

Two Contemporary Human Rights Issues:
The right to be offensive
What should the government know
about you?

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LSA 2013 State Conference

Contemporary issues illustrating human rights issues

The right to be offensive

- Limitations on free speech
- Racial discrimination

What should the government know about you

- Right to privacy

NSW Council for Civil Liberties



New South Wales
Council for
Civil Liberties

The NSW Council for Civil Liberties (NSWCCL) was founded in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone (as long as they don't infringe the rights and freedoms of others) and oppose any abuse or excessive power by the State against its people.

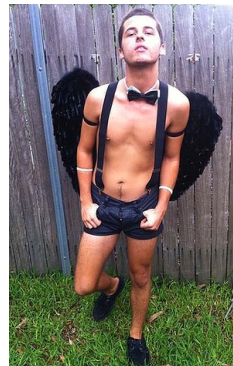
<http://www.nswccl.org.au>

- Current issues

- Right to silence



- Police brutality



- ASIO



International Covenant on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) for respect of the rights of reputations of others;
 - (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

International Covenant on Civil and Political Rights

Article 20

...

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

The Racial Discrimination Act

Section 18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a [person](#) to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to **offend**, insult, humiliate or intimidate another [person](#) or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other [person](#) or of some or all of the people in the group.

Section 18D - Exceptions

Section 18C does not render unlawful anything said or done **reasonably** and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the [person](#) making the comment.

*Sections 18C, 18D added 1995

Some early experiences

- “Poms” and “Pommies” not offensive;
- “Aboriginal people were savages who ate babies, family members and Chinese people”
Pauline Hanson not in breach;
- “Aboriginal people in their native state are the most primitive people on Earth”
Senator Lightfoot (WA) not in breach;

The Offence

“It’s so hip to be black”

“White is the new black”

Andrew Bolt



Professor Larissa Behrendt found ... Mr Bolt’s reference to her as a “professional Aborigine” to be hurtful, insulting and offensive. She perceives that as suggesting she identifies with her race, not because she is Aboriginal, but because she wants to exploit the system because identifying as Aboriginal is lucrative. She found Mr Bolt’s reference to her as “mein liebchen” particularly offensive, patronising and denigrating.

Human Rights and Anti-Discrimination Bill 2012 (November)

- Consolidate 5 laws into a single Act
- Consistently apply highest current standards
- Make laws easier to understand
- Strengthen human rights and advance equality
- Prohibit discrimination on the grounds of sexual orientation and gender identity
- Streamlined complaints process

The right to offend

The Hon Mr Spigelman:



- “[D]eclaring conduct, relevantly speech, to be unlawful, because it causes offence, goes too far. The freedom to offend is an integral component of freedom of speech. There is no right not to be offended... The new Bill proposes a significant redrawing of the line between permissible and unlawful speech... 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.”

Politics in action

- January 2013 - Secretary of the Attorney-General's Department indicated that the Government was likely to resile from the inclusion of "offends [or] insults" in the definition of unfavourable treatment;
- 20 March 2013 – Dreyfus scuttles proposed anti-discrimination laws
- The result – s18C remains in tact for the time being

What should the
government know
about you

International Covenant on Civil and Political Rights

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence,
2. Everyone has the right to the protection of the law against such interference or attacks.

What should the government know about you

- May 2012 - Government announced plans to review via public consultation a range of national security legislation, including that which covers 'lawful access to telecommunications ... to ensure that vital investigative tools are not lost as telecommunications providers change their business practices and begin to delete data more regularly';
- July 2012 – Government discussion paper *Equipping Australia against emerging and evolving threats*
- October 2012 – Public hearings by Parliamentary Joint Committee
- Similar developments in the UK and elsewhere
- Germany – Constitutional Court in March 2010 declared the German data retention laws unconstitutional, because of lack of proportionality in balancing right of privacy against interest in prosecuting crime.

The “problem”

As at June 2011, there were in Australia:

- 29.28 million active mobile services (voice and data)—an increase of 13 per cent since June 2010
- 10.54 million fixed-line telephone services—a decrease of 0.5 per cent since June 2010
- 3.8 million home VoIP users—an increase of 31 per cent since June 2010
- 10.9 million Internet service subscribers—an increase of 15 per cent since June 2010
- 57 per cent of people using three communication technologies (fixed-line telephone, mobile phone and Internet)
- 26 per cent of people using four communication technologies (fixed-line telephone, mobile phone, Internet and VoIP), and
- 21 per cent of people (aged 14 and over) accessing the Internet via a mobile phone.

The ability of people to effortlessly and quickly move between different modes of communication combined with increasing volumes of data makes it complex and costly for law enforcement agencies to reliably identify and access communications.

The Concern

The Office of the Victorian Privacy Commissioner argues that data retention is:

“...characteristic of a police state. It is premised on the assumption that all citizens should be monitored. Not only does this completely remove the presumption of innocence which all persons are afforded, it goes against one of the essential dimensions of human rights and privacy law: freedom from surveillance and arbitrary intrusions into a person’s life.”

Data retention

- Turns telecommunications carriers into data collection agencies for the State
- Disproportionate
- The “snoopers charter”
- Cost

Other proposals

Amending the ASIO Act to **update** the definition of 'computer' in section 25A:

- "**computer**" means a computer, a computer system or part of a computer system

Use of 3rd party computers and communications in transit to access a target computer

Postscript



- Still in detention – now 3 years and 3 months
- *Habeus corpus* proceedings in High Court may be heard in June 2013
- Review of ASIO assessments underway
- Pyrrhic High Court win in October 2012