THE ROLE OF PARLIAMENT IN PROTECTING FREE SPEECH: FOUR VERY DIFFERENT CASE STUDIES

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Abstract

This article discusses the vexed issue of freedom of speech. It looks into whether the parliament can have a meaningful role in protecting such freedom. This paper's focus is on the role of Australian State parliaments in protecting free speech and in limiting it when considered justified by other public interests. The author seeks to reference this to four different case studies: shield laws for journalists; the sexualisation of children; hate-speech laws and parliamentary privilege.

I INTRODUCTION

Lord Keith of Kinkel, giving judgment in the House of Lords in a case involving the serialisation by British newspapers of Peter Wright's tell-all memoir *Spycatcher*, stated as the common law approach to freedom of speech and communication:

> The general rule is that anyone is entitled to communicate anything he pleases to anyone else, by speech or in writing or in any other way. That rule is limited by the law of defamation and other restrictions ... imposed in the light of considerations of public

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> interest such as to countervail the public interest in freedom of expression.[1]

In Australia, subject to the right to freedom of political communication held by the High Court to be implied by the provisions of the Constitution of Australia establishing a system of representative government, State Parliaments have the power to pass laws restricting freedom of speech.

The existence of an implied right to freedom of political communication in the Constitution is enunciated *in Lange v Australian Broadcasting Corporation*[2] ('*Lange*'). In *Lange* the High Court explicitly addressed the application of the implied right to State matters:

> [T]he discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.[3]

Nonetheless, subject to this restriction:

> Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the *Constitution*.[4]

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1 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 256.
2 (1997) 189 CLR 520, 561–2, 567.
3 Ibid 571–2.
4 Ibid 567.

II SHIELD LAWS FOR JOURNALISTS

The *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) ('*Amendment Act*') was passed by the Legislative Council of the Parliament of Western Australia on 12 September 2012 after having been initially introduced into the Legislative Assembly on 20 October 2011.

A *Balancing Competing Public Interests*

The *Amendment Act* addressed the need to balance the competing public interests that arise from time to time in judicial proceedings when a court is asked to compel a journalist to reveal the identity of a source. On the one hand there is a public interest in a free press that vigorously investigates and reports on all matters that affect or may be of interest to the public. On occasion journalists will receive sensitive information from informants or whistle-blowers on the condition that the informant remains anonymous. This practice can, at times, be critical in leading to public exposure of improper practices in business, politics and other realms of public life. On the other hand in both criminal and civil proceedings there can be a competing public interest that favours requiring a journalist to disclose the identity of a source.

B Liu v The Age Co Ltd

In the recent NSW Supreme Court defamation case of *Liu v The Age Co Ltd*[5] ('*Liu*') the Court found that there was a public interest in allowing Ms Liu to be told the identity of the informants from whom The Age obtained information alleging that she made certain payments to people including Joel Fitzgibbon, who was the Minister for Defence from 2007

[5] [2012] NSWSC 12.

to 2009 in the Rudd Government, which outweighed the public interest in allowing journalists to refuse to disclose the identity of a source. The Court was required to consider the application of the *Uniform Civil Procedure Rules 2005* made under the *Civil Procedure Act 2005* (NSW) to an application from the plaintiff, Ms Helen Liu, for an order that the defendants (The Age newspaper and three of its journalists) provide information that would assist Ms Liu to identify the informants to enable her to commence proceedings against them for defamation. The Court considered *Evidence Act 1995* (NSW) s 126B, provisions closely reflected in the new section 20C which has been inserted into the *Evidence Act 1906* (WA) by the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA).

McCallum J said in part:

> In my assessment, the present case sits poised uncomfortably on the fault-line of strong, competing public interests. The position is complicated by the fact that, to a significant extent, the respective positions of the plaintiff and the defendants rest on conflicting factual contentions which cannot satisfactorily be resolved in the present proceedings.
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> The defendants' case is that, following lengthy and careful negotiation, they obtained documents which reveal the making of corrupt payments by the plaintiff to a Federal Member of Parliament. They contend that the documents were obtained from sources who entertain real and substantial fear of reprisal in the event that their identities are revealed, contrary to undertakings given to them by the defendants. Accepting those contentions without qualification, there would be a strong case for refusing the discretionary relief sought by the plaintiff.

> Conversely, the plaintiff's case is that a person or persons conducting a vendetta against her have provided documents to journalists which have been deliberately forged or falsely attributed to her. Accepting those contentions without qualification, to refuse the relief sought would perpetuate the fraud. That would plainly be a strong reason for exercising the Court's discretion in favour of the plaintiff.[6]

The hearing of this case preceded the passage of the *Evidence Amendment (Journalist Privilege) Act 2011* (NSW), which inserted sections 126J to 126L into the *Evidence Act 1995* (NSW).

The *Evidence Act 1995* (NSW) s 126K reads as follows:

> **Journalist privilege relating to identity of informant**
>
> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained.
>
> (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs:
>
> (a) any likely adverse effect of the disclosure on the informant or any other person, and
>
> (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

6 Ibid [168]–[170].

> (3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

It is not clear whether the Court's decision would have been any different if these provisions had been in effect. It is worth noting, however, that the matters which a court is required to take into account were explored in *Liu* in a discussion of the considerations underlying the newspaper rule as set out by the High Court in *John Fairfax & Sons Pty Ltd v Cojuangco*:[7]

> [T]he rule is one of practice, not of evidence. Secondly, although the rule rests on a recognition of the public interest in the free flow of information, the law gives effect to that recognition of the public interest by exercising a discretion to refuse to order disclosure of sources of information in interlocutory proceedings in defamation and, perhaps, other analogous actions, even though disclosure would be relevant to the issues for trial in the action. The law does not protect that public interest to the extent of conferring an immunity on the media from disclosure of its sources.[8]

The option for a court to order a journalist to disclose the identity of a source does not, of course, only arise in civil proceedings. In a criminal case the court may judge that the public interest in obtaining evidence directly from the anonymous informants about alleged crimes outweighs the public interest in protecting the anonymity of a journalist's informants.

C *The Situation in WA*

Before the passage of the Evidence and Public Interest Disclosure Amendment Bill 2011 (WA) the courts in Western Australia made

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7 (1988) 165 CLR 346.

8 Ibid 356 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

decisions about these competing public interests without any specific guidance from legislation.

The new statutory provisions will direct the courts to consider very specific factors before deciding to override the presumption that a journalist is not compellable to give identifying evidence when they have promised not to disclose the identity of their source. However, ultimately the courts must still decide which interest will prevail in a particular case. Some of the matters required to be considered tend towards protecting journalists' sources, for example:

> the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;[9]

and:

> the public interest in preserving the confidentiality of protected confidences and the confidentiality of protected identity information.[10]

However, other factors to be considered tend to favour requiring disclosure:

> the probative value of the evidence in the proceeding;[11]
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> the importance of the evidence in the proceeding;[12]

and:

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9 *Evidence Act 1906* (WA) s 20C(4)(e).
10 Ibid s 20C(4)(j).
11 Ibid s 20C(4)(a).
12 Ibid s 20C(4)(b).

> the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding.[13]

The Parliamentary Secretary responsible for the Act in the Legislative Council stated that:

> [L]egislation of the kind delivered by the bill has been slow to come to Western Australia. [Professional confidential relationships protection provisions] have existed in New South Wales since 1997. Regardless, such legislation is now here. Until now, courts and tribunals have engaged in an unassisted balancing exercise between two competing philosophies when deciding whether or not to permit evidence to be adduced: the utilitarian philosophy that a court should be able to make the most judicious decision based on all the available information and the libertarian philosophy that the law should not unduly interfere with the rights and interests of individuals. This bill delivers a solution to this complex balancing exercise.[14]

While not disagreeing with the sentiment of this remark one ought to note that the 'balancing exercise' required by the conflict between competing public interests raised by cases such as *Liu* still remains a complex one, despite guidance being given to the courts by the parliaments.

III SEXUALISATION OF CHILDREN

On 24 October 2012 the Joint Standing Committee on the Commissioner for Children and Young People, pursuant to *Commissioner for Children and Young People Act 2006* (WA) s 19(l), referred to the Commissioner for Children and Young People a series of matters, insofar as they may be relevant to the sexualisation of children, for consideration, and requested

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13 Ibid s 20C(4)(c).

14 Western Australia, *Parliamentary Debates*, Legislative Council 20 October 2011, 8437 (Michael Mischin).

the Commissioner 'to make recommendations as to any specific actions required to be taken by the government of Western Australia in relation to these matters in order to better secure the wellbeing of children and young people in Western Australia'.

The matters referred were:

Written laws

Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)

Criminal Code (WA) ch 25

Reports

American Psychological Association (APA), Report of the APA Task Force on the Sexualisation of Girls (2007, republished 2010)

Commonwealth Parliament, Senate Standing Committee on Environment, Communication and the Arts, Inquiry into Sexualisation of Children in the Contemporary Media (2008)

Commonwealth Parliament, Senate Legal and Constitutional Affairs References Committee, Review of the National Classification Scheme: Achieving the Right Balance (June 2011)

United Kingdom Department for Education, Letting Children Be Children: Report of an Independent Review of the Commercialisation and Sexualisation of Childhood (2011) ('Bailey Review')

French Parliament, Against Hyper-Sexualisation: A New Fight for Equality (March 2012)

Practices, procedures and other matters

Outdoor advertising, particularly billboards

> Use of children in advertising
>
> Marketing of sexualised products to children
>
> Education of children.[15]

The two written laws referred for consideration deal with laws which prohibit the production, distribution and, in some cases, even possession, of certain publications, films or computer games including items of child pornography. These laws plainly seek to restrict freedom of communication.

A *Child Pornography and Other Child Exploitation Material*

Criminal Code (WA) ch 25 contains offences relating to 'child exploitation material'. This is defined in *Criminal Code* (WA) s 271A to mean:

> (a) child pornography; or
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> (b) material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be, a child –
>
> (i) in an offensive or demeaning context; or
>
> (ii) being subjected to abuse, cruelty or torture (whether or not in a sexual context).

Child pornography is defined to mean:

> material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be a child –

[15] Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 October 2012, 7735–6.

(a) engaging in sexual activity; or

(b) in a sexual context.

Criminal Code (WA) ss 217–220 make it an offence to involve a child in the production of child exploitation material, to produce child exploitation material, to distribute child exploitation material, and to possess child exploitation material. The restriction on the rights to freedom of expression and communication imposed by these provisions is justified by the overriding public interest in protecting children from exploitation, including being portrayed in any way as sex objects. One matter raised by these provisions is the definition of 'child' used. *Criminal Code* (WA) s 217A includes the following definition:

> **child** means a person under 16 years of age.

This definition means that children aged 16 or 17 are not protected by the law from being exploited by child pornography producers and users or by those who produce or use other forms of child exploitation material.

B United Nations Convention on the Rights of the Child

The United Nations *Convention on the Rights of the Child*, ('*Convention*')[16] which Australia ratified on 17 December 1990, defines a child to mean 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. In Western Australia the age of majority has, since the *Age of Majority Act 1972* (WA) commenced operation on 1 November 1972, been 18 years of age. So for the purposes of applying the *Convention* in Western Australia

[16] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

the relevant definition of a child is 'every human being below the age of eighteen years'.

Convention art 34 obliges those who have ratified it 'to protect the child from all forms of sexual exploitation and sexual abuse' in particular by taking all appropriate measures 'to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials'.

On 8 January 2007 Australia ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* ('*Optional Protocol*').[17] The definition of a child as 'every human being below the age of eighteen years' in the *Convention* also applies to the provisions of the *Optional Protocol*.

Optional Protocol art 3 requires those who have ratified it to ensure that 'producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography' is 'fully covered under its criminal or penal law'. 'Child pornography' is defined in *Optional Protocol* art 2 to mean 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.'

One should not necessarily be supportive of every provision of every United Nations treaty just because it is in a United Nations treaty. Many Western Australians have concerns for the sovereignty of the Australian

[17] Opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

States under the current mode of ratification of such treaties in the context of our Federal system. This, however, is a discussion for another paper. In this case, however, it is difficult to avoid the conclusion that in seeking to extend the fullest possible protection to children the United Nations, that is to say the international community of nations, has got it right on this point.

Parliaments should certainly be aiming to be reflecting international best practice in the law protecting children from all forms of sexual exploitation and abuse, including the exploitative use of children – all children – in pornographic performances and materials. The criminal law should fully cover 'producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography'.

As the law currently stands in Western Australia it fails to do so. There is a major gap in the protection of children from exploitation in child pornography. The law on child pornography and other forms of child exploitation material in Western Australia fails to give any protection to children aged 16 or 17.

C *Other Australian Jurisdictions*

Western Australia has fallen behind other Australian jurisdictions in the comprehensiveness and reach of its laws to protect children from this form of exploitation. *Crimes Act 1958* (Vic) s 67A defines a minor for the purpose of child pornography offences as 'a person under the age of 18 years'. *Crimes Act 1900* (ACT) Dictionary defines a child as 'a person who has not attained the age of 18 years'. This definition applies to that Territory's child pornography offences. *Criminal Code Act* (NT) s 1 defines a child as 'a person who is not an adult' and an 'adult' as 'a

person of or over the age of 18 years'. This definition applies to that Territory's child exploitation material offences. *Criminal Code Act 1924* (Tas) s 1A defines 'child exploitation material' to mean 'material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years engaged in sexual activity, or in a sexual context, or as the subject of torture, cruelty or abuse (whether or not in a sexual context)'. Commonwealth's *Criminal Code Act 1995* (Cth) s 473.1 defines 'child abuse material' and 'child pornography material' with reference to 'a person, who is, or appears to be, under 18 years of age'. On the basis of the above statutory references, it is clear that a majority of Australian jurisdictions have given effect to international best practice by protecting all children – including those aged 16 or 17 – from being abused by child pornographers while Western Australia, along with New South Wales, Queensland and South Australia, lag behind.

D *Definition of Child in Other Criminal Offences*

One objection that may be raised to the proposition to define a child for the purposes of child pornography and other child exploitation material offences as a person under 18 years of age is that some of the Western Australian *Criminal Code* (WA) offences against a child only apply to children under the age of 16 years. The argument is that if a child aged 16 or 17 can consent to participate in a sexual act with another person then a child aged 16 or 17 should also be held capable of consenting to be depicted in pornography. This argument assumes that pornography is merely another form of sexual activity and that children aged 16 or 17 do not need any more protection from being exploited by pornographers than adults.

In this context it is worth noting that Western Australian criminal law does acknowledge that children aged 16 or 17 do need special protection from sexual exploitation. *Criminal Code* (WA) s 322 covers sexual offences by a person against a child 'of or over the age of 16 years' who 'is under his or her care, supervision, or authority'. The law recognises that in these circumstances children aged 16 or 17 need protection from sexual exploitation by those who have them under their care, supervision or authority.

The *Prostitution Act 2000* (WA) defines a child as 'a person whose age is less than 18 years'. The law recognises that while a child aged 16 or 17 is held to be capable of consenting to sexual intercourse children of this age still need special protection from being exploited by prostitution.

The *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) defines a minor as a person 'who is under18 years of age'. It prohibits the sale or supply of pornographic items such as Category 1 or Category 2 restricted publications and R18+ or X18+ films to minors. It is an offence for any person to exhibit an X18+ film in the presence of a minor even in a private place. Of course any publication or film that contained pornographic or other exploitative depictions of children aged 16 or 17 would be classified Refused Classification or RC under the National Classification Scheme. It would then be an offence under Western Australia's *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) to possess the item. In fact *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) s 81 already makes it an offence to possess a copy of a film that would, if classified, be classified RC. This means it is already an offence to possess any film that contains pornographic or other exploitative depictions of a child aged 16 or 17.

Western Australian law should be changed so that it likewise recognises that children aged 16 or 17 need protection from being exploited by the producers of child pornography or other child exploitation material. The question now is whether, for the sake of children, additional restrictions are needed. There certainly appears to be a growing momentum in this respect.

In April 2012 the Australian Medical Association called for a new inquiry into the premature sexualisation of children in marketing and advertising. AMA President Dr Steve Hambleton said '[t]here is strong evidence that premature sexualisation is likely to be detrimental to child health and development, particularly in the areas of body image and sexual health.'[18] This call followed a private member's motion moved in the House of Representatives on 13 February 2012 by Labor MHR Trish Rishworth and supported by members of parliament across the political spectrum. The motion called (in part) that the House:

> notes with concern that the sexualisation of children is a growing issue ... in Australia; [and]
>
> recognises that the sexualisation of children, and in particular girls, has been associated with a range of negative consequences including body image issues, eating disorders, low self esteem and mental ill health.

In a motion which enjoyed similar cross-party support in the Legislative Council of the Parliament of Western Australia I moved (in part) that the Legislative Council:

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[18] Australian Medical Association, *AMA Calls for New Inquiry into the Sexualisation of Children in Advertising* (3 April 2012) <https://ama.com.au/media/ama-calls-new-inquiry-sexualisation-children-advertising>.

> recognises that the sexualisation of children has been an important issue of ongoing concern in the community, which has now become urgent.

I expect that over the next few years this growing concern will translate into legislative action to protect children better from premature sexualisation and other forms of exploitation. Such legislation will of necessity restrict free speech in various ways.

In a paper given at the 5th World Congress on Family Law and Children's Rights held in 2009 in Halifax, Nova Scotia, Dr Tom Altobellia, Judge in the Federal Magistrate's Court of Australia, gave a moving account of a case he had heard in 2007 involving a 5 year old boy Sam, who had developed aggressive sexual behaviour towards his younger brother following exposure to pornographic images on the internet. Dr Altobelli observed:

> ... the dynamic nature of cyberspace is in itself the strongest reason for advocating an approach that the key to protecting children is regulating content in cyberspace, not access to cyberspace. Of course the notion of regulating content invokes in many people a concern about censorship and free speech ... There can be little doubt that, at least at a superficial level, protecting children from the dangers of cyberspace presents a clash of competing interests: the best interests of children, as opposed to free speech. But perhaps the clash of interests is not necessarily as great as it seems? There are limits to the concept of the best interests of children, just as there are limits to the concept of free speech. No one seriously advocates that each concept is unlimited and unfettered.[19]

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[19] Tom Altobelli, 'Cyber-Abuse – A New Worldwide Threat to Children's Rights' (Paper presented at 5th World Congress on Family Law and Children's Rights, Halifax, 23–26 August 2009) 32–3.

IV HATE SPEECH LAWS

In an oration delivered on 10 December 2012 for Human Rights Day, His Honour James Spigelman, Chairman of the ABC and former Chief Justice of the Supreme Court of NSW from 1998 until 2011, addressed the question of so-called 'hate speech' laws and the protection of freedom of speech. His remarks were in part directed to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) which would extend the vilification provisions currently in *Racial Discrimination Act 1975* (Cth) s 18C to apply to seventeen other protected attributes in addition to 'race', including, at least in a context related to employment, 'religion' and 'political opinion'. Furthermore, the definition of discrimination would be broadened significantly to include '*conduct that offends, insults or intimidates*' another person.

His Honour observed that:

> The freedom to offend is an integral component of freedom of speech. There is no right not to be offended. …
>
> When rights conflict, drawing the line too far in favour of one, degrades the other right. Words such as 'offend' and 'insult', impinge on freedom of speech in a way that words such as 'humiliate', 'denigrate,' 'intimidate', 'incite hostility' or 'hatred' or 'contempt', do not. To go beyond language of the latter character, in my opinion, goes too far.[20]

Some people can be very easily offended by robust expressions of opinion by others on religious or political matters. Will an employer who

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[20] James Spigelman, '2012 Human Rights Day Oration' (Speech delivered at the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012 <http://about.abc.net.au/speeches/hate-speech-and-free-speech-drawing-the-line/>.

makes remarks, or who does not prevent employees making remarks, that may be found offensive by an overly sensitive employee of a particular religion or with a particular political opinion be in danger of a complaint of discrimination on the grounds of religion or political opinion and, in the face of evidence that the employee was offended have the burden of proving that the conduct was not offensive or was unrelated to the protected attribute of the employee?

The proposed definition goes well beyond a person being denied a job or promotion because of a protected attribute and seeks to intrude into the day-to-day interactions between people in the workplace and other areas of public life. It introduces a form of 'religious vilification' law by stealth. Such laws had fallen into disfavour following the notorious finding at first instance in 2005 by the Victorian Civil and Administrative Tribunal in the case of Catch the Fire Ministries which was so scathingly overturned by the Supreme Court of Victoria in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*.[21] In its application to political opinion the provisions may breach the implied right to freedom of political communication in the Constitution.

On 30 January 2013 Attorney-General Nicola Roxon announced that she had asked her department to develop alternative drafting of sections of the Human Rights and Anti-Discrimination Bill 2012 (Cth) that have raised freedom of speech concerns. In particular, she flagged the possibility of removing *Racial Discrimination Act 1975* (Cth) s 19(2)(b), which stipulates that conduct that 'offends, insults, or intimidates' would constitute discrimination. Parliaments should not enact legislation that would significantly erode free speech in the name of protecting people from being offended or insulted.

21 [2006] VSCA 284.

V PARLIAMENTARY PRIVILEGE

The *Bill of Rights 1688*, 1 Will and Mar Sess 2, c 2, art IX provides (in the English of the day):

> That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament summarises the implications of this freedom of speech in debate in Parliament as follows:

> Subject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by parliamentary privilege from any action for defamation, as well as from any other question or molestation.[22]

In Western Australia the effect of *Bill of Rights 1688*, 1 Will and Mar Sess 2, c 2, art IX on the Parliament of Western Australia is preserved by the operation of *Parliamentary Privileges Act 1891* (WA) s 1(b). The parliamentary privilege of free speech is in effect an immunity for parliamentarians from being sued or prosecuted for anything said in the course of parliamentary proceedings. This privilege can only be overridden by an explicit provision in a statute.

Parliamentary privilege can be abused and particular instances where it has allegedly been abused have lead to calls for its limitation by statute. For example, in February 2010 the then leader of the opposition in the United Kingdom, David Cameron, foreshadowed Conservative plans to

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[22] Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011) 222.

amend the *Parliamentary Privilege Act 1770*, 10 Geo 3, c 50 in response to claims that three Labour MPs were seeking to avoid criminal prosecution for fraudulent expense claims. Subsequently the UK Supreme Court ruled that the submission of expense claims was not covered by parliamentary privilege. Lord Rodgers stated:

> I am accordingly satisfied that the prosecution does not infringe article 9 of the Bill of Rights by impeaching or questioning the freedom of speech, the freedom of debates or the freedom of proceedings of the House or of its Members. I am equally satisfied that the prosecution is not precluded on any other basis relating to the Commons' privilege of exclusive cognisance.[23]

Recent controversial uses of parliamentary privilege in the Commonwealth Parliament include the naming of an alleged child rapist by Senator Nick Xenophon in the Senate on 12 and 13 September 2011. Following the procedures established by a resolution of the Senate in 1988,[24] Senator David Johnston, chair of the Committee of Privileges, sought and was given leave to table a response to Senator Xenophon's allegations by the person he named.[25] While the right to seek the tabling of a reply gives some redress to a person against whom accusations are made under cloak of parliamentary privilege this still leaves parliamentarians in a privileged position of immunity.

Perhaps it is ironic that Parliamentarians enjoy the special immunities bestowed on them by parliamentary privilege whilst having the power to restrict the freedom of speech of the very people they represent. Accordingly, parliamentarians have an extraordinary responsibility to

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23 *R v Chaytor* [2010] UKSC 52, [125].

24 Senate Resolution 5(7)(b), 25 February 1988.

25 Commonwealth, *Parliamentary Debates*, Senate, 22 September 2011, 6870–1 (David Johnston).

ensure they understand this privilege, respect this privilege and utilise this privilege responsibly.

VI CONCLUSION

Freedom of speech is a significant component of a democratic polity. Democratically elected parliaments nonetheless have an obligation to pass laws, on occasion, which limit freedom of speech. Such laws should be few and should be enacted judiciously.

In relation to shield laws for journalists there will always be a balance to be struck between facilitating freedom of speech by giving journalists some protection from being compelled to reveal their sources and allowing courts to order disclosure where genuinely necessary for the sake of a competing public interest such as the administration of justice.

The sexualisation of children in modern society results in part from a lack of adequate restrictions on freedom of expression and communication. Laws prohibiting the production and distribution of child pornography of their nature restrict such freedoms. These restrictions are justified because of the serious nature of the harms to children involved in the production of child pornography. These harms apply also to children aged 16 or 17 and the law in Western Australia should be changed to reflect this.

So-called 'hate speech' laws have the potential to significantly restrict free speech by overreaching in their definitions and seeking to penalise speech that may offend or insult. A free society must allow the robust exchange of views on matters including religion and political opinion. Naturally in the course of such discourse some persons may be offended or insulted. Parliaments should not adopt the position of nannies trying to

bring peace to the nursery by avoiding hurt feelings between their charges.

Parliamentarians enjoy the special immunities bestowed on them by parliamentary privilege. They need to respect the purpose for which such immunity is given and use it responsibly. Otherwise they will be faced with understandable calls to limit the scope of their parliamentary privilege.