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## Secularism in the Modern World

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**Guest Speaker**

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Nobody at this conference should disagree that freedom of expression is a political principle of fundamental value.

There are two primary reasons.

First, freedom of speech is essential for the maintenance of democracy and effective participation in it. Citizens can't participate effectively in democracy unless they have a reasonable understanding of political issues. So, open debate about political and governmental affairs is essential.

Secondly, freedom of speech is crucial to the pursuit of truth. Society will more effectively ascertain accurate facts and valuable opinions in an atmosphere of free and uninhibited discussion, criticism and debate.

It is also well accepted, however, that freedom of expression should, in certain circumstances, be limited. So, as the jurisprudence around freedom of 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, for the proper enforcement of the law, public health and public morality.

It is generally accepted that expression may be constrained to protect the rights or reputation of others, for reasons of privacy, and for the protection of fair trial.

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

There are no general rules that enable us to adjudicate these competing claims. Decisions as to balance will always be influenced by the specific circumstances in which the competition takes place.

What we can say, however, is that political speech should be relatively immune from restriction because it constitutes a dialogue between members of the electorate and between the 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 to it should be kept to a minimum.

The position is different for speech that has only a tenuous connection to democratic deliberation. Racially and Religiously hateful speech is speech of that kind.

This is because Racial and Religious hatred is, fundamentally, an attack on tolerant society and the right of everyone to equal respect and concern. Limits to it may more easily and properly be justified.

While in the remainder of this address, I will be looking principally at the operation of the Racial Discrimination Act, my comments and Recommendations apply equally to cases of religious discrimination.

### Reforming S.18C of the Racial Discrimination Act

In a considered speech auspiced by the Australian Human Rights Commission, the former Chief Justice of New South Wales, Jim Spigelman, made two significant observations about the current debate in Australia with respect to freedom of speech and its relationship to s.18 of the Racial Discrimination Act (RDA).

He observed that the debate should not be confined to a consideration of the rights and wrongs of the Andrew Bolt case. Its terms must, necessarily, be deeper and wider than that.

At the same time, however, serious consideration needs to be given to whether in Australia, the giving of offence or insult should be the subject of legal sanction. In Spigelman's view, there should be no right 'not to be offended'.

In that context, the key question is whether or not it should be unlawful, in the terms of S.18C, to 'offend, insult, humiliate or intimidate' a person because of their race.

In the BOLT case, the judge was required to interpret and apply the provisions of the RDA as written. The judgment is worth examining closely. The judge found that the following imputations were contained in the articles that Bolt wrote.

- The applicants were not genuinely aboriginal.
- Fair skin colour is sufficient to demonstrate that a person is not sufficiently aboriginal.
- The applicants, who had fair skin, had chosen falsely to identify as aboriginal.
- They had used their assumed aboriginal identity to advance their careers or political ambitions.
- They had deprived other people who were genuinely aboriginal of opportunities to which they may otherwise have been entitled.

In the case of the applicants, the judge found that every one of these imputations was incorrect.

The question then was whether the imputations were reasonably likely to 'offend, insult, humiliate or intimidate' a person by reason of their race – the test for actionable discrimination set down in the RDA.

Having heard the evidence provided by the applicants, he concluded that an ordinary and reasonable person in their position was likely to be injured in some or all of the ways specified.

Further, the harms concerned had been inflicted by virtue of the applicants' race. For these reasons, the judge concluded that a case of racially discriminatory conduct had been made out.

The next question was whether Bolt could claim an exemption on the grounds that his articles constituted fair comment on a matter of public interest. To qualify for this exemption under the RDA, he had to demonstrate that he had acted 'reasonably and in good faith'.

Justice Bromberg determined that he had not. This was because:

- The articles in question had contained multiple and serious errors of fact.
- They had distorted the truth.
- They were founded on inadequate and careless research.
- They had been written in a manner heedless of their racially prejudicial character.

In these circumstances Bolt could not be regarded as having behaved either reasonably or in good faith. The exemption could not be claimed.

For all these reasons, the Bolt Case is an inappropriate one on which to base a reasoned argument that the RDA constitutes too great an infringement upon Australians' right to freedom of expression.

In my view, however, the section does constitute too great an incursion on free speech. This is because in a free and democratic society we ought to be able to accommodate speech that 'offends and insults', even on racial and religious grounds.

We may disagree with and be concerned by such speech but the solution is to combat it in the marketplace of ideas rather than to prohibit it.

However, the situation is different with respect to speech that vilifies or incites hatred. Here, the measure of the hurt, the gravity of the discrimination and potential social disruption are plainly sufficient reasons to justify a legal limitation.

Ever since the Andrew Bolt case, the Racial Discrimination Act's (RDA) limits on freedom of speech have been the subject of lively debate. The Attorney-General, George Brandis, has sought, not always competently, to wind back these limits.

That position, however, has met intense opposition from an array of organizations whose members have, from time to time, suffered racial and religious vilification. They want the RDA's restrictions on racially prejudicial speech retained.

The two sides have powerful backers.

Those opposing any change include umbrella organizations representing people from Indigenous, Chinese, Vietnamese, Lebanese, Islamic and Jewish backgrounds.

They have received influential support from the Race Discrimination Commissioner, Tim Soutphommasane.

Those advocating change form an unlikely coalition. It consists of conservative think tanks, including the Institute of Public Affairs; influential legal commentators and civil liberties organizations like Liberty Victoria.

The best place to begin an evaluation of the competing views is to examine the terms of the Racial Discrimination Act itself. The relevant provision is s.18C.

This provides that it is unlawful for a person to do an act if it is reasonably likely to 'offend, insult, humiliate or intimidate' another person and the act is done because of the person's race.

The provision appears in a part of the RDA headed racial vilification.

It can be seen immediately, however, that the terms of the section relate only very loosely to the idea of racial vilification. Vilification carries with it a sense of extreme abuse and even hatred of its object.

Vilification can provoke hostile and even violent responses. The words of s.18C simply do not convey this meaning.

Unlike several States and the ACT, the Commonwealth does not have a law sanctioning racial hatred or vilification.

So, as a first step in overcoming the present disagreement the Government should consider outlawing hate speech. S.18C of the Racial Discrimination Act is inadequate because it makes no direct reference to hate speech. It concerns less injurious forms of expression.

Further, as a matter of principle, it seems reasonable to impose a limit on racially hateful utterances given their propensity to incite or provoke vengeful and violent responses.

Community organizations that have opposed any change to S.18C sometimes misconceive this proposal. As the umbrella group's joint statement says:

'We view with growing concern that the Federal Government has plans to remove or water down protections against racial vilification which presently extend to Australians of all backgrounds.'

We should maintain such protections, but the RDA does not contain them.

If real protection against racial - or religious hatred - is desired, then racial or religious hatred, serious ridicule and serious contempt should be named and made subject to civil law sanction.

Should this be done, the intensity of the opposition to proposed changes to S.18C of the RDA may recede.

Then one could look more dispassionately at the terms of the Act's limits on freedom of speech and determine whether and to what extent they might give way to the desirability of protecting free public and political communication.

In that pursuit, however, some advocates of untrammelled free speech go too far. Free speech extremists, such as those in the Institute of Public Affairs, argue that s.18C should be eliminated altogether.

That would mean that prejudicial speech that insulted, offended, humiliated or intimidated members of a racial or ethnic group would be regarded as permissible.

Here, the Racial Discrimination Commissioner has a point. As he argues, to remove any sanction for speech of this character would send a signal that racism is acceptable. We should not do that. However, the question of what might best be discarded and what should be kept remains.

S.18C limits four different kinds of speech. The first is speech that intimidates a person on racial grounds. Intimidatory behaviour is threatening behaviour. It is behaviour that is calculated to place an individual or group in fear.

However much one might value freedom of expression, to allow racially threatening behaviour to pass without civil sanction does not seem desirable.

People of different racial and ethnic backgrounds should be enabled to take their place in society without others inducing in them a real fear of being injured or silenced.

Secondly, there is speech that humiliates. Speech of this kind is an attack on a person's self esteem and belief. And it is an attack on a ground that the person cannot change.

To say, for example, that a person is black and therefore something less than human is to cut a person's sense of self to the quick. The injury here is psychological but no less severe for that. Racial humiliation should also attract civil penalty.

Next there is speech that insults. Insult is aggravated by its connection to race.

However undesirable such invective may be, room needs to be made in the political realm for language that is impetuous or callous.

Not to provide that space would substantially constrain the manner in which people habitually speak and relate. One might not like insult but it should be tolerated in the interests of political pluralism and free expression.

Finally the RDA restrains speech that offends. The problem is that it is difficult to predict when offence will be taken.

The definition of offence is so wide and the circumstances in which it may be inflicted are so numerous that those wishing to put their views strongly on matters that bear on race enter upon uncertain legal territory.

The unpredictability can produce a silencing effect that impinges too invasively upon open political and public communication.

## CONCLUSION

Recently, The UN committee on the Elimination of racial discrimination set down in a general comment the kind of speech that it believed should be restricted by law.

It comprised incitement to, and statements of, hatred, contempt and serious discrimination against members of a group on the grounds of their race, colour or ethnic origin.

At the same time, The UN committee was also clear that racial insult, offence or slight should not qualify for legal restriction. It should only qualify if the racially prejudicial speech amounts to hatred, serious contempt or serious discrimination.

In accordance with these principles, if the terms of S.18C are to be amended, therefore, it should retain restrictions on speech that humiliates and intimidates but abandon limits on speech that insults or offends.

State legislation which prohibits racial and religious hatred and contempt ought also to be amended to conform with these fundamental principles.

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