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Why the law has to change

Nobody understands the evil of racism better than the Jewish people. And nobody cares more about intellectual freedom than Jewish people do. Both of those fundamental values – the right to be protected from racism, and the right to the most important intellectual freedom of all, freedom of speech – arise in the current community debate about the appropriate structure of Australia's anti-racism laws.

Although it is commonly said that this debate is about "striking the right balance", in fact, it is not a choice between alternatives. It is possible to do both: to have appropriate protections against racism, and to defend freedom of speech. Section 18C of the Race Discrimination Act 1975 needs to be reformed because it does neither. Its attempts to protect racial minorities are ineffective, while its current terms are invasive of freedom of public discussion. Although Section 18C, as it is currently worded, has become almost totemic for some, I have met nobody who believes that, if we started with a blank sheet of paper, we would arrive at the current words of the section. So the question is: How can we do better?

Much of this debate has focused upon one person, Andrew Bolt, and one case. The significance of the Bolt case was merely that it showed the reach of the section in its current form, and that it could be used to prohibit the expression of a point of view about a vexing social question. In the government's view, it is not the role of the state to police or censor the expression of opinion about contestable public issues. No law which can have that effect, when properly applied, should be allowed to remain on the statute books.

I am, of course, deeply conscious of the sensitivities of this issue, particularly for Jewish people. That is why, in arriving at a draft proposal for community consultation, I spoke privately with a number of leading members of the Jewish community, including Peter Wertheim, Mark Leibler, Colin Rubenstein, David Gonski and Julian Leeser. I also took counsel from my close friend and colleague, Josh Frydenberg. Naturally, I also consulted with others who brought different perspectives to the debate, including Andrew Bolt himself.

The exposure draft released last week seeks to express anti-vilification laws better, while protecting freedom of speech from the over-reach of the present section. Because it is released as an "exposure draft", naturally it has precipitated a great deal of public discussion.

That is a good thing. What is not a good thing is that some politicians, for nakedly political reasons, have decided to "play the race card", bizarrely characterising what should be a constructive community debate as a veiled form of racism. We should all be insulted and offended by those who seek to score political points on such an important and emotional issue.

My own history in relation to these issues is well known. I have devoted much of my Parliamentary career to defending Australia's multicultural society, and to opposing the strident, rebarbative voices of the far right wing – whether in the form of Pauline Hanson's One Nation party, or some of the more extreme voices within my own party. And my passionate advocacy of the State of Israel is well known to all Jewish community leaders. The same may, of course, be said of the Prime Minister.

And I have also been a passionate advocate of free speech. As such, I have adopted the Voltairean position that, if one is sincere in one's belief in freedom of speech, the true test is whether one will defend to the death the right of people to say things which one finds deeply offensive. The freedom of speech argument is one of the most politically difficult of all, because if one is to be a true defender of free speech, one has to defend one's enemies. To do so is not to condone, let alone approve of, what they say. It is to acknowledge that the right to hold and express opinions is one of the most fundamental rights which a person can have; that for the state to arrogate to itself the right to censor those opinions is one of the most dangerous things the state can do.

The government's proposed amendments to the Racial Discrimination Act are an attempt, made in good faith and after much deliberation, to resolve the Voltairean paradox. The protection against racism is strengthened by including, for the first time in Commonwealth law, a specific prohibition against racial vilification (defined as inciting hatred of a person or group because of their race, colour, or national or ethnic origin). It is, by the way, one of the misconceptions in this debate that the current Racial Discrimination Act already prohibits racial vilification. It doesn't.

On the other hand, it will remove the reference to offend, insult and humiliate. Conduct which intimidates (i.e., causes fear) will remain. It is just not possible to have a vigorous argument about a political, social or cultural question without the possibility that another person might feel insulted, offended, or even humiliated (mocked) by a point of view to which they have a passionate aversion.

But to vilify or to intimidate someone – i.e., to incite hatred of them, or to cause them fear – is not to engage in freedom of speech. Inciting hatred or causing fear are not an aspect of intellectual freedom, or freedom of speech. They are not an expression of freedom at all.

The defence provision will be broadened. A community standards test of reasonableness will be included.

The government welcomes constructive feedback on its exposure draft. We want to engage as many members of the community as possible in the process. Where we want to end is by sending the strongest possible message that protecting people from racism, and protecting freedom of speech, are not inconsistent values. We can do both well, but only if Section 18C, in its current form, is reformed.

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