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Current trends surrounding the constitutional freedom of political communication

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Current trends surrounding the constitutional freedom of political communication

Abstract

Freedom of speech is a vital pillar supporting Australia's democracy and has long been recognised as a fundamental principle at common law. The freedom of political communication is implied from Australia's Constitution and acts as a restriction on the Commonwealth's legislative power. Current events such as the growing threat of a possible terrorist attack and renewed public debate surrounding the operation of the Racial Discrimination Act 1975 (Cth) have led to statutory amendments and proposed changes that affect Australian's freedom of political communication. This paper endeavours to examine these recent legislative amendments and proposals in order to determine whether they are strengthening or enfeebling Australian society.

Keywords

Freedom of speech, common law

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CURRENT TRENDS SURROUNDING THE CONSTITUTIONAL FREEDOM OF POLITICAL COMMUNICATION

JAKE BUCKINGHAM

INTRODUCTION

Contrary to popular belief and unlike numerous other nations Australia has not expressly enshrined a constitutional right to freedom of expression. Rather, by virtue of the High Court's decision in the cases of *Nationwide News Pty Ltd v Wills*,¹ and *Australian Capital Television Pty Ltd v Commonwealth*,² Australians enjoy an implied freedom of political communication. This implied freedom includes non-verbal forms of communication.³ The High Court implied this freedom when interpreting sections 7, 24, 64 and 128 of the Commonwealth *Constitution*.⁴ These sections outline Australia's system of 'representative government'.⁵ The High Court determined that for the effective functioning of the electoral process, citizens are afforded the opportunity to access the necessary information, ideas and arguments in order to make an authentic judgment when voting.⁶ As a result this implied freedom protects such expression as political speech directed toward members of the executive arm of government, such as Ministers and public servants.⁷ Australia's narrow freedom of speech is emphasised in *Lange v Australian Broadcasting Corporation*,⁸ where the High Court unanimously held that the freedom of political communication is not a defence against a claim of defamation.⁹ In doing so the High Court overturned its previous decision in *Stephens v West Australian Newspapers*,¹⁰ and asserted that political communication is not a personal right, but rather a restriction on the legislative power of State and Federal Parliaments.¹¹

¹ (1992) 177 CLR 1.

² (1992) 177 CLR 106.

³ *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ).

⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566-7.

⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 231-2 (McHugh J).

⁷ See *Coleman v Power* (2004) 220 CLR 1, 45 [80] (McHugh J).

⁸ (1997) 189 CLR 520.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 569-73.

¹⁰ (1994) 182 CLR 211.

¹¹ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 74 [166] (Crennan and Kiefel JJ); See eg, *Coleman v Power* (2004) 220 CLR 1, 88-9 [228]-[229] (Kirby J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.

As a result communication in Australia is free only to the extent that it is ‘left unburdened by laws that comply with the Constitution’.¹²

The High Court’s decision in *Lange* narrowed the freedom of political communication from previous cases, such as *Theophanous*.¹³ Further, the High Court established a two-limb test when determining whether an act is invalid for breaching this freedom. First, the freedom only covers governmental and political matters.¹⁴ Second, an Act of Parliament can burden the dissemination of both matters only if the statute is reasonably proper to serve a legitimate end.¹⁵ In answering the second limb of the test the Court will ask whether the impugned act is compatible with the maintenance of a ‘representative and responsible’ form of government.¹⁶ In ascertaining whether the impugned act places a legitimate burden on the freedom, the Court will consider whether the means adopted are ‘reasonably appropriate and adapted.’¹⁷ It can be said with certainty that after the case of *Lange*, Australia’s freedom of expression is undeniably not absolute.

It has been argued that Australians’ right to free speech is also derived from the *United Nations International Covenant on Civil and Political Rights* (‘ICCPR’) to which Australia is a signatory.¹⁸ While article 19(1) of the ICCPR states the right to *hold* opinions without interference cannot be subjected to any exception of restriction,¹⁹ there is no unrestricted right to *express* those opinions. This is because article 19(3) provides that the right of expression may be limited in order to uphold public order.²⁰ Therefore, it can be ascertained that an international conceptualisation of free expression, which Australia has signed does not comprise of an unlimited right.

¹² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

¹³ *Theophanous v Herald & Weekly Times Ltd and Another* (1994) 182 CLR 104.

¹⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.

¹⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

¹⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.

¹⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.

¹⁸ *International Covenant on Civil and Political Rights* signed 18 of December 1972, [1980] ATS 23 (entered into force 13 November 1980).

¹⁹ *Ibid*, art 19(1).

²⁰ *Ibid*, art 19(3); Department of Attorney General, *Right to Freedom of Opinion and Expression* (2014) Australian Government <<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofopinionandexpression.aspx>>.

I COMMON LAW ANALYSIS OF THE FREEDOM OF POLITICAL COMMUNICATION

1 *What is Political Communication?*

While the High Court has been unambiguous in stating that the implied freedom of political communication ‘extends only so far as is necessary to give effect to those provisions of the *Constitution* that prescribe the federal system of responsible government’,²¹ what is less clear is what exactly constitutes political matters. The distinction between political and non-political expression is illustrated in the case of *Brown v Members of the Classification Review Board*.²² In *Brown* the censorship of an article providing advice on effective methods of shoplifting was not in breach of political communication because the article was found not to have a political or governmental flavour.²³

Brown can be contrasted with that of *Wotton v Queensland*,²⁴ where the High Court held discussions concerning perceived injustices in aboriginal communities were political in nature.²⁵ The plaintiff in *Wotton* was prohibited, without approval, from attending public meetings on Palm Island and from speaking to the media during his parole. The issue at hand was whether the order made by the Parole Board under the *Corrective Service Act 2006* (Qld) legitimately burdened political communication.²⁶ The High Court found the Parole Board’s power to make such an order was reasonably appropriate and adapted in ensuring community safety and crime prevention.²⁷ Then Chief Justice Gleeson recognised the opacity in applying the *Lange* test when finding that ‘reconciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term political.’²⁸ This highlights one of the detriments in the absence of bill or charter of rights within the Australian Constitution: that difficult questions surrounding freedom of expression are left to unelected judges without any contribution from parliamentarians or directly from the citizenry. Queens Counselor Ronald Sackville claims that High Court’s decision to imply rights such as

²¹ *Coleman v Power* (2004) 220 CLR 1, 88 [228] (Kirby J).

²² (1998) 82 FCR 225.

²³ *Brown v Members of the Classification Review Board* (1998) 82 FCR 225, 238 (French J).

²⁴ (2012) 246 CLR 1.

²⁵ *Wotton v Queensland* (2012) 246 CLR 1, 15 [25]-[27] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁶ *Wotton v Queensland* (2012) 246 CLR 1, 16 [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁷ *Wotton v Queensland* (2012) 246 CLR 1, 17 [34] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁸ *Coleman v Brown* (2004) 220 CLR 1, 31 [28] (Gleeson CJ).

political communication has ‘elevated judicial supremacy to a new level... [resulting in the High Court becoming] an increasingly powerful counter-majoritarian force in the Australian constitutional structure.’²⁹ Even though the High Court was correct in implying the freedom of political communication, it should not be expected to imply further rights or expand existing ones. Such a move would be seen as blatant judicial activism. The only way to rectify the court’s wide discretion on freedom of political communication is to insert an express constitutional right of free expression via referenda.

1.1 *Limits of Free Communication*

No country allows for an absolute right to freedom of expression,³⁰ and for good reason. It would be impractical to permit an unlimited right of free expression in order to pursue philosophical purity. A well-cited example of the perils of such an unfettered right is the situation where an individual would be legally able to scream ‘fire’ in a crowded theatre knowing there was no fire, without any disciplinary punishment.³¹ Adverse effects would result from an absolute right to free speech – the foremost being an eventual breakdown of social cohesion. In order to avoid such consequences it is necessary to place reasonable statutory restrictions on this right. The need for community protection from socially undesirable speech is reflected in the second limb of the *Lange* test. The High Court in determining whether a statute reasonably burdens political communication, created a distinction between acts that incidentally restrict political communication and those that prohibit or regulate inherently political communications.³² The majority in *Wotton* found a ‘burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description.’³³ This is because in order for Australia’s system of representative government to operate effectively, it is necessary that citizens be able to access inherently political speech.

The case of *Banerji v Bowles* acknowledged that generally rights are ‘not unbridled or unfettered’.³⁴ *Banerji* concerned an Immigration Department bureaucrat who posted ‘tweets’ critical of the government’s asylum seeker detention policies as well as members of cabinet and the opposition

²⁹ Ronald Sackville, ‘The Changing Character of Judicial Review in Australia: The legacy of *Marbury v Madison*? (2014) 25 *Public Law Review* 245, 262.

³⁰ Ekaterina Balabanova, *The Media and Human Rights: The Cosmopolitan Promise* (Routledge Publishing, 2014) 127.

³¹ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012), 145.

³² *Hogan v Hinch* (2011) 243 CLR 506, 555-556 [95]-[99] cited in *Wotton v Queensland* (2012) 246 CLR 1, 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

³³ *Wotton v Queensland* (2012) 246 CLR 1, 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

³⁴ *Banerji v Bowles* [2013] FCCA 1052 [102].

frontbench.³⁵ Ms Banerji tweets were in breach of the Australian Public Service Code of Conduct ('APSCC').³⁶ Ms Banerji sought to invalidate the APSCC by arguing that it breached the freedom of political communication.³⁷ Justice Neville rejected Ms Banerji's submissions, holding that the freedom 'does not provide a licence to breach a contract of employment'.³⁸ *Banerji* reaffirms that political communication is not a personal right, but rather a restriction on legislative power. As a result, Australians are not entitled to a far-reaching freedom of expression as seen, for instance, under the first amendment of the United States *Constitution*.³⁹

It is alarming that even though Ms Banerji was expressing her personal views about government policy and elected representatives – matters, which at their very heart are political, without disclosing her employment, the freedom of political communication did not afford her protection. It can be said that there is a legitimate public interest in disallowing public servants from speaking publically against the government of the day in order to maintain impartiality between differing governmental branches. But there is a fine line to be drawn between conveying bureaucrats' public neutrality and ensuring electors like Ms Banerji are allowed to pass judgement on political matters and call out wrongful government action. It is important to note that whistleblowers are now protected under the *Public Interest Disclosure Act 2013* (Cth). Public servants are now 'guaranteed anonymity and immunity if they disclose an abuse of public trust, corruption, acts that endanger the environment, or unjust, oppressive or negligent conduct, among other wrongs'.⁴⁰ Nevertheless, the *Public Interest Disclosure Act* (Cth) does not cover judicial conduct, security agencies, politicians or the private sector.⁴¹

One jurisprudential argument when drawing boundaries of statutory impingement upon freedom of expression is made by legal scholar Jeremy Waldron. Waldron asserts that when the societal interest of being immune from obscene or inflammatory speech outweighs an individual's interests in communicating their thoughts and opinions, legislative curtailment of free speech is justifiable.⁴² Conversely Ronald Dworkin contends that if an individual has a right, then it is wrong for him to be

³⁵ *Banerji v Bowles* [2013] FCCA 1052 [16]-[24].

³⁶ *Banerji v Bowles* [2013] FCCA 1052 [36].

³⁷ *Banerji v Bowles* [2013] FCCA 1052 [39].

³⁸ *Banerji v Bowles* [2013] FCCA 1052 [102].

³⁹ *United States Constitution* amend I.

⁴⁰ Gillian Triggs, 'Right to freedom of speech cannot breach employment contract' *The Sydney Morning Herald* (online), 1 May 2015 <<http://www.smh.com.au/comment/right-to-freedom-of-speech-cannot-breach-employment-contract-20150430-1mwn9f.html>>.

⁴¹ *Ibid.*

⁴² Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012), 146.

denied the exercise of that right even when social utility would be advanced.⁴³ The problem with Dworkin's argument is that in an Australian setting, citizens do not enjoy an unlimited right to speech. This is due to the fact that Australia's freedom of political communication was born with practicable limitations and was never intended to be absolute.⁴⁴

Not only can Parliament infringe upon peoples' freedom of political communication when seeking a legitimate purpose, but also when the 'right' allegedly being infringed is conferred by statute. This proposition was explored in the case of *Mulholland v Australian Electoral Commission*.⁴⁵ The Applicant, Mr John Mulholland, was the registering officer of the Democratic Labour Party. He contended that the *Commonwealth Electoral Act 1918* (Cth), which mandated registered political parties have a minimum of 500 members, breached the implied freedom of political communication.⁴⁶ The High Court rejected Mulholland's argument finding there was no burden on political matters, since the 'right' to be registered as a political party was not a right at all, but in fact a statutory privilege.⁴⁷ Ultimately, the High Court reasoned that the identification of candidates as affiliated to a political party does not hinder electors' ability to make a 'fully informed choice' when voting.⁴⁸

1.2 *Statutory Restrictions on the Freedom of Political Communication*

Both successive Commonwealth and State Parliaments have sought to regulate free speech. These restrictions include defamation laws, which aim to protect persons from libel and slanderous statements.⁴⁹ Another constraint upon free speech is found within section 340 of the *Electoral Act 1918* (Cth), which prohibits an individual from canvassing votes within six meters of a polling booth on election day. A further inhibition is State and Commonwealth sedition laws. For instance the *Anti-Terrorism Act (No. 2) 2005* (Cth), which amended the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth) criminalises the urging another individual to 'overthrow' any level of government.⁵⁰ All these statutes are reasonable restrictions on the freedom of speech, and it can be argued that all serve a legitimate public purpose.

⁴³ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012), 159.

⁴⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 235 (McHugh J).

⁴⁵ (2004) 220 CLR 181.

⁴⁶ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 186-8 [1]-[6].

⁴⁷ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 223 [105] (McHugh J).

⁴⁸ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 211 [74] (McHugh J).

⁴⁹ See eg, *Defamation Act 2005* (Qld); *Defamation Act 2005* (Vic).

⁵⁰ *Anti-Terrorism Act (No. 2) 2005* (Cth) Sch 7 Part 5.1 Div 80 s 80.2.

A more substantive limitation upon the freedom of the press and political speech is contained within the *Racial Discrimination Act 1975* (Cth) ('RDA'). The RDA has been contentious ever since its enactment by the Whitlam Government. The impetus for the passage of the RDA was to give effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁵¹ Before the RDA's introduction non-violent acts of racism were typically beyond the reach of the law.⁵² This is because the common law failed to develop civil or criminal protections against hate speech.⁵³ As a result it was left to Parliament to establish a statutory right to be free from racial and other forms of verbal discrimination. Since the passage of the RDA more than 6,000 complaints of racial discrimination have been conciliated, with fewer than 300 reported decisions made by the courts and tribunals during its 40-year lifespan.⁵⁴

Part IIA of the RDA has been at a crossroad with the principle of free speech since its inception, with the Federal Government last year exploring and eventually ruling out potential amendments to various sections.⁵⁵ Specifically section 18C makes it unlawful to do any act reasonably likely 'offend, insult, humiliate or intimidate another person or a group of people', based on their 'race, colour or national or ethnic origin.'⁵⁶ These words are to be understood using their ordinary and natural meaning.⁵⁷ The Court has broadly characterised the meaning of 'a group of people' to include peoples of a common ethnic origin despite differing nationalities. For instance *Miller v Wertheim*,⁵⁸ the Federal Court observed that Jewish people constitute a 'group of people' even though they have varying national origins.⁵⁹ Furthermore, the Court has interpreted the phrase

⁵¹ GA Res 2106 UN GAOR (4 January 1969).

⁵² Dr Tim Soutphommasane, 'The Racial Discrimination Act at 40' (2015) 89 *Australian Law Journal* 303, 303.

⁵³ *Ibid.*

⁵⁴ Gaze B, 'The Racial Discrimination Act after 40 years: Advancing equality or sliding into obsolescence?', (Paper presented at the RDA@40 Conference, Sydney, 19-20 February 2015).

⁵⁵ Heath Aston, 'Tony Abbott Dumps Controversial Changes to 18C Racial Discrimination Laws' *Sydney Morning Herald* (online), 5 August 2014 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html>>; Joint Press Conference with Tony Abbott, Prime Minister of Australia (Canberra, 5 August 2014), <<https://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>>.

⁵⁶ *Racial Discrimination Act 1975* (Cth) s 18C(1)(b).

⁵⁷ *Jones v Toben* (2002) 71 ALD 629, 650 [87] (Branson J).

⁵⁸ (2002) EOC 93–223.

⁵⁹ *Miller v Wertheim* [14].

‘reasonably likely’ as being an objective test of whether the act was more probable than not to cause discrimination.⁶⁰

Under section 18C(1) an act is not unlawful if it is done privately. Privately is to be distinguished from the public domain. For instance an act would not be private if it was communicated to the public or is done in a ‘public place’.⁶¹ There are three defences excluding one’s culpability under section 18C. First, if act were done during the course of artistic work.⁶² Second, if the act concerned any expression made for artistic or scientific, or any other purpose in the public interest.⁶³ Third, if the act was made in the publishing of a fair and accurate report, or comment that was a genuinely held belief of the person who made the comment.⁶⁴ All three defences require the act to be done in good faith with the respondent bearing the onus of proof.⁶⁵

It has been asserted that the wording of section 18C is too broad and thus too great a burden upon free political communication. For instance the courts have been willing to find that speech directed at individuals based on ‘race, colour or national or ethnic origin’ does not need to be the dominant or substantial reason, but just *a* reason for the speech.⁶⁶ Critics of the RDA argue that the judiciary’s construction of section 18C unfairly outlaws speech that is not directed or intended to cause harm. Critics further contend that it is difficult for the courts to determine what ‘offensive, insulting and humiliating’ speech is, given the abstract nature of the words. On the other hand proponents of the RDA maintain that it successfully balances the right to free speech with the right to be free from racism. It has been reasoned that while the RDA outlaws certain speech no one can be prosecuted or convicted for a breach under it.⁶⁷ Further, supporters of the RDA reason that speech in the interest of the public are exempt from being unlawful under the aforementioned defences and therefore it places a legitimate burden on free expression. This burden was

⁶⁰ *Jones v Toben* (2002) 71 ALD 629, 648 [83] (Branson J) quoting *Jones v Scully* (2002) 71 ALD 567 [98]–[99] (Hely J).

⁶¹ Section 18C(3) defines ‘public place’ to include any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

⁶² *Racial Discrimination Act 1975* (Cth) s 18D(a).

⁶³ *Racial Discrimination Act 1975* (Cth) s 18D(b).

⁶⁴ *Racial Discrimination Act 1975* (Cth) s 18D(c).

⁶⁵ *Jones v Toben* (2002) 71 ALD 629, 653 [101] (Branson J).

⁶⁶ *Jones v Toben* (2002) 71 ALD 629630 [98] (Branson J) quoting *Jones v Scully* (2002) 71 ALD 567 [114] (Hely J).

⁶⁷ Dr Tim Soutphommasane, ‘The Racial Discrimination Act at 40’ (2015) 89 *Australian Law Journal* 303, 304.

prominently illustrated in the Federal Court case of *Eatock v Bolt and Another*.⁶⁸ The respondent in that case, well renowned columnist and commentator Andrew Bolt, was found to breach section 18C for two articles he wrote in 2009 for the Herald Sun Newspaper entitled ‘It’s So Hip to be Black’ and ‘Aboriginal Man Helped’.⁶⁹

Both articles conveyed imputations that fair-skinned Aboriginals were not sufficiently indigenous to identify themselves as being of native origin. Additionally Bolt claimed fair-skinned Aboriginals only choose to identify themselves as Aboriginal in order to enhance their career opportunities or obtain government welfare payments.⁷⁰ The applicant, Ms Eatock argued that both articles were offensive in asserting that Indigenous people like herself were merely faking their ethnicity ‘in order to have access to benefits and privileges’ exclusively available to Aboriginal people.⁷¹

Bromberg J held the relevant test is a consideration of the value, standards and circumstances of the persons or a group of persons to whom section 18C(1)(a) refers - not general community standards.⁷² Accordingly, Bromberg J found an ordinary Aboriginal person of ‘mixed descent was reasonably likely to have been offended, insulted, humiliated and imitated.’⁷³ Further, Bromberg J determined that due to the factual errors, the inflammatory and provocative language used and the ‘mocking derisive and cynical tone of the articles’, Mr Bolt was precluded from relying on any defence under section 18D of the RDA.⁷⁴ Subsequently, Mr Bolt was ordered to apologise, compensate the applicant and retract the articles.⁷⁵ Bolt’s employer the Herald Sun was held to be vicariously liable under section 18E of the RDA.⁷⁶

⁶⁸ (2011) 283 ALR 505.

⁶⁹ *Eatock v Bolt and Another* (2011) 283 ALR 505, 505-6.

⁷⁰ *Ibid*, 505-7.

⁷¹ *Ibid*, 507 [3].

⁷² *Ibid*, 558 [253].

⁷³ *Ibid*, 598 [452].

⁷⁴ *Ibid*, 518 [54].

⁷⁵ *Eatock v Bolt and Another (No 2)* (2011) 284 ALR 114, 127.

⁷⁶ *Eatock v Bolt and Another* (2011) 283 ALR 505, 507.

II CONTEMPORARY DEVELOPMENTS SURROUNDING THE *RACIAL DISCRIMINATION ACT 1975*

The tragic shootings of Charlie Hebdo's Parisian employees have reignited public debate around free speech.⁷⁷ Australian Human Rights Commissioner Tim Wilson proclaimed that the controversial cartoons depicted in the French satire magazine might be unlawful under the RDA.⁷⁸ There are valid arguments from both sides as to whether or not such a publication should be outlawed. Recently in Australia it has been contended that the Federal Government's discarded plan to amend section 18C of the RDA from 'offend, insult, and humiliate' to simply 'vilify or intimidate'⁷⁹ should be reinstated.⁸⁰ The rationale put forth is that the amended wording would more effectively balance the need to protect vulnerable members of the community from harm, while simultaneously allowing for a greater exchange of ideas to occur. This reasoning follows the thought of John Stuart Mill that governments should only legislate to prevent harm.⁸¹ Legislation enacted to protect an individual from being 'offended' may be an unnecessary statutory encumbrance on freedom of expression. However, if the government were to make changes to the RDA it would need to be consistent in protecting free expression in the drafting of all legislation. For instance the government should not be able to reprimand individuals who criticise government policy, as seen in *Banerji*.

It has also been argued that amending the wording of section 18C would ensure that the RDA remains constitutionally valid and not susceptible to a legal challenge. This is because the High Court, albeit on an equally divided opinion, held in *Monis v The Queen* that section 471.12 of the *Criminal Code 1995* (Cth) was invalid for breaching the freedom of political communication.⁸² Section 471.1 made it an offence to use the Australian post in a way that would offend a reasonable

⁷⁷ Heath Aston and Latika Bourke, 'Paris terror sparks new push to bolster freedom of speech in Australia', *The Sydney Morning Herald* (online), 13 January 2015 <<http://www.smh.com.au/federal-politics/political-news/paris-terror-sparks-new-push-to-bolster-freedom-of-speech-in-australia-20150112-12mmv4.html>>.

⁷⁸ Jane Norman, 'Tim Wilson joins call for changes to discrimination laws, says Charlie Hebdo cartoons would be banned in Australia', *ABC* (online), 13 January 2015 <<http://www.abc.net.au/news/2015-01-13/wilson-calls-for-discrimination-law-changes/6013946>>.

⁷⁹ Department of Attorney General, *Consultation on 18C* <<http://www.ag.gov.au/Consultations/Documents/Attachment%20A.pdf?>>.

⁸⁰ Emma Griffiths, 'Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws', *ABC* (online), 6 August 2014 <<http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030>>.

⁸¹ John, Stuart Mill, *On Liberty* (J. W. Parker and Son, 1859).

⁸² *Monis v The Queen* 249 CLR 92, 93.

person.⁸³ French CJ found that section 471.12 was invalid even though it provided judicial discretion in determining what was offensive.⁸⁴ The Chief Justice maintained ‘whether or not located in the eye of a reasonable beholder and whether or not narrowly defined, offensiveness is a protean concept which is not readily contained unless limited by a clear statutory purpose and other criteria of liability’.⁸⁵ It is important to have in place a statutory framework to prevent racially vilifying speech. This is because without legislative protection Australia’s multicultural society would not properly function. However, given the High Court’s decision in *Monis*, outlawing offensive communication may be incompatible with Australia’s constitutionally prescribed system of free flowing political communication.

The High Court in the recent case of *Unions New South Wales v New South Wales* unanimously struck down provisions within the *Election Funding Expenditure and Disclosures Act 1981* (NSW).⁸⁶ The impugned act prohibited political donations by anyone other than an enrolled elector. The High Court held in *Unions* that the statutory prohibition on political donations did nothing to promote any legitimate public purpose and therefore was invalid. As a result the High Court’s decision in *Unions* echoes its previous ruling in *Australian Capital Television Pty Ltd v Commonwealth*.⁸⁷ It is difficult to understand the High Court’s decision a law attempting to curtail the influence of money in politics in a state, which has suffered severe and systemic corruption uncovered by an Independent Commission Against Corruption does not serve the public’s interest.⁸⁸ If the RDA in its present form were to be challenged and upheld by the High Court it would be difficult to reconcile how burdening political communication in the prevention of offending individuals is in the public’s interest while reducing the likelihood of government corruption is not.

A recent statutory burden of the freedom of the speech is encompassed within Australia’s revised terrorism laws. Specifically, section 35P(2) of the *National Security Legislation Amendment Act (No 1) 2014* (Cth) (‘NSAA’) makes it a criminal offence punishable for up to 10 years imprisonment, if a person discloses information relating to special intelligence operations.⁸⁹ The Act’s purpose is to ‘modernise and improve the legislative framework’ governing Australia’s

⁸³ *Monis v The Queen* 249 CLR 92, 93.

⁸⁴ *Ibid*, 134-5 [74]-[77] (French CJ).

⁸⁵ *Ibid*, 124 [47] (French CJ).

⁸⁶ *Unions New South Wales v New South Wales* (2013) CLR 252 530.

⁸⁷ (1992) 177 CLR 106.

⁸⁸ Ronald Sackville, ‘The changing character of judicial review in Australia: The legacy of *Marbury v Madison*?’ (2014) 25 *Public Law Review* 245, 261.

⁸⁹ *National Security Legislation Amendment Act (No 1) 2014* (Cth) s 35P(2)(ii).

security agencies.⁹⁰ However, it is extremely troubling that the phrase ‘special intelligence operations’ utilised within the Act is loosely defined, and could have an extensive meaning that impedes upon people’s ability to inform the public about governmental affairs. For instance it has been speculated that if these laws were in effect during the First World War, journalists reporting catastrophic casualties of the Gallipoli campaign may have been imprisoned.⁹¹ Such an occurrence in the present day would not be consistent with the principle repeatedly expounded by the High Court that electors should be able to access information required to make an informed electoral choice.

Rather than ensuring the protection of the public interest, the amended security legislation will have the opposite effect by hampering appropriate public scrutiny of the actions of government. Alas, corrode a vital touchstone of our democracy – the ability of citizens to question the decisions of their elected representatives. As a result there have been calls for the NSAA to include a more narrow definition of ‘special operations’. There is a strong argument to be made that in its present form the NSAA is not consistent with constitutionally described method of representative and responsible government. This is because the NSAA is not reasonably appropriate and adapted in pursuing a legitimate end, since there is no limit on what communication the act can restrict.

III CONCLUSION

Australia has a narrow and fragile right to free expression, which is limited to political matters. This freedom in its present form is insufficient to protect and facilitate the requisite transparency and accountability in Australia’s public institutions. The only way to truly foster free expression and uphold Australia’s democratic ideals is to constitutionally enshrine an express right of free expression. As recent case law shows, the implied freedom of political communication needs to be vigilantly protected by the judiciary in order to prevent illegitimate statutory encroachment. It is of vital importance that the judiciary continues to perform this protective task until such a time that an express right is included in the constitution. In the words of John Stuart Mill, ‘...mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind’.⁹²

⁹⁰ Explanatory Memorandum, National Security Legislation Amendment Act (No1) 2014 (Cth) 1,1.

⁹¹ Jared Lynch, ‘Lachlan Murdoch Slams Local Terror Laws’, *Financial Review* (online), 23 October 2014 <http://www.afr.com/p/national/lachlan_murdoch_slams_local_terror_QWHiY9oI8BkCaVmu38pJzN>.

⁹² John, Stuart Mill, *On Liberty* (J. W. Parker and Son, 1859).