by ACMA was the subject of protracted proceedings in the Federal Court over the last year. The proceedings arose out of a telephone call made by two presenters of radio station *2Day FM* in December 2012 to the hospital in London where the Duchess of Cambridge was being treated during her pregnancy. The presenters, posing as the Queen and Prince Charles, spoke with two hospital staff and the recorded telephone call was played on air in Sydney. One of the two staff members subsequently took her own life, although whether influenced by the conduct of the presenters was difficult to determine.

ACMA instituted an investigation into whether the radio station had complied with one of the conditions to which all commercial radio licences are subject – that is, the licensee will not use the broadcasting service in the commission of an offence against a law of the Commonwealth, a state or a territory. The recording of and publication of private telephone conversations may be contrary in some circumstances to the provisions of the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2007* (NSW).¹¹⁹ The radio station sought an injunction restraining ACMA from making any finding that it had committed a criminal offence on the basis that such a finding could only be made by a court. Edmonds J held that ACMA was entitled to continue its investigation despite the radio station not having been found guilty of any offence by a court.¹²⁰

On appeal to the Full Federal Court, however, it was held that the relevant provisions of the BSA did not envisage a finding by ACMA as to whether or not particular conduct constituted the commission of a criminal offence.¹²¹ The Full Court considered that ACMA could only find a breach of the relevant condition where the licensee had made an admission that it had used its broadcasting service in the commission of a criminal offence, or a court exercising criminal jurisdiction had found that such an offence had been committed. ACMA has filed an application for special leave to appeal to the High Court and the application will be heard on 15 August 2014. The cost of these proceedings has already been substantial on both sides and obviously further considerable costs will still be incurred, particularly if leave to appeal is granted by the High Court.

Restrictions on media concentration

The BSA has a lengthy set of extraordinarily complex provisions seemingly designed to prevent significant concentration of media ownership in particular markets.¹²² A single media company is, for example, precluded from controlling a commercial television licence, a commercial radio licence and a newspaper in the one region. One problem with this concept is that the BSA, like all earlier legislation in this area in Australia, has largely accepted an existing historical situation of substantial concentration of media ownership. It may be, however, that there is a degree of inevitability about this kind of ownership structure in Australia. The combination of a relatively small population in urban clusters and a large land mass might suggest oligopoly as a likely result. These provisions of the BSA – and the provisions of the *Competition and Consumer Act 2010* (Cth) dealing generally with competition in markets – have their genesis in the U.S. anti-trust legislation of the 1890s. It might be doubted that this kind of legislation has ever been particularly effective in the U.S. itself, but the value of its importation to a much smaller and inherently less competitive environment in Australia can certainly be doubted.

Regulation of the print media

In contrast to the elaborate system of regulation for the electronic media, the world of newspapers and magazines, together with their online extensions, is largely unregulated. There was a proposal to change this situation in 2012 in the form of the Finkelstein report into the media and media regulation.¹²³ The report recommended a News Media Council that would set journalistic standards for both the electronic and print media, and handle complaints made by the public when those standards were breached.

The report was heavily criticised, not least for its apparent assumption that most members of the community were incapable of assessing material in the media without some form of external guidance. It was said in the report, for example, that ‘in modern society there is a limited capacity of people to learn all that they must to fully participate in the democratic process’ and that often ‘readers are not in a position to make an appropriately informed judgment’.¹²⁴ In any event, the report, which was made to the then relevant Minister in the federal government, was not implemented.

There is a system of voluntary regulation for the print media in the form of the Press Council. The Council is comprised of 22 members, nine of whom are nominees of media organisations together with four independent journalist members and nine members who have no affiliations with a media organisation, one of these being the chairperson. The core funding for the Council is provided by the major media organisations that form its membership. Complaints can be made by members of the public to the Council and are considered against standards that have been developed by the Council. The Council’s adjudications on complaints are published in the newspaper – and its online extension – about which the complaint was made.

One problem for the Press Council is that it seems to have become embroiled in highly contentious and ultimately unresolvable debates over economic and social issues by considering complaints about publications on these kinds of questions. It might be thought that complaints as to factual inaccuracy would be better confined to those by an individual as to what has been published about him or her in the relevant article.

It should be noted that the print media, like the electronic media, and even social media, is subject to various legal regimes that may impose civil or criminal liability for what is published. The most obvious of these regimes are the law of defamation which provides a remedy, subject to a range of defences, for damage to reputation, and the law of contempt which imposes criminal liability for publications that, for example, prejudice the pending trial of a person charged with a criminal offence.

Convergence Review

In March 2012 the Convergence Review established by the then federal government reported to the relevant Minister.¹²⁵ As its title suggests, it had been set up to consider the question of media regulation at a time when the boundaries between traditional forms of media had become significantly blurred. The chief findings of the review were as follows:

- Licensing and broadcasting services should cease as this sector was over regulated.
- Major media operators – perhaps numbering 15 in Australia but not including, for example, Google, Telstra and Apple – would be subject to regulation in two areas:
 - First, media ownership to ensure that no operator had a dominant influence in a local market for news and commentary.
 - Second, content standards for news and commentary should be the responsibility of an industry-led body along with other content standards, including local content quotas, being the responsibility of a federal statutory body replacing ACMA.

Although the report considers the broadcasting sector to be over-regulated, arguably its recommendations do little to address that problem and extend much of the existing regulation of the broadcasting sector to the print sector. It is hard to see how these recommendations would be an improvement on the current position, although there can be little doubt that the issue of convergence needs to be addressed in any scheme of regulation that is going to be maintained in the future.

6 Free Speech Reflections

6.1 The Hon Mark Dreyfus QC MP^{xviii}

Shadow Attorney-General

Topic: Free speech reflections

I thank the Australian Human Rights Commission and Human Rights Commissioner Tim Wilson for inviting me to speak at this event. Free speech is a fundamental human right, and I am very pleased to have the opportunity to discuss it this afternoon under the auspices of this Human Rights Commission symposium.

Our country has a long tradition of engagement with the principles of human rights developed by the international community in the aftermath of the Second World War. Doc Evatt, a great Australian jurist and stalwart of the Labor Party, presided over the adoption by the United Nations General Assembly of the *Universal Declaration of Human Rights* (Universal Declaration) in 1948.

The preamble to the Universal Declaration expressed the General Assembly's recognition of 'the inherent dignity and of the equal and inalienable rights of all members of the human family'. In the intervening years, the international community has settled a range of human rights treaties which give binding force to this basic principle and to the rights enumerated in the Declaration. Australia has generally played a constructive role in this work. But not always...

Unlike many comparable jurisdictions, Australia lacks a full charter of rights. We have however implemented a number of our treaty commitments in legislation such as the Racial Discrimination Act¹²⁶ to *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act), the *Sex Discrimination Act 1984* (Cth), the *Age Discrimination Act 2004* (Cth) and the *Disability Discrimination Act 1992* (Cth).

The Human Rights Commission has a special responsibility, as our national human rights institution, for the promotion and protection of human rights in this country. It is empowered to administer those human rights statutes that Australia has implemented. Independent of government, it works to make sure that Australia honours the human rights commitments we have made. The Commission does immensely valuable work, and I am very happy to speak here today about an important human rights issue.

I start by giving this context because we must be very clear what we mean when we talk of the human right to free speech. Freedom of speech has been an issue I have dealt with not just in my public life as a parliamentarian, but also in my practice as a lawyer before entering politics. In my practice at the Bar I specialised in, among other areas, the law of defamation. In that area of the common law – which I assure you, is far more restrictive of speech than anything in a human rights statute such as the Racial Discrimination Act – the courts squarely grapple with the boundaries of lawful speech.

And, as is the case with so many areas of the law that require the balancing of competing societal interests, the law of defamation continues to change. And I am happy to say that when it comes to human rights, our laws are generally changing for the better. From my perspective, that means that our laws are becoming better at protecting human rights, including the right to free speech.

A good example is the establishment by the High Court of Australia's implied constitutional freedom of political communication in *Theophanous v Herald & Weekly Times*,¹²⁶ *Lange v ABC*¹²⁷ and *Levy v State of Victoria*.¹²⁸

Since leaving the Bar and entering Parliament I have maintained my longstanding commitment to improved legal protection of human rights in this country, and that certainly includes the protection of free speech.

xviii The Hon Mark Dreyfus QC MP was elected to the House of Representatives as the Member for Isaacs in November 2007. Mark practised as a barrister before entering Parliament, and appeared in the High Court in the landmark freedom of political communication cases *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Mark held various portfolios in the former Labor Government. He served as Cabinet Secretary and Parliamentary Secretary for Climate Change and Energy Efficiency, before being appointed Attorney-General in February 2013. Mark is now Shadow Attorney-General and Shadow Minister for the Arts.

Of course, everyone declares that they are committed to freedom of speech.

George Orwell wrote about the abuse of political terminology in his excellent 1946 essay *Politics and the English Language*.¹²⁹ He said that words like ‘freedom’ are capable of several different and irreconcilable meanings. Orwell wrote that this kind of word can be used dishonestly. What a politician really means by ‘free speech’ can be very different from what their audience takes it to mean. It is very easy to declare one’s commitment to freedom of speech. But the critical question is: ‘what does that commitment mean in practice?’

For many of my political opponents, it seems that ‘free speech’ has a very selective meaning indeed. Though they would never dare admit it, ‘free speech’ for some means that reactionary shock-jocks are free to indulge in rants that ride roughshod over the standards of truth and basic decency that our community expects and deserves. For some, it means that no racist hate speech is too vile to be constrained by the law. For some, it means the untrammelled freedom for large corporations to dominate public debate with campaigns designed to serve no interests other than their own.

These same loud devotees of ‘free speech’ are very quiet indeed when the freedom of community groups and activists to participate in important debates is threatened, or the freedom of community legal services to advocate for law reform is removed. They are nowhere to be found when overzealous or clumsy lawmaking threatens the ability of real journalists to do their vital work. They have a very narrow understanding of what ‘free speech’ means.

By contrast, I will be very clear about what I mean when I talk about ‘free speech’. The freedom of speech I seek to advance is a much more important value than that advanced by the Abbott Government. It is rooted in the principles of human rights, properly understood: the principles that this Commission works to advance in our society.

I firmly reject the false argument put by some that practically any regulation or restriction on what we say infringes our right to free speech. I reject the simplistic notion that our only legitimate recourse against harmful or hateful speech is to be found in an imagined ‘marketplace of ideas’. This reductionist understanding of what free speech entails is mistaken on several counts.

First, what I will call the ‘absolutist’ position on free speech ignores the fact that government restraint is not the only threat to freedom of speech. As the Race Discrimination Commissioner noted in his excellent Alice Tay Lecture in Human Rights and Law at the Australian National University in March this year,¹³⁰ freedom is not merely the absence of external restraint. We rightly speak of ‘freedom to’ as well as ‘freedom from’.

Regulation can secure the freedom to speak and to engage meaningfully in civic life. Our most important and long-standing democratic institutions reflect this insight. They always have. Courts, for example, lay down strict rules and procedures about how parties are to argue their case to ensure that proceedings are fair.

The free press, which fulfils a critical role in our democracy, must be careful in its reporting or risk breaching our defamation laws. Even more importantly, the journalists who work in our media are bound by a rigorous set of professional ethics, though the extent to which they adhere to these ethics and what can be done if they do not, are complex issues worthy of a speech in themselves.

Parliaments, ostensibly the ultimate forum for free political debate in our society, impose very prescriptive standing orders. While the laws of privilege free me from the constraints of defamation law inside the Parliament, I am constrained in other ways from what I can say. For example, even here, outside the Parliament, I am forbidden as a parliamentarian to reflect on the Speaker of the House of Representatives. The standing orders try to ensure that parliamentary debate is conducted in an orderly, dignified and appropriate manner, though watching question time you might have your own opinion on how successful this framework is.

In almost any forum where our society debates important issues we impose rules governing speech.

My second criticism of the absolutist position on free speech is that it ignores the relationship between free speech and other human rights. Very few human rights, other than the rights to be free of criminal abuses such as torture and slavery, are unqualified.

Implementing an authentic human rights agenda requires careful balancing of competing rights against one another. The human rights system both domestically and internationally clearly is intended to direct our attention to this important and delicate task. The statute establishing the Australian Human Rights Commission expressly says that it is the duty of the Commission to perform its work with regard to the indivisibility of the whole body of human rights.¹³¹

That free speech is limited by reference to other human rights is apparent on the face of the international agreements we have agreed to. Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) states that 'everyone shall have the right to freedom of expression'. That article goes on to stipulate, however, that the exercise of this right 'carries with it special duties and responsibilities'. The right to freedom of expression may be curtailed in order to protect the rights of others.

It was the mistaken belief that an absolute freedom of speech trumps other important rights which drove the Abbott Government's misguided attempt to repeal section 18C of the Racial Discrimination Act. Of course, this divisive attack on our protections against hate speech was finally dropped on Tuesday by the Prime Minister, who termed it an unnecessary 'complication' for the government.

The Prime Minister seems to have developed a newfound talent for understatement. I understand that the Prime Minister was trying to ease the embarrassment to Senator Brandis, who has so clearly lost the confidence of his Cabinet colleagues, not to mention the Liberal backbench and a very large part of the Australian community.

However, the government's attack on section 18C was much more than a 'complication'. That the Prime Minister described his abandonment of Senator Brandis' signature policy in terms of a simple political calculation tells you a lot about this government's continued commitment to a distorted view of what freedom of speech means.

Most notably, what Mr Abbott failed to do this week was to admit to the Australian people that he and his Attorney-General had got it wrong on section 18C. And so the victory we had this week in the government's back-down was marred by the knowledge that the eloquent arguments expressed in the thousands of submissions opposing the gutting of our race hate protections did not convince the government to abandon its reckless course.

What convinced the government to back down was that the political costs of continuing on its hugely unpopular and ideologically blinkered course were simply too great.

So while we have had a victory – and I congratulate again all those who fought the government on this issue – the truth is that the government's ideological blinkers are still firmly in place. They still don't get it. They still have an undergraduate understanding of political philosophy and of human rights. The Abbott Government still doesn't understand, as any human rights lawyer could explain, that the human right to free speech has always been subject to the human right to be free from racial discrimination.

Senator Brandis' defining policy priority as Attorney-General has failed because he did not care to understand the breadth and nuance required of an authentic human rights agenda. Senator Brandis, a sworn devotee of the 'marketplace of ideas' his government appears determined to shut down, should recognise when he has lost an argument. His colleagues certainly have.

I will not say any more about the Racial Discrimination Act now. My topic today is free speech. The particular focus on section 18C by Senator Brandis, and the spirited defence that this attack engendered, has distracted from a number of other threats posed to free speech in our society.

I am sad to say that many of those threats emanate from the current government: a government whose heated rhetoric on free speech is belied by its actions.

I will return for a moment to Orwell's reflection on politics and language. When Abbott Government Ministers talk about 'free speech', they aren't just ignorant, but disingenuous. I don't for a second believe that those who trumpet their commitment to unfettered free speech in the debate surrounding the Racial Discrimination Act in actuality support an absolute approach to freedom of speech.

If they hewed closely to their professed principles, the libertarians amongst the Abbott Government would be demanding a radical revision or even abolition of defamation law and the abolition of offensive language offences. They would defend the fundamental right to make misleading statements in trade and commerce.

No, though the Liberal Government and its supporters talk in sweeping terms about ‘free speech’, they have in mind a much more selective application of that right.

The Attorney-General likes to invoke Voltaire’s (perhaps apocryphal) declaration that he would defend to the death the right to say things with which he completely disagrees. This is heady stuff in the Australian political arena, which is usually more given to pragmatism than philosophy. I am sad to say that I can see no evidence of the sort of political bravery that would have impressed the great French thinker.

Au contraire. Voltaire’s principle is honoured only in the breach. Senator Brandis and his colleagues are more than happy to attack free speech, and when they do, it is invariably the type of speech and the type of speaker with whom they disagree.

I will give you a couple of examples.

Though this government says it has a ‘profound’ commitment to free speech, it has deliberately sidelined expert NGOs from policy discussion. Senator Brandis has changed the terms on which the Commonwealth funds community legal centres (CLCs) right around the country to prevent them from speaking out on ways in which the law might be usefully reformed, or even from responding to government inquiries and consultations. He has amended the sector’s funding agreements to exclude Commonwealth funding for ‘law reform and advocacy’.

Chillingly, the government has also removed clause 5 of the service agreements, inserted by the last Labor Government. That clause affirmed the commitment of our government that conditions attached to Commonwealth funding to CLCs would not ‘stifle legitimate debate or prevent organisations engaging in advocacy activities’.

The government has cancelled all Commonwealth funding for Environment Defender’s Offices (EDOs). EDOs are small, highly dedicated organisations which work to protect the environment through law. EDOs assist the community at a grassroots level with legal advice and representation in public interest environmental matters. They work towards the improvement of our environmental laws and regulations.

We know from documents released under freedom of information that Senator Brandis’ decision to completely defund the EDOs came just weeks after the NSW Minerals Council wrote to him to complain about EDO advocacy. In Senate Estimates, Senator Brandis admitted that there had been no analysis of EDO funding arrangements done before the government terminated all funding.

Indeed, Senator Brandis’ decision flies in the face of the advice being provided to his government, if he would care to listen. The Productivity Commission has strongly endorsed the value of CLC advocacy work in its Draft Report on Access to Justice Arrangements.¹³² We might conclude that the government cut funding to these community organisations simply because they don’t like what those organisations sometimes say and what they sometimes advocate for, regardless of the benefits they consistently provide to our community and our environment.

This is not the only front on which this government is fighting those who wish to participate in public debate. The Federal Council of the Liberal Party recently unanimously supported a motion by Federal MP Andrew Nikolic calling for environmental groups to be stripped of their tax-deductible status.

Even more chillingly, members of the Abbott Government have now indicated that they plan to use competition law to silence environmental activists. The Parliamentary Secretary for Agriculture Richard Colbeck has told the press that there is an ‘appetite’ within the government to remove the current exemption to the prohibition on secondary boycotts provided for environmental activism.

This government, which holds itself out as a champion of free markets and free speech, wants to prohibit Australian citizens from speaking out in the marketplace in defence of environmental causes they disapprove of.

The government’s blind spot on free speech it doesn’t approve of isn’t limited to the NGO sector or to environmental activism. Worryingly, it extends to the media. Though the government is fond of reactionary opinion columnists, it does not appear to have much interest in defending real, independent journalism.

In opposition, Senator Brandis promised that he would be a champion of the free press. In May 2013 he said on the ABC’s *Lateline*: ‘There is no greater friend of journalist shield laws than me’.

In government, Labor began working with State and Territory Attorneys-General to create a uniform national system of journalist shield laws. We were serious about making sure that journalists were able to do their vital work and uphold their ethics without risking contempt charges and even jail time.

Senator Brandis, stalwart of freedom that he is, has abandoned this work. This Attorney-General, who claims to be a committed classic liberal, has taken shield laws off the agenda at the Council of Australian Governments (COAG). Instead, he is working with his colleagues in Liberal state governments towards the implementation of Campbell Newman-style repressive law and order policies nationwide.

But Senator Brandis, who describes himself as 'a John Stuart Mill man', doesn't just fail to protect the free press. He actively attacks it.

The national security legislation Senator Brandis has recently introduced into the Senate contains a new provision, section 35P, which makes it an offence punishable by up to ten years imprisonment for anyone to disclose information about certain undercover operations declared by ASIO to be 'special intelligence operations'. As has been pointed out, this could apply to journalists, even when they did not know that information relates to such an operation. There are no exemptions.

I have no desire to politicise national security issues. I have said publicly numerous times – and privately to the government – that I will always work constructively to help the government on any legislation necessary to keep our nation safe. Senator Brandis' national security legislation has been referred to the bipartisan Parliamentary Joint Committee on Intelligence and Security for just this purpose.

It is clear to me however that the proposed section 35P as currently drafted is not necessary. It is an unprecedented overreach of government power which poses a real threat to the freedom of the press. Senator Brandis has spent more than two years fulminating over a civil prohibition on race hatred, and now his own legislation would criminalise an activity of journalists.

The government must amend the legislation to remove this threat to freedom of speech and freedom of the press. Labor will oppose it in its current form. We will not tolerate legislation which exposes journalists to criminal sanction for doing their important work – work that is vital to upholding the public's right to know.

I suggest to you that these attacks on free speech show what a façade this government's professed commitment to free speech is.

The protection of human rights should not be a matter for partisan contest. Despite what Senator Brandis sometimes suggests, human rights are not and never can be the province of any one party. Governments of both political complexions have made meaningful contributions to human rights protection in this country.

The Abbott Government, however, has taken us backwards. Hopefully, this government will have learnt a serious lesson from its failure this week in relation to section 18C. And if this government has any integrity about its stated principles, it will cease its attacks on free speech in this country.

In particular, the Abbott Government must renounce its hostility to environmental groups and wider civil society, and reinstate government support for the involvement of CLCs in advocacy and law reform processes. Senator Brandis must get to work on the journalist shield laws he promised, and encourage his Cabinet colleagues to cease their attacks on the independence and capacity of the ABC to report what is happening in our nation.

And the government must also abandon repressive changes to our competition law that would shut down the public's right to protest through organised actions against corporations.

Freedom of speech must not be reduced to a simplistic slogan, employed as a war cry in the pursuit of base political objectives. Freedom of speech must be respected as a fundamental right in our society, a nuanced and deeply important value that we must fight to uphold, and to strengthen.

7 Accommodating Rights (Session 2)

7.1 Professor Anne Twomey^{xix}

Professor of Constitutional Law, University of Sydney

Topic: Donations as speech

Introduction

Are political donations speech? At first glance, it appears a rather odd proposition. But in the United States, where erotic dancing has been held to be a constitutionally protected form of speech,¹³³ the Supreme Court has held that the making of a political donation does amount to the exercise of freedom of speech and freedom of political communication, both of which are protected by the First Amendment.

In 1976, the U.S. Supreme Court held in *Buckley v Valeo* that the making of a political donation 'serves as a general expression of support for the candidate and his views'.¹³⁴ It is effectively a form of putting one's money where one's mouth is. It is therefore regarded as a form of 'symbolic speech'. The Court held that putting a cap on donations was acceptable, because the nature of the symbolic expression of support by a candidate is not affected by the amount of the donation – just by the fact that it is made. Hence, caps on donations were acceptable because they did not affect the symbolic expression involved, whereas banning donations would not be constitutionally acceptable because it would prevent this form of symbolic expression of political support.

More recently, in April this year, the U.S. Supreme Court relied on the 'donations equal speech' argument in striking down aggregation rules.¹³⁵ Since caps on donations were first imposed in the United States, aggregate limits were also imposed on donations. A donor, therefore, could only make capped \$1000 donations up to the point that he or she met an aggregate limit of \$25,000. This aggregate limit was initially upheld in *Buckley v Valeo*, as a 'modest restraint' aimed at preventing the circumvention of the law. The Court was concerned that otherwise a donor could make a large number of capped donations to different political committees which would then all be funnelled to the same candidate, effectively still permitting donors to make large donations to the one candidate.¹³⁶

In 2014 the aggregate limit, now \$48,600 for candidates and \$74,600 for party committees and political action committees, was challenged in *McCutcheon v Federal Election Commission*.¹³⁷ This time the U.S. Supreme Court struck it down because it denied the donor the capacity to be associated with additional candidates and political action committees, once he or she had reached the aggregate cap. Mr McCutcheon had already made donations to 16 federal candidates in the 2012 election and wanted to contribute to another 12 candidates and some political action committees. The Court held that the aggregate limit was invalid because it denied him the capacity to associate himself with those additional candidates in this way. They rejected the previous view of the Supreme Court in *Buckley* that an aggregate limit was a 'modest restraint'. Chief Justice Roberts said:

An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a 'modest restraint' at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.¹³⁸ [Emphasis added]

xix Professor Anne Twomey is the Professor of Constitutional Law at the University of Sydney. She has previously worked for the High Court of Australia, the Commonwealth Parliamentary Research Service, the Senate Legal and Constitutional Committee and The Cabinet Office of New South Wales. She wrote a report for the NSW Government in 2008 on the constitutional issues concerning the reform of political donations, expenditure and funding.

Not all Supreme Court Justices, however, have agreed with this approach. Shortly after this judgment was handed down, former Supreme Court Justice John Paul Stevens, told a Senate Committee:

While money is used to finance speech, money is *not* speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive precisely the same constitutional protections as speech itself. After all, campaign funds were used to finance the Watergate burglary – actions that clearly were not protected by the First Amendment.¹³⁹ [Emphasis added]

Do political donations really contain a message?

A number of questions arise about whether political donations are speech. The first is whether they can amount to protected speech if that communication is not publicly disclosed. Just as one can ask, does a tree falling in a forest, which nobody hears, make a noise, one might well ask, does a political donation make a communication of support for a political party if the donation is kept secret and not disclosed? At the Commonwealth level, the level at which the disclosure of political donations is required is relatively high – \$12,800. Arguably, where the identity of the donor of a political donation is not publicly disclosed, the donation should not receive constitutional protection because it does not amount to a political communication of support for a candidate or party. Such an argument might be employed to justify the banning of anonymous or undisclosed donations.

Of course it might be argued that the point of the donation is not to make public one's support for a party, but to exercise covert influence over the party's officials and parliamentary representatives by virtue of being known as a secret donor. However, it is precisely that type of influence that laws regulating political donations are intended to prevent.

Secondly, if political donations are speech, what is the message that they convey? Is it *really* that the donor supports the relevant candidate and wishes to be affiliated with him or her? If so, what do we say about the many persons and corporations that give to two or more opposing political parties – that they are schizophrenic or confused?¹⁴⁰ The more likely answer is that their political message is that they want to be on the side of whoever wins, in order to gain influence and access, regardless of which party that might be. While some political donors may genuinely want the candidates and parties to which they donate to succeed in elections, it is likely that just as many, or perhaps more, are donating to secure their own advantage, or at least to ensure that they are not put at a disadvantage if their competitors have donated to the winning side.¹⁴¹ Again, however, it is the reality or perception of influence-peddling that Parliaments seek to prevent by capping or banning political donations.

Finally, even if the making of a donation does amount to a political communication, how important is it to protect this form of communication? As Justice Keane noted in the recent *Unions NSW* case, there are many other ways by which a person can express support for a candidate or a political party.¹⁴² Given the ambiguity involved in the message being sent by making a donation, if a political donor really does want to make a political communication concerning support for a party or candidate, he or she might find other far more effective ways of doing so.

The High Court and political donations

The High Court, unlike the U.S. Supreme Court, has not reached a conclusion about whether political donations are a form of political communication. It has, however, taken two steps towards that conclusion. First, in 1992, the High Court held that the provisions in the Constitution that require that the Houses of Parliament be 'directly chosen by the people' imply that this choice must be free and therefore capable of being an informed choice. It concluded that as free political communication is necessary for voters to be able to make an informed vote in elections and referenda, then there is a constitutional implication of freedom of political communication that acts as a limit on Commonwealth and State legislative power.¹⁴³

Secondly, the High Court has accepted that political communication may involve non-verbal symbolic acts, such as displaying the bodies of dead birds as a form of silent protest against duck-shooting.¹⁴⁴ Hence it is theoretically possible that the payment of money, in the right circumstances, could be regarded as a form of political communication.

The issue was raised, but avoided by the High Court, in the case of *Unions NSW v New South Wales*.¹⁴⁵ The case concerned NSW legislation that banned the making of political donations other than by people on the electoral roll. The effect was to ban corporations, unions, partnerships, unincorporated bodies, permanent residents and those under 18 from making political donations.

In *Unions NSW*, the question was whether a ban on some people and bodies from making political donations amounted to a breach of the implied freedom of political communication. In other words, do political donations amount to a form of political communication that has been invalidly burdened? The Court noted the argument that donations are a form of political expression, but raised a concern that approaching the question from this direction might blur the distinction that the High Court has long maintained between the implied freedom as a limit on legislative power as opposed to a personal right.¹⁴⁶ As Keane J pointed out, in a separate judgment, what is constitutionally protected in Australia is the interest of the people of the Commonwealth in the free flow of political communication that aids them in performing their duties as voters. Australia is therefore different from the United States where the First Amendment protects the right of an individual to make a form of political communication by way of a political donation.¹⁴⁷

The Court concluded that it did not need to decide whether political donations amount to political communications, and did not do so. Instead, it focused upon the effect of the law upon political communication, finding that the ban on political donations by some categories of potential donors had the effect of restricting 'the funds available to political parties and candidates to meet the costs of political communication by restricting the sources of those funds'.¹⁴⁸ Keane J added that banning some kinds of donations is 'apt to distort the flow of political communication within the federation by disfavours some sources of political communication and thus necessarily favouring others'.¹⁴⁹

This argument does not appear to be terribly convincing. There are still 15 million voters from whom donations can be raised. There are also expenditure limits that parties must comply with. Parties are also reimbursed 75% or more of their campaign expenses through the public purse. Hence they only have to raise from donations up to one quarter of their costs within the expenditure limit – at a maximum, for a major party, that is \$2.3 million to raise over four years or around 115 donations of \$5000 annually.

It is more than conceivable that even with the ban on donations from unions, corporations and others, political parties could still have validly raised such amounts from persons on the electoral roll, with no consequential effect on their capacity to spend on political advertising and other forms of political communication. As the U.S. Supreme Court said in *Buckley*, political parties and candidates would simply have to raise funds from a wider field of people and could still raise large amounts if they had sufficiently broad support.¹⁵⁰ Limiting the potential number of donors does not necessarily result in a reduction on the donations that can be raised or indeed the quantity or quality of political communications that can be made by parties and candidates at election time.

Other points made by the High Court in *Unions NSW* are of some interest. First, it contended that the political communication that is protected by the Constitution involves communication between 'all interested persons', not just between voters.¹⁵¹ This includes 'all persons and groups in the community'.¹⁵² Their Honours noted that there are 'many in the community who are not electors but who are governed and are affected by decisions of government'.¹⁵³ While stressing again that no one has a 'personal right' to make political communications, their Honours accepted that non-voters 'have a legitimate interest in government action and may seek to influence elections either directly or indirectly through the support of a party or candidate, through donations or otherwise'.¹⁵⁴ This includes corporations, unions, other entities and non-citizens.¹⁵⁵

The Court held that while the capping of political donations may take place in order to achieve the legitimate end of reducing the risk or appearance of corruption,¹⁵⁶ there was no legitimate government interest in banning donations from corporations, unions, other bodies and individuals not on the electoral roll. As caps already limited the donation that anyone could make to \$5000 to parties and \$2000 to candidates, the risk of corruption had already been dealt with. A corporation's \$5000 is worth just as much as a union's \$5000 and a voter's \$5000. Nothing gives one any greater influence than the other.

The Court was not convinced by the State's argument that despite the \$5000 cap on donations, corporations were still more likely to corrupt the electoral system than voters on the electoral roll. It noted that the impugned provision was not directed at corporations in particular – but to any entity or person who was not on the electoral roll. The majority observed that:

General concerns about corporate activities, as distinct from specific concerns about the activities of any entity (or individual) who is prepared to exert influence corruptly in pursuit of self-interest, cannot explain the purpose of s 96D.¹⁵⁷

Justice Keane added that the implied freedom of political communication 'is not an adjunct of an individual's right to vote, but an assurance that the people of the Commonwealth are to be denied no information which might bear on the political choices required of them'.¹⁵⁸

The Court left open, however, the possibility that the prohibition of specific classes of donors might be acceptable where they have 'interests of a kind which requires them to be the subject of an express prohibition'.¹⁵⁹ In NSW, property developers and tobacco, liquor and gambling industry business entities, including their directors, officers and their spouses, are also prohibited from making political donations. The High Court, while holding invalid the general ban on donations by corporations, unions and other non-voters, noted that the provisions banning specific bodies and persons from donating were not challenged. It appeared to leave open the possibility that such bans might be able to be justified if evidence were provided that donations by these specific groups give rise to a greater risk of corruption.¹⁶⁰

A forthcoming challenge to these provisions by property developer, Jeff McCloy, might again raise the question of whether donations amount to political communications.¹⁶¹ If the number of prohibited donors is so small as not to impose any effective reduction of the sources available for raising political donations, then the High Court will face the question of whether the burden on political communication arises from prohibiting the communication entailed in the making of the political donation.

What about suggestions that there should be a complete ban upon all political donations, replaced by a system of full public funding? The Court, again, left open the possibility that such a ban could be justified, but it would be a difficult task. The majority said:

A complete prohibition might be understood to further, and therefore to share, the anti-corruption purposes of the... Act. On the other hand, if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source.¹⁶²

It is doubtful that the fact that some people in political parties and their supporters seem unwilling to obey the laws and comply with the caps is sufficient to justify banning all donations. If people are prepared to break laws that limit donations, then they will most likely also break laws that ban political donations.

Conclusion

Are donations speech? In strict legal terms, the issue has not yet been determined in Australia. In practical terms, it doesn't much matter because the High Court has held that even if the donations themselves are not speech, they facilitate political communication and that banning or limiting them therefore raises the prospect of breaching the implied freedom of political communication. It is only once the argument about reducing the capacity to fund political communication is taken out of play (as it might be, if the sector banned from donating is sufficiently small) that the issue of whether donations amount to speech comes into play.

In any case, the message to all political parties is to be very careful when it comes to campaign funding laws. Such laws may legitimately limit political communication where it is for the genuine purpose of reducing the risk or perception of corruption or undue influence, but the laws need to be carefully calibrated to achieve that purpose with minimal impact upon the freedom of political communication. The use of such laws as a cloak for achieving some kind of party political advantage would not amount to a legitimate limitation on the implied freedom and would most likely be struck down as invalid by the High Court.

7.2 Bret Walker SC^{xx}

St James' Hall Chambers

Topic: Security, sedition and seeking asylum

I am interested in the misleading seductiveness of the expression 'free speech'. It seems to me it is a red herring to some very important political discussion, very important social interactions and from a technical, professional point of view, very important constitutional and legal questions.

We can't surely mean by 'free speech' speech which can be uttered and disseminated with impunity. We can't mean speech that is not visited by consequences; which, second time round might make you pause before doing it again.

By 'free speech', presumably we mean speech not amenable to prior legal restraint, where you cannot be muzzled in advance.

Why that is important to me with my experience in the counter-terrorism area is this: I was pressed both before and during my appointment by a deal of, I regret to say, rhetoric and polemic approaching the level of analysis about the danger that counter-terrorism presented to free speech.

I'm one who believes there is a peculiar danger of the rhetoric and polemic to counter-terrorism to a number of liberties and freedoms, but I'm by no means convinced that speech is one of them.

The way I see it is as follows.

One of the most impressive and intriguing differences between the mother country, the United Kingdom of Great Britain and Northern Ireland, and the Commonwealth of Australia that I have found in relation to counter-terrorism really highlighted the oddity of the fact that we imitate sometimes verbatim what they have done.

That is that in England and Wales, you simply cannot use in a terrorist's trial any of the reams and reams of covertly recorded telephone and computer intercepts by which the would-be terrorist has been identified and ultimately investigated. You cannot tender that in court.

In this country, the trials are largely the playing of extraordinarily tedious, but in their accumulation unbelievably telling, words of the accused themselves about what they are planning to do.

And why we would ever, as lawyers and citizens, prefer some second-hand or third-hand interpretation to the very words of the accused themselves, I don't know.

I have some views as to why our British colleagues do not permit intercepts to be tendered. Because they partake a little bit of a conspiracy theory, I won't go into it today. But the difference is very telling because in this country, I have never heard anybody say, 'It's unfair for accused terrorists to be confronted with a recording of their own words'. I have never heard it. That's got to be the best evidence.

It's their words. If they think the jury might misinterpret, they have the forensic choice to get in the box and testify. It seems fair to anybody engaged in any criminal trial with any experience of the way in which facts fail to be proved with the onus on the prosecution.

Indeed, the Attorney-General in the recent introduction – I should say preliminarily to the introduction of the proposed amendments of whatever they are going to be to the counter-terrorism laws – himself correctly referred to the telling words and gestures, depraved, obscene and disgusting, with which we are all familiar, by which the severed heads of terrorist victims were held up supposedly by Australians supposedly in some way responsible for that.

And the Attorney-General correctly pointed out that here was material that properly represented the very striking admission – if you like confessional material – which if proven, accurately and authentically would have some impact one imagines before a jury.

xx Bret Walker SC was admitted to the NSW bar in 1979. He was appointed Senior Counsel in 1993. He was president of the NSW Bar Association from 2001-3, and had been Vice-President from 1996-2001. He was President of the Law Council of Australia from 1997-8. He is a member of the Council of Law Reporting for New South Wales, and has been Editor of the NSW Law Reports since 2006. He is a patron of the State Library of NSW as a Foundation Senior Fellow.

The speech in those disgusting videos was obviously not free, in the sense that the consequence of it being tendered against the speakers is manifest in the punishment that it ought to attract.

We don't mean that any free speech has been attacked by the repetition, perhaps in a court of law, of those revolting recordings. Neither, surely, do we think that free speech is attacked when somebody thinking they are speaking in private or in fact being recorded pursuant to a duly authorised intercept, conducted by the authorities to find out before the explosion whether people are setting a bomb.

It seems to be that far from free speech being endangered by these matters, we should be thinking about whether or not there is freedom of action of a political kind which is threatened by any counter-terrorist laws.

I have been pressed over the years by a view that that is so.

One of the best arguments against the counter-terrorism laws is that we didn't need all of them because we had long criminalised murder, incitement to murder, conspiracy to murder. That is a good argument.

There can be no legitimate civil liberties complaint – I do not have my speech interests infringed by inciting someone else to kill or injure.

It does seem to me that too much of the debate, which has perhaps in a healthy way pushed back against counter-terrorist legislation, is framed as the threat to freedom of speech by all counter-terrorist legislation.

There is certainly too much enacted law relating to terrorism, but not because the substance is unnecessary, but because the complication is Australia's gift to its lawyers.

It leaves an area of topicality where free speech does need to be raised and be at the forefront of a challenge, be pushed back, if you like, a sceptical stance in relation to proposed counter-terrorist reform.

I am referring to that area of metadata, the definition of which is waiting to be drawn by our Attorney-General himself.

Whatever definition of metadata you have, we are not faced with anything of any gravity at all with relation to an attack on free speech. I do not accept that visiting upon me years after the event the consequences of something I have said is affecting my freedom at all.

It is proper that I am called to account by what I have said. An asylum seeker, as we know, is subject to laws that will prohibit them getting rights of residence which would otherwise flow from refugee status, if they do not satisfy so-called national security qualifications.

How can one seriously say there is a free speech liberty infringed, when such a person has held against himself or herself what they published? Another time, another place, another war perhaps. How can it be said that this is an infringement of freedom?

It seems to me it is an application of personal responsibility consistent with the dignity of human rights.

It seems to me that when people talk about metadata and the storage of such data and the investigation of possible crime, we all need to stay sober. We would object if our medical details were forgotten or burnt. We would be horrified if they were published. It doesn't mean that we don't want our medical records kept, of course we do. And we are required to keep our tax records as well.

No one seriously suggested this was an infringement of civil liberties, let alone possible recourse to them by police; no one suggested it was an infringement of freedom. There was no free speech infringement with it being accessed. We accept this with metadata the phone company keeps to make sure we are paying our bills.

As long as we have applied protections, I don't see how in relation to counter-terrorist there should be a denial to authorities of the capacity which has proven so useful in the past to understand patterns of communication of those who, to my certain conviction as we speak, are plotting to hurt us.

In the bad, old days, a ground for divorce was adultery. And the metadata of the dalliance would be the hotel bills, taxi drivers etc. They are the bad old days, no doubt, but it's not because we presented an issue that the law of the land required to be tried by the available evidence as close as possible to an accurate fact-finding.

It does seem to me that the special sensitivity of our people's resort to electronic data either so as to create it or access it probably speaks more of a peculiar temporary embarrassment than of anything to do with principles concerning free speech.

I stress I have never heard anybody protest that it is a privacy reason why their bank account should not be subpoenaed if they refuse to supply what the Family Court requires in relation to their wealth when there is a division of the wealth contemplated by the law.

You may resent that the law exists, but no one can seriously say that that being the law, we should pretend we are going to try to find the facts necessary to determine the issues by spurning the best and in many cases only evidence about it.

It is for those reasons it seems to me we aren't really worried about the creation and storage of metadata. We are desperate to create it. We create it. Not the government. It is the keeping, the rendering of it accessible, the transformation of what used to be ephemeral, the book I read not being recorded as such except for its physical appearance on my shelves, that is now transformed. The book I read may now well be the subject of an intrigue, probably not metadata, but certainly an intrigue that could be archived indefinitely.

It seems to me, it's not about the creation and storage, it is about the access and use. And the idea that specially required and created archives of so-called metadata would automatically become available for every backyarder or family dispute of a private kind is a completely different issue from free speech issues.

That requires a political decision addressed by Parliament as to whether once you have got that archive, that's going to be one of the things that a privately sought court subpoena can compel to be produced. There are many times and places in relation to certain records where they are excluded from the open slather which we would otherwise obtain via a subpoena at the behest of private parties.

I am interested in as full a record as possible being kept by means of which recent history shows that counter-terrorist plots have been detected and prevented and prosecuted. And prosecuted successfully, culminating in lengthy terms of imprisonment for people who, I hope, will be subject eventually to control orders when they get out.

It does seem to me that we all need to get a grip. We create the metadata; the government is not doing that. If we wanted to be ephemeral, let it be understood we are passing up means by which research can be conducted which otherwise could not be conducted on conspiratorial occurrences.

Now if you don't believe in the conspiracies, I am very pleased with your rosy view of life, but they are a fact. They have been proved to the highest degree that we can expect things to be proved. I think to believe it is not happening is naive.

7.3 Dr Roger Clarke^{xxi}

Xamax Consultancy

Topic: Privacy and free speech

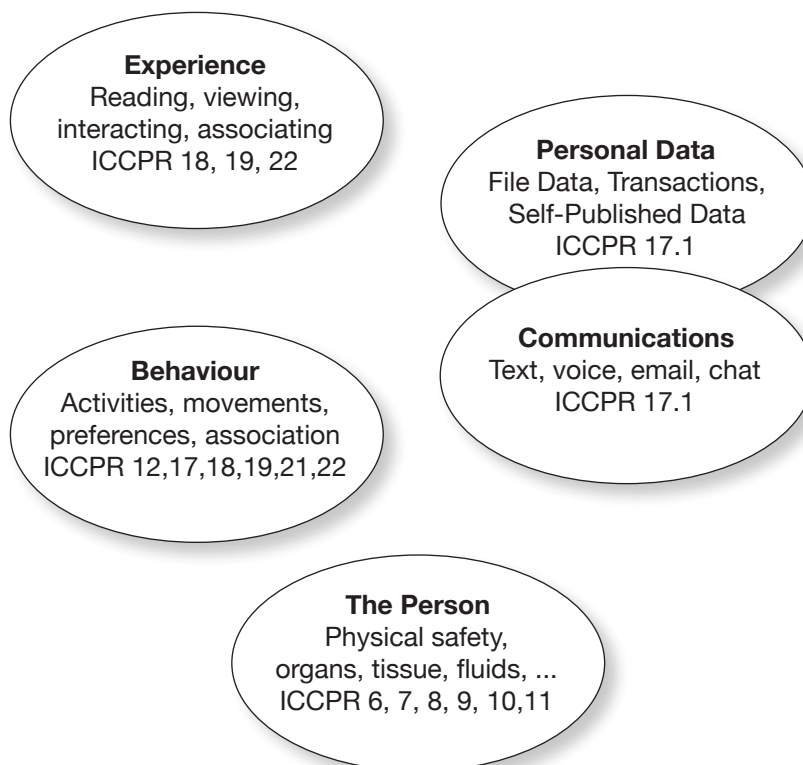
Privacy and its dimensions

Privacy is a human right. When conducting policy analysis, however, it has proven to be much more convenient to define it as an interest: privacy is the interest that individuals have in sustaining a ‘personal space’ free from interference by other people and organisations.¹⁶³

This underlines the fact that privacy is one interest among many. Hence all privacy protections are an exercise in balancing multiple considerations. There are no ‘privacy absolutists’; it’s all relative.

The human need for privacy has multiple dimensions,¹⁶⁴ summarised in Exhibit 1. Despite its allegedly recent origin as a preoccupation of well-off societies, all of these dimensions are recognisable in the *International Covenant on Civil and Political Rights* (ICCPR).

Exhibit 1: The dimensions of privacy



^{xxi} Dr Roger Clarke is a consultant specialising in strategic and policy aspects of eBusiness, information infrastructure, and data surveillance and privacy. He has been in the information technology industry for 40 years. He is able to interpret technology so as to make its relevance, opportunities and impacts accessible to executives and managers, and provides expert evidence in a variety of areas. He is Chair of the Australian Privacy Foundation (APF) and Visiting Professor, UNSW Law, as well as Secretary of the Internet Society of Australia (ISOC-AU) and Visiting Professor, ANU Computer Science.

The deepest-seated need is for privacy of the physical person, which is addressed by a large number of Articles in the ICCPR. It's useful to distinguish four further dimensions. Surveillance, whether it is conducted in a physical manner (using the eyes and ears of humans), aided by technologies (such as directional microphones and recording apparatus), or entirely automatically, threatens the privacy of personal behaviour and thereby constrains how people act. Covert surveillance causes many people to have a generalised fear of the 'panoptic', which has an even more substantial impact on their freedom of behaviour. This 'chilling effect' ranges from being highly desirable (where it creates a disincentive for criminal, sociopathic or psychopathic behaviour) to highly undesirable (where it reduces artistic creativity, scientific and engineering inventiveness, economic innovation or political speech).

Since at least the early days of the telegraph in the 1840s, messages have been subjected to interception. Moreover, unlike earlier forms of surveillance, electronic interception is usually conducted covertly. Recent decades have seen invasions of the privacy of human communications reach epidemic proportions. Since the application of computing technologies to administrative data in the 1960s, the privacy of personal data has also been subject to a rapidly-rising crescendo of threats.¹⁶⁵ During the 1970s, business and government moved to defuse public concerns by creating a chimera rather than a shield. The real function of 'data protection' laws is to authorise privacy-invasive behaviours by organisations while offering the appearance of a regulatory framework.

The early years of the current century have seen technological change that embodies serious threats to a further dimension of human concerns. What an individual reads and views, and the ideas that they gain access to through meetings and other events, have been converted from unrecorded ephemera to stored data. That data is under the control of and exploitable by for-profit corporations, and available to government agencies. The privacy of personal thought may not yet be directly under assault, but the privacy of personal experience is a dangerously close proxy for it.

In 1986, the four higher-level dimensions of privacy were referred to by Health Minister Neal Blewett, while he was championing the Australia Card, as 'a bourgeois right'.¹⁶⁶ It is certainly the case that a person who is in danger, wet and cold, or seriously hungry, does not have the luxury of worrying about needs higher up the Maslowian hierarchy. On the other hand, people in many societies enjoy pleasant living conditions, and place considerable value on these dimensions of their privacy, for psychological, social, economic and political reasons.

Privacy and free speech

Privacy and freedom of speech are both addressed in the ICCPR. Article 19 refers to the right to hold opinions without interference, to freedom of expression, and to freedom to impart information and ideas.

Privacy and free speech are interdependent, but each is also threatening to the other.

Privacy as a precondition for free speech

Speech acts that create discomfort for the powerful create risks for the person who utters them. For example, journalists seek to protect their sources of information, because without effective protections for whistleblowers the flow of information will dry up, and hypocrisy and corruption will continue to flourish. In the political context, I coined the term 'disidentity' as a means of drawing attention to the importance of identity protections for political dissidents: 'The survival of free societies is dependent on the rights to multiple identities and anonymity becoming engrained, as insurance against abuse of the powers enjoyed by governments and corporations'.¹⁶⁷

Free speech as a precondition for privacy

In closed societies that are dominated by authoritarianism or collectivism, gross compromises to privacy are common, including to privacy of the physical person. On the other hand, in societies in which openness, individualism and self-determination are highly-valued – which are commonly liberal democracies – privacy tends to be less compromised. Freedom of speech is a cornerstone of such societies, and a precondition for achieving and sustaining reasonable levels of privacy and of privacy protections.

Free speech as a threat to privacy

Many circumstances arise, however, in which the exercise of the freedom of speech collides with the privacy interest. There are many categories of persons at risk. Disclosure of the location of a victim of domestic abuse, or of the identity of an undercover operative planted in an illicit drug ring, or of a parallel social network of a person in whom group trust is vested, represents a serious threat to that individual's safety. Whistleblowing on serious misbehaviour by intelligence agencies has proven to be essential to addressing serious subversion within democracies; but unless the leaks are edited they may cost lives.

Many disclosures of personal data are less dramatic than this, in that they do not give rise to risks to personal safety. Nonetheless, privacy of personal communications and data are important to many people. A person's drink-driving conviction, their genetic predisposition to epilepsy, their big win in a lottery, and the valuable artwork on the wall of their unguarded house, may be disclosed because of some important public interest. But mostly no such countervailing interest exists, and the exercise of freedom of speech is unjustifiably harmful to the individual's interests.

The privacy of personal behaviour may also be negatively impacted by speech acts. A person who is subject to an accusation of paedophilia, of fraternisation with a criminal, of misogyny, of a racist attitude, or even of undeclared homosexuality, infidelity or promiscuity, may find it highly advisable to lie low and avoid public appearances generally, or for a period of time, or in particular places. Other aspects of behavioural privacy may also be affected, such as the interest in associations with other people. In all such cases, freedom of speech may be, and may need to be, compromised in the interests of the privacy of affected individuals.

Privacy as a threat to free speech

Where exercise of the right to freedom of speech may harm privacy, there are naturally calls for restraints on that freedom. The examples provided in the previous section were selected so as to highlight instances in which the appropriate balance-point is readily argued to be in favour of privacy. Clearly, there are also many instances in which the reverse is true. For example, disclosure to an employer, a licensing agency or an investigative agency of a person's medical conditions, assets or actions may be critical to public safety or the pursuit of justice.

The Australian Privacy Foundation (APF) has proposed that judgements about disclosures that are and are not in the public interest are capable of being supported by robust guidelines.¹⁶⁸ Specifically the APF proposed that:

1. The media ... must not publish personal data unless a justification exists, and that justification must be based on 'the public interest', not on 'what the public is interested in'.
2. The disclosure must be proportionate, i.e. it must be of sufficient consequence that it outweighs conflicting interests, in particular the person's interest in privacy.
3. The basis of the justification may be one or more of the following:
 - consent by the affected person
 - relevance to the performance of a public office
 - relevance to the performance of a corporate or civil society function of significance
 - relevance to the credibility of public statements
 - relevance to arguably illegal, immoral or anti-social behaviour
 - relevance to public health and safety
 - relevance to an event of significance
 - any other justification, but with the onus squarely resting on the publisher to demonstrate that the benefits of publication outweigh the privacy interest.¹⁶⁹

Although framed so as to address publication by 'the media', consideration was also given to the democratisation of publishing channels and the emergence of less formal media. The rapidity of that change over the last five years is such that a general framework of this kind is urgently needed. It is in the interests neither of individuals nor society as a whole for the means of balancing privacy and freedom of speech to continue to be treated as though it were an ineffable art form.

The current controversy

A particular cluster of issues stimulated this event. Since 1995, the *Racial Discrimination Act 1975* (Cth) has declared as unlawful public actions that constitute 'offensive behaviour because of race, colour or national or ethnic origin'.¹⁷⁰ The awkward grammar of the heading ['Prohibition of offensive behaviour based on racial hatred']¹⁷¹ mirrors the uncertainties that surround the provisions' implementation.

Under section 18C, it is unlawful, 'otherwise than in private', to 'offend, insult, humiliate or intimidate... because of... race, colour or national or ethnic origin'. This is, however, subject to saving provisions in section 18D, which spare artistic works, 'any genuine purpose in the public interest', fair and accurate reporting of any event or matter of public interest, and 'fair comment expressing a genuine belief'. These saving provisions are quite broad, and feature the loose defence of 'public interest' rather than the much stricter and appropriate test of 'in the public interest'.

The Attorney-General has proposed amendments, comprising:

- The removal of 'offend', 'insult' and 'humiliate' from the list of actions that are unlawful.
- A definition of intimidation as 'a reasonable likelihood of causing of fear of physical harm'.
- The addition of 'vilification' to the list of actions that are unlawful, using a definition of 'reasonable likelihood of inciting hatred'.
- A test for 'reasonable likelihood', which is 'to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community' – still less by the question of whether the affected person 'reasonably felt fear of personal harm', or any person felt hatred, as a result of the act.
- The substitution of rather different saving provisions, viz. 'participation in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'. This has been widely interpreted as being a great deal more permissive than the existing exceptions.¹⁷²

Applying the definition and dimensions of privacy outlined above, I draw the following inferences:

1. Privacy of the physical person would no longer be adequately protected.
2. The removal of 'offend', 'insult' and 'humiliate' does not reduce protections for physical privacy. On the other hand, the 'intimidation' and 'vilification' provisions are important; but the interpretation and saving provisions are so broadly phrased that many intimidatory and hatred-inciting acts would not be subject to sanctions.
3. Protections for privacy of personal behaviour would also fall short of the need to protect privacy more generally.
4. The removal of 'offend' and 'insult' is not an issue, because provisions that treat bad manners and injudicious expressions as being unlawful extend beyond a reasonable balance-point between privacy and free speech. The removal of 'humiliate' comes closer to the balance-point, and its relationship to 'intimidate' is worthy of detailed analysis and debate. However, the excessively permissive interpretation and saving provisions in relation to 'intimidation' and 'vilification' undermine the protection, and ensure that many unjustifiably harmful uses of the freedom speech would lack legal sanctions.

Conclusions

From a privacy perspective, adjustment of the existing provisions by removing 'offend' and 'insult' from the list of unlawful acts is uncontroversial. However, legal sanctions against 'intimidation' and 'vilification' are essential. The proposed interpretation and saving provisions are far too permissive and require substantial re-working. Examples of tests that need to be applied include whether sustained verbal attacks represent intimidation, whether goading a person into performing physical assault is or should be unlawful conduct, and whether harassment or stalking are more appropriate models to apply.

In all cases, it is vital that a suitable balance between privacy and freedom of speech is achieved. It appears to be entirely feasible to formulate definitions of intimidation, incitement of hatred and incitement to violence, and indeed of stalking and harassment, that sustain the most crucial aspects of freedom of speech: the ability of both formal and informal media to investigate and report on the many forms of misbehaviour.

It would appear to be entirely feasible to achieve a reasonably balanced outcome either by amending the existing sections 18C and 18D, or by replacing them. This does, however, raise questions as to what laws currently exist in these areas, and whether racial discrimination is the only context in which such behaviour needs to be declared unlawful.

However, the discussion to date has been largely conducted at a level of abstraction that is too far removed from the daily experiences of people whose privacy is harmed by unreasonable use of the freedom of speech. The debate would benefit greatly if it were now shifted, from polite discussion amongst the invited few, to workshops that include representatives of categories of people affected by unreasonable behaviours and that consider concrete examples against which the alternative definitions and saving provisions can be assessed.

- 1 (1992) 177 CLR 106.
- 2 *Al-Kateb v Godwin & Ors* (2004) 219 CLR 562.
- 3 *Monis v The Queen* [2013] HCA 4.
- 4 Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991), pp 2-3.
- 5 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).
- 6 Parliamentary Research Service, *Racial Hatred Bill 1994 Bills Digest* (1994), p 4. At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FM7Z10%22> (viewed 7 May 2014).
- 7 Parliamentary Research Service, above.
- 8 Castan Centre for Human Rights Law, *Submission to the Human Rights Policy Branch of the Attorney-General's Department on the repeal of section 18C of the Racial Discrimination Act* (30 April 2014), p 5. At <http://www.law.monash.edu.au/castancentre/policywork/section-18c-submission.pdf> (viewed 7 August 2014).
- 9 Monash University Castan Centre for Human Rights Law, above, p 6.
- 10 Liberty Victoria, *Submission to the Human Rights Policy Branch of the Attorney-General's Department on the exposure draft – proposed changes to the Racial Discrimination Act* (30 April 2014). At http://libertyvictoria.org/sites/default/files/LibertyVictoria_Submission_RacialDiscriminationAct20140430_web.pdf (viewed 7 August 2014).
- 11 Sex Discrimination Act 1984 (Cth), s 28B
- 12 A list of 19 specific examples is included in the Terms of Reference, which are set out on the ALRC's website: www.alrc.gov.au.
- 13 P Laslett (ed), *Locke: Two Treatises of Government* (2nd ed, 1988), p 57.
- 14 R Atherton, *'Family' and 'Property': a History of Testamentary Freedom in New South Wales with particular reference to Widows and Children* (PhD Thesis, University of New South Wales, 1994).
- 15 Laslett, note 3.
- 16 *James v Cth* (1936) 55 CLR 1, 56.
- 17 *Campbell v MGN Ltd* [2004] 2 AC 457, 148.
- 18 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013).
- 19 Australian Law Reform Commission, *Classification – Content Regulation and Convergent Media*, Report No 118 (2012).
- 20 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
- 21 *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433, 98.
- 22 Australian Law Reform Commission, *Fighting Words: a Review of Seditious Laws in Australia*, Report No 104 (2006).
- 23 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004).
- 24 Australian Law Reform Commission, *Family Violence – a National Legal Response*, Report No 114 (2010); Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2012).
- 25 Due to be completed in August 2014.
- 26 *R v Central Independent Television plc* [1994] Fam 192, 202–3.
- 27 Commonwealth, *Parliamentary Debates*, Legal and Constitutional Affairs Legislation Committee, 24 February 2014 (The Hon George Brandis QC, Attorney-General).
- 28 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.
- 29 L Bollinger, 'Free Speech and Intellectual Values' (1983) 92(3) *The Yale Law Journal* 438, p 444.
- 30 This argument is spelled out at length in C Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (2012).
- 31 G White and P Zimbaro, *The Chilling Effects of Surveillance: Deindividuation and Reactance*, ONR Technical Report Z-15, Office of Naval Research (1975), p 22.
- 32 C Moore (ed), *The Histories: Books I-III* (1925).
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- 48 R T Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293, p 301.
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- 50 Pascal Bruckner writes on the need to criticise 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 its 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 harbour regarding this sacrificial monotheism. Criticising 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'. – P Bruckner, *The Tyranny of Guilt: An Essay on Western Masochism* (2012), pp 46–7.
- 51 For example, in January 2009, a Muslim cleric from Melbourne instructed his married male followers to hit, and force sex upon their disobedient wives: Staff Writers and Wires, 'It's OK to Hit Your Wife, says Melbourne Cleric Samir Abu Hamza', *The Australian* (Sydney), 22 January 2009. Statements such as this clearly deserve our repulsion and indignation.
- 52 J Dolce, 'Free Speech and the Stokie Case' (2014) 53(7-8) *Quadrant* 32, p 32.
- 53 D Flint and J Martinkovits, *Give us Back our Country* (2013), p 166.
- 54 Flint and Martinkovits, above, p 182.
- 55 T Wilson, 'Insidious Threats to Free Speech', *The Weekend Australian*, April 5-6 2014, p 17.
- 56 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.
- 57 Accordingly, in the 1960s the U.S. Supreme Court held that a statute may not 'forbid or prescribe advocacy of the use of force or of the law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action'. The court adopted a stringent standard of punishment of speech likely to encourage criminal action. – *Brandenburg v Ohio* 395 U.S. 444 (1969).
- 58 K Greenawalt, 'Free Speech in the United States and Canada' (1992) 55(1) *Law and Contemporary Problems* 5, p 16.
- 59 Greenawalt, above.
- 60 This is a point which has been made by Salman Rushdie, the British novelist who was put under an Islamic death sentence because he had insulted Muslim sensibilities. He stated: "The idea that any kind of free society can be constructed in which people will never be offended or insulted is absurd. So too is the notion that people should have the right to call on the law to defend them against being offended or insulted. A fundamental decision needs to be made: Do we want to live in a free society or not? Democracy is not a tea party where people sit around making polite conversation. In democracies people get extremely upset with each other. They argue vehemently against each other's positions". Rushdie goes on to conclude: "People have the fundamental right to take an argument to the point where somebody is offended by what they say. It is no trick to support the free speech of somebody you agree with or to whose opinion you are indifferent. The defence of free speech begins at the point where people say something you can't stand. If you can't defend their right to say it, then you don't believe in free speech. You only believe in free speech as long as it doesn't get up your nose". – S Rushdie, 'Defend the Right to Be Offended', *Open Democracy*, 7 February 2005. At http://www.opendemocracy.net/faith-europe_islam/article_2331.jsp (viewed 7 August 2014).
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Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
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