Annual Kirby Lecture on International law: ANZSIL 2013

Freedom of Speech and giving offence: can a balance be struck?

I was especially pleased to be invited to give this address as, throughout my career, I have been enriched by Michael Kirby's judgments, books, speeches and media comments. He has been the undoubted leader over decades in promoting the international rule of law and the implementation of human rights in Australia. Michael's work is so well recognized internationally that he has recently been appointed to head a United Nations team to investigate human rights violations in North Korea. If anyone can persuade North Korea to come in from the cold, Michael Kirby can.

Today, the Australian government holds about 9,000 asylum seekers in mandatory, indefinite detention in camps throughout Australia, including 1,800 children.[1] When on the High Court, Justice Kirby was a dissentient in the *Al-Kateb* decision that it was valid to detain a stateless asylum seeker indefinitely. Justice Kirby argued that:

"Opinions that seek to cut off contemporary Australian law from the persuasive force of international law are doomed to failure. They will be seen in the future…with a mixture of curiosity and embarrassment".[2]

In arguing that our courts should interpret the constitution and legislation wherever possible consistently with the fundamental principles of international human rights, Michael Kirby provides powerful leadership that will inform the development of our law for many years to come.

It is good to be back at ANU and to have the opportunity to reflect on our work over the last year at the Commission. It is of course one thing to study international law. It has proved to be quite another to apply international law in practice, especially human rights law. It is clear to me, however, that the human rights principles provide our "lode star" at the Commission and I am surer than ever that they are one of the most important pillars of our pluralistic democratic society.

Tonight, I would like to explore how the right to freedom of speech has been integrated in Australian law and how Parliament and our courts have attempted to strike a balance between this freedom and other fundamental freedoms. In doing so, I will consider the implied right of political communication and the application of 18C, the "insulting and offending" provision of the *Race Discrimination Act*. I would also like to explain the role of the Australian Human Rights Commission in promoting human rights.

While much ink has been spilled on the question of appropriate limits to freedom of speech, reinvigoration of the issue has been prompted by the recent and unprecedented debate in Australia. The idea of freedom of speech conjures images of Socrates asking awkward and unanswerable questions in the market place of Athens, We are also reminded of Voltaire's oft quoted, though I believe, falsely attributed,

[1] DIAC statistics, 4 July 2013

[2] *Al-Kateb v Godwin* (2004) 219 CLR 562

assertion that 'I disapprove of what you say, but I will defend to the death your right to say it.'

Be careful what you choose to defend to the death, for I would like to challenge Voltaire's assertion, by suggesting that the right to freedom of speech may, and often must be, balanced with other rights and responsibilities. Recognition that freedoms are not usually absolute and should be balanced is hardly a new idea. It has, however, been surprising how often we need to remind ourselves of this simple proposition when so many claim a completely unfettered right to say exactly what they please.

Rather than a philosophical abstraction, the day-to-day realities in which freedom of speech is claimed raise hard questions. The right to freedom of speech is all too often abused on public transport. Recent examples include abuse against a French woman signing the "Marseilles" and an ABC reporter taking his daughter to school by bus. Racial abuse occurs in our shopping malls and even through our postal system against the families of Australian soldiers killed in Afghanistan. Indeed, over the last year the Commission has received a 59% increase in complaints against racial vilification in public, many of them on social media.[3]

At the AHRC we have been especially concerned by the recent incident when a young girl made racial comments in a football match to start the National Indigenous week. The reason for our interest in the incident was that our **"Racism it stops with me"** campaign was launched at that match before 80,000 people. We watched with deepening concern as events unfolded. The President of the Collingwood Football Club apologized, only to make further racial comments on radio- characterized as "casual racism"-followed by yet another apology. These events prompted a week of public debate about the limits to freedom of speech and the value of S18C of the *Racial Discrimination Act* 1975 (Cth) that prohibits racial vilification in public.

Incidents such as these fueled the recent public debate about the acceptable limits to freedom of speech, a debate that led to the unexpected consequence of withdrawal by the Government of two of its major legislative reform initiatives earlier this year. The first was the *Human Rights and Anti-discrimination Bill 2012*, an ambitious exercise in legal consolidation of existing laws and much needed reform of the complex network of federal anti-discrimination laws. The second was a package of bills to regulate the Media, two of which were passed and four withdrawn, after a robust rejection by the media.

Origins of freedom of expression

The origins of the right to free expression, as a central component of democracy in the modern era, lie in the work of the father of liberalism, John Locke.[4] In his turn, Locke influenced the adoption of freedom of speech by the First Amendment to the American Constitution. This was the first constitutional protection of the right to freedom of expression, which is commonly understood as enabling democratic governance, among other things. Freedom of speech was subsequently adopted in

[3] AHRC 2012-13 Annual Report

[4] *Two Treatises of Government,* 1689

national constitutions and legislation, and the common law courts developed the legal jurisprudence. The influence of such national laws on the development of international laws has been profound, and none more so than in respect of freedom of speech.

The right to freedom of expression is protected in the 1948 United Nations Universal Declaration on Human Rights, by the International Covenant on Civil and Political Rights 1966 (ICCPR), and by the European Convention on Human Rights.

Art 19 of the ICCPR provides that:

> *(2) Everyone shall have the right to freedom of expression…*
>
> *(3) …the exercise of this right 'carries with it special duties and responsibilities. It may be subject to certain restrictions, but these shall be such as are provided by law and are necessary: for respect of the rights or reputations of others, for the protection of national security or of public order or of public health or morals.*

Article 20(2) of this Convention also provides that:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

These provisions were given greater precision by the International Convention on the Elimination of Racial Discrimination 1965 condemning the promotion of racial hatred. In particular, Article 4 requires States to make it an offence punishable by law to disseminate ideas based on racial superiority or hatred. [5]

To what extent have these treaty-based rights to freedom of speech, and limitations on that freedom, been implemented in Australian law?

In considering the fraught question of the role of international law in domestic law, it seems that human rights and Australian law are like ships passing in the night. They give each other a wide berth for fear of collision.

If the 20th century was a time for negotiation and articulation of international human rights, the 21st century is a time for implementation of those rights. This is especially true of Australia where, as good international citizens we played an active role in developing the body of international human rights law, but where we have generally chosen not to implement those rights directly in our national laws and practices.

Australia is unique among comparable legal systems in that it has no explicit constitutional protections for most human rights and has no human rights act, as such.

[5] The jurisprudential flesh has been put on the bones of these laws by the work of the Human Rights Committee in *General Comment No 34*.

The Australian Constitution deals with human rights in an 'incoherent patchwork'.[6] The Government and Parliament, rather than our courts, play the primary role in restricting or protecting our human rights, the Constitution guarantees some human rights in narrow respects only and most of our judges see themselves as restricted to statutory interpretation when applying common law protections.[7]

There is no explicit constitutionally guaranteed right to freedom of speech. Rather, the right to free political communication was implied from the interstices of the Constitution in *Lange v ABC* 1997.[8] The source of this implied right was that it was necessarily inherent in a parliamentary system of representative and responsible government. The right is, however, at best a shield, and not a sword with which to enforce the freedom. While the right is not an individual freedom, it precludes the curtailment of the right to political communication through the exercise of legislative or executive power. [9]

Australian Human Rights Commission

Rather than constitutional or legislative protections of our fundamental freedoms, Australia has created what might be described as an essentially administrative system to monitor and promote human rights. In 1986, the Commonwealth introduced the *Australian Human Rights Commission Act 1986 (Cth)* which created the Australian Human Rights Commission (AHRC). [10] The legislation establishing our mandate creates the obligation to assess whether Australia meets international human rights law and to advocate for human rights. The Commission is limited to an indirect form of access to justice through investigation and conciliation of complaints. While the Commission has no power to make binding and final decisions it is successful in conciliating 65% of complaints and very few matters take the next step to the Federal Courts. [11]

In monitoring human rights, our statute sets the benchmark definition for the Commission's work as those "rights and freedoms recognized" in the ICCPR, the Convention on the Rights of the Child (CROC) and various declarations with respect to Religion, the Disabled, and Discrimination in Employment. [12]

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[6] P Gerber and M Castan, *Contemporary Perspectives on Human Rights in Australia* (2013) at 84.

[7] Ibid, Gerber and Caston at p 38.

[8] (1997) 189 CLR520

[9] Ibid, at p 560

[10] As Australia's national human rights institution, the AHRC is an independent statutory body that is recognized as an "A" status Institution in accordance with the United Nation's Paris Principles.

[11] Under the separation of powers doctrine, *Brandy v HREOC 1995*, the adjudicative functions have been transferred to the Federal Courts.

[12] Scheduled instruments are the Convention on the Elimination of Discrimination in Employment, ICCPR, CROC, Declaration on the Mentally Retarded, Declaration on the Rights of the Disabled.

This selective approach to the definition of human rights has important consequences for the Commission.

First, many core human rights treaties are not included in our mandate, such as the ICESCR, Refugees Convention and the Torture convention do not form part of the definition of human rights. Secondly, in respect of those treaties that are within the statutory mandate of the Commission, the ICCPR and CROC have not been given direct implementation in Australian law.

Indeed, many of the international human rights treaties to which Australia is a party are not part of Australian law, as they have not been implemented by legislation in accordance with the principle of parliamentary sovereignty. There is thus a 'disconnect' between our international human rights responsibilities and Australian law For example, as the ICCPR is not, as such, part of Australian law, the Commission's analysis of the right of asylum seekers not to be detained arbitrarily, relies upon Article 9 of a treaty that is not part of domestic law. The practical result is that the Commission has one hand tied behind its back when we point out breaches of human rights law to departmental officials. [13]

In respect of the Conventions on race, sex and disability, comprehensive legislation has been adopted by Australia. Commissioners have been appointed under the Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth). The power of the Commission to receive and attempt to conciliate complaints is largely exercised in respect of these three acts, more recently joined by the *Age Discrimination Act 2004 (Cth)* for which there is no international convention.

Of the 18,000 or so inquiries and complaints we receive a year we receive maybe one or two a year in respect of freedom of speech. This contrasts sharply with a rising number of complaints with respect to racial abuse, especially through social media.. [14]

In summary, the Commission has specific powers in respect of race, sex, disability and age discrimination but is confined in respect of other human rights to treaties that are not part of our law. It is for this reason that the common law and jurisprudence developed by our courts, especially the Federal Court and High Court of Australia, assume so important a role in protecting human rights in this country.

Common law and the High Court

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[13] Some exceptions to this disconnect are to be found in legislation that in various ways implements human rights obligations such as the Privacy act, parts of the *Migration Act* eg : definition of a refugee and the principle of non-*refoulement*, Criminal Code's prohibition on torture, Fair Work Act 2009, labor rights re social and economic rights, Paid Parental Leave Act 2010 (Cth)

[14] Last year, 19% of complaints based on the *Race Discrimination Act* concerned racial vilification and hatred; with a 19% increase over the year before; 36% arose in the internet (where we have had a significant increase) and 27% in employment.

As the Chief Justice French has observed, the common law is the 'ultimate constitutional foundation'.[15] It provides a basis on which the High Court can develop jurisprudence to constrain government power.

While the High Court has protected against excessive parliamentary and executive infringements of human rights, that protection has been piecemeal only. The judiciary has accepted the role of civil and political rights as part of Australian law in cases such as *Mabo (No.2).* Brennan J recognized that international law is a "legitimate and important influence on the development of the common law, especially as it declares universal human rights". [16]

But it remains true that the High Court has emphasized restrictions on executive power rather than individual guarantees of liberty.[17] It is also true that the courts have avoided abstract discussions of human rights, or the international treaties that articulate them, in favor of narrow principles of statutory interpretation and legalism.

The common law has long recognized the right to freedom of expression. The High Court has stated that:

".. every body is free to do anything, subject only to the provisions of the law, so that one proceeds upon an assumption of freedom of speech and turns to the law to discover the established exceptions to it".[18]

But the right to freedom of speech is well recognized as one that is not absolute or unqualified; the right can be constrained if the law reasonably serves a countervailing public purpose. Examples include the laws of defamation, blasphemy, contempt of court and of parliament, confidential information, torts of negligent misstatement, deceit and injurious falsehood, public order offences such as those dealing with obscenity, copyright, censorship and consumer protection.

The High Court has been cautious when applying the right to freedom of speech in practice. In *Coleman v Power*, the High Court set aside a conviction for using insulting words -that the police are corrupt- because the words were essentially political.[19] The legislation was read down to apply only where the insulting words are intended or likely to provoke an unlawful physical reaction. Justices Gummow and Hayne stressed that, "for the fundamental common law right of freedom of expression to be eroded, clear words are required". [20]

What protections should be given to offensive language?

An answer to the question, how far should freedom of speech protect offensive or hurtful language, is that a balance needs to be struck of values of dignity and equality:

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[15] "Protecting Human Rights without a Bill of Rights", speech to the John Marshall School of Law, (Chicago, 26 January 2010).
[16] (1992) 175 CLR 1, at p 141-2
[17] Gerber and Caston at p 73
[18] *Eatock v Bolt* [2011] FCA 1103, Para 231
[19] (2004) 220 CLR 1
[20] Ibid, at para 192

Racial vilification infringes 'the fundamental liberal-democratic principle that all members of a community as a whole should be treated as equal to each other" (at 194)… in a free and pluralistic society encouraging tolerance and mutual civility amongst them is an especially important aim".[21]

The right to political communication has provided relatively weak protection for freedom of expression. Decisions of the High Court indicate that political debate may properly be unruly and raucous and may involve unpleasantness and insult.[22] In *Coleman* the High Court considered that insult and invective are part and parcel of political communications.[23] The majority view might be contrasted with that of Callinan J who doubted that insulting words make a contribution to free and informed debate.

More recently, the High Court has determined that any conflict between the right to political communication and regulations that restrict that right may be resolved by considering whether the restriction is reasonably appropriate and serves a legitimate end compatible with the Constitution

The appropriate limits on political communication were considered this year in *Monis v The Queen.* [24] A Muslim cleric and another were accused of sending offensive letters to the families of soldiers killed in Afghanistan referring to them in 'a denigrating and derogatory fashion'. They were convicted under s 471.12 of the *Criminal Code* (Cth) that prohibits the use of a postal service in a way that a reasonable person would regard as 'menacing, harassing or offensive'. The legal issue for the High Court was whether this provision impermissibly burdens freedom of communication about government or political affairs. Counsel for one of the accused, David Bennett QC argued that the letters were 'purely political' and should be protected as free speech. As the Court was evenly split in answering this question, the convictions were accordingly upheld. [25]

The Chief Justice found the provision was in his view a burden on the right of political communication and did not serve a reasonable appropriate and legitimate end because it was too broad and was therefore incompatible with the freedom of communication necessary for representative and responsible government. The views of Chief Justice French were supported by Justices Hayne and Hayden. Justice

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[21] Chesterman: Freedom of Speech in Australian law:

[22] In the *Hinch v Hogan* where Hinch contravened a suppression order by naming persons under the *Serious Sex Offenders Monitoring Act 2005 (Vic*), the High Court upheld the legislation on the ground that it served a legitimate end. The same result was reached in *Wotton v Qld* (2012) where a prohibition on attending public meetings on Palm Island was found to be reasonably adapted to meet a legitimate end.

[23] Per JJ McHugh, Gummow, Hayne and Kirby.

[24] [2013] HCA 4, 17 February 2013

[25] The Court of Criminal Appeal found that the provision was "reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution". Bathurst CJ stressed that the word 'offensive' requires a strong reaction, anger, rage, disgust or hatred.

Hayden, nonetheless, observed, in a judgment that included a moving poem to a son lost in battle, that the right of political communication was flawed, describing it as "a noble and idealistic enterprise which has failed, is failing and will go on failing".

Justices Crennan, Kiefel and Bell, in a joint judgment, agreed that the provision was valid as it was proportionate to a legitimate aim. They confirmed that the degree of offensiveness should be at the higher end of the spectrum, requiring serious offensive material. A restriction on freedom of speech may be allowed, these justices concluded, subject to the need to protect legitimate interests.

The 3-3 decision of the High Court was a disappointing outcome, as the justices disagreed on the application of the principle (of a proportionate measure to achieve a legitimate aim) to the statutory provision at issue, in effect upholding the earlier convictions.

Another and more controversial aspect of the right to free speech relates to the notion of insulting or giving offence.

The *Racial Discrimination Act* 1975 (Cth) (RDA) was enacted to give effect to the CERD which, in Art. 4 (a), provides that States parties:

"Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin etc."

Section 18 C of the RDA prohibits offensive behavior on the basis of race, color or national or ethnic origin. More precisely, it is unlawful for a person to do an act, otherwise than in private if the act is reasonably likely, in all the circumstances, to "offend, insult, humiliate or intimidate" another person and the act is done because of the race or national origin of that person.

There are several exceptions to s. 18C: it is not unlawful if what was said was done reasonably and in good faith, for specified purposes including a genuine purpose in the public interest or was a fair or accurate report of any matter of public interest or was fair comment, if the comment was a genuine belief. The legislative aim of these exceptions was to balance freedom of speech with the right to be free from racial prejudice and intolerance.

There is relatively little guidance given by the courts as few cases have arisen for decision. The much-discussed *Bolt Case* illustrates how the exceptions apply in practice. Ms Eatock complained about two newspaper and blog articles written by Mr Bolt and published in the *Herald Sun*. She argued that the articles were offensive to fair-skinned aboriginal people in saying that they pretended to be of Aboriginal identity in order to gain access to welfare benefits.

Justice Bromberg of the Federal Court applied an objective test to conclude that ordinary and reasonable members of an aboriginal group were reasonably likely to be "offended, insulted, humiliated or intimidated' by the imputations in the articles and that the offensive conduct was not exempt because the articles contained errors of

fact, distortions of the truth and inflammatory and provocative language. Mr Bolt has not acted reasonably or in good faith.

It was a key point in Justice Bromberg's judgment that 'beyond the hurt and insult involved', the conduct was likely to intimidate fair-skinned Aboriginal people, especially those who are young and vulnerable in respect of their identity. He stressed that it was not unlawful to deal with racial vilification by challenging the genuineness of the identification of a group of people. To do so is protected by the right to freedom of speech. Rather, he emphasized the manner in which this subject matter was dealt with.

Bromberg concluded that outside political discourse, freedom of expression is not merely a freedom to speak inoffensively or politely but there is a restraint on inflammatory, provocative language and gratuitous insults. Language should have a legitimate purpose in communicating a point of view and not disparage those to whom offence has been caused.

The *Bolt* case illustrates the practice of Australia's courts in requiring that for speech to be unlawful, it will usually be at the egregious end of the spectrum, involving intimidation or humiliation, not merely an offensive and insulting act. Courts have never found speech unlawful when the language was at the lower threshold. Conduct must have "profound and serious effects, not to be likened to mere slights". [26]

Impact on the HRAD Bill

Finally, we come to the HRAD Bill. Over the last 30 years or so Australian federal and state legislation on human rights has grown "like topsy". It has been *ad hoc*, reflecting the evolution of human rights treaties over the decades: Race, Sex, Disability and Age, with some sections of wide ranging legislation such as the *Migration Act* and the *Crimes Act*. A significant body of law has grown up on discrimination matters, broadly giving effect to the principle of equality. These laws at the federal level required some simplification because of overlap and inconsistent provisions. The stated aim of the HRAD Bill was to create a single integrated piece of legislation. Indeed, the Bill did achieve a comprehensive consolidation of the existing law and the then Attorney supported the initiative on the grounds of a common sense rationalization of the law; one that would bring benefits to business and the community alike.

An area of reform was to expand the language of discrimination laws, borrowed in part from *S 18* C, to apply to the new attributes, including nationality, social origin, religion, sexual orientation and industrial and medical history.

Discrimination was defined as treating a person 'unfavorably', a term that was defined to include, "harassing, offending, insulting or intimidating" another person.

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[26] *Creek v Cairns Post Pty Ltd* FCA 2001 (Kiefel J); *Bropho v HREOC* 2004, FCA, French J, Scully Hely J and Branson J in *Jones* at 92 put it as "real,offence".

S18C had existed successfully since 1996 and the Government may have thought that it could, without attracting controversy, extend the application of these words to other protected attributes. This proved to be a fundamental error of judgment as the media and commentators leapt upon the words claiming a violation of the right to freedom of speech. Moreover, it proved fatal that this aspect of the Bill became the butt of jokes. Humor it seems can be devastating as a weapon against legislative reform.

The *Bolt case* was revived, providing a vehicle for rejection of both the current and proposed laws. The legal reality that the Federal Courts have applied s 18 C in only the most serious cases of racial vilification and never at the level of merely insulting or offending, such as holocaust deniers, indecent cartoons of Aboriginals and extreme race hatred. This was not to the point for most commentators.

Despite the way the law is applied in practice, the words used in s 18C was considered in the public and media debate to place the standard at an unacceptably low level. While the bill could have been amended and reintroduced, the political damage was done and the Bill has now been withdrawn.

The damage done by this debate is that calls are now being made to repeal s 18C on racial vilification, a provision that was working well, and applied to the most egregious cases on the rare occasions when a compliant could not be resolved through the conciliation proceedings of the AHRC.

Conclusions:

Freedom of speech is alive and well in Australia but it is a fragile flower that requires constant vigilance to protect. The exponential increase in complaints about racial vilification to the AHRC, especially in the workplace suggests that Australians are not fearful about their right to freedom of speech. Rather, they are fearful of racial or other abuse in a public place. It is in this context that a balance of freedoms needs to be struck. That balance will be constantly adjusted to reflect emerging community standards and our courts play a vital role as arbiters of that balance.