Abbott Should Take the Canadian Lead on Free Speech

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This article from the July 2014 edition of the IPA Review is by Research Fellow at the IPA, Aaron Lane.

In a visit to Canada earlier this year, Prime Minister Tony Abbott praised Canada for being a longstanding friend of Australia that has always shared our commitment to democracy and liberty.

So why won't the Australian government follow Canada's lead and completely repeal section 18C of the Racial Discrimination Act?

In June 2013, Canada repealed its section 13 of its Human Rights Act. This section made it unlawful to communicate, by phone or internet, 'any material that is likely to expose a person or persons to hatred or contempt' based on grounds of discrimination. (The prescribed grounds of discrimination included race, national or ethnic origin, colour, and religion.)

A key problem with Canada's section 13 of the provision is the use of the word 'likely' to have

exposed somebody to 'hatred of contempt'. Canadian Conservative MP, and sponsor of the repeal bill, Brian Storseth explains:

> This is a very subjective and unnecessarily vague definition, not one of the narrowly defined legal definitions that would be far more appropriate for this clause. This is where section 13 truly fails to make a distinction between real hate speech and what I often term as 'hurt speech', or speech that is simply offensive. This means that if someone has offended somebody and is investigated under section 13 of the Canadian Human Rights Act, intent is not a defence. Truth is no longer a defence.

In a similar way to section 18C, section 13 gave Canadians the ability to seek legal redress against those that have offended them— principally, by making a complaint to the Human Rights Commission. At the conclusion of an inquiry, the Commission could make a range of legally enforceable orders that included lifetime speech bans, as well as monetary compensation.

By its very design, section 13 favoured identity group rights over the classical human right of free speech. The 1990 Canadian Supreme Court decision of *Taylor v Canadian Human Rights Commission*, an important Canadian constitutional law case, made this clear. The then Chief Justice Brian Dickson explained that:

> Messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial and cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society.

Dickson went on to state that the promotion of rights for certain groups was of such 'pressing and substantial importance' that it warranted the limitation of the freedom of expression for all Canadians.

Just as the Andrew Bolt case has placed pressure on Australia's section 18C, in Canada two high profile cases demonstrated the problems with section 13. In 2006, Ezra Levant published the famous Danish cartoons of the Prophet Muhammad in his magazine, *the Western Standard*. He published these in an apparent effort to cover the news story, where major news publishers around the globe lacked the courage.

Following a complaint by a Calgary imam, Levant was interrogated by the Alberta Human Rights Commission. Levant posted the interrogation on YouTube. It's an extraordinary record—the judicial and bureaucratic system has become the arbiter of what (and how) opinions can be expressed. At one point, the Commission's investigator asks Levant what his 'intent and purpose' was in publishing the cartoons. Why should somebody have to justify their free expression to the state?

Ezra Levant interrogated by the Alberta Human Rights Commission.

The parallels with the Andrew Bolt case are obvious. Bolt breached section 18C not because he got his facts wrong, as many claim, but because Federal Court Justice Mordecai Bromberg did not like the tone of Bolt's articles.

Another prominent Canadian case was against Mark Steyn. Between 2005 and 2007, Steyn wrote twenty-two separate articles about Islam in *Maclean's* magazine. The series included an extract of his book, which argued that the spread of radical ideology in Muslim countries was a threat to Western values.

Three law students approached *Maclean's* to print a counter article. When its editor refused, they filed suit in the Human Rights Commission. Complaints were also filed by the British Columbian Muslims and the Canadian Islamic Congress. Although the complaints did not proceed, the head of the commission took the liberty of writing an open letter to *Maclean's* that implied Steyn had to put up with the continued threat of restrained speech, simply because it was the 'law of the land'.

These two cases sparked a national debate in Canada. The battle-lines were drawn between those who sought to promote group rights and endorsed state-censorship, and those who sought to defend the classical liberal tradition.

There was no question about which side the Canadian Human Rights Commission lined up on. In 2008, one of the Commission's lead investigators testified to a hearing that 'freedom of speech is an American concept, so I don't give it any value'. The Commission's Chief Commissioner Jennifer Lynch told the *National Post*, 'I'm a free speecher. (But) I'm also a human rightser'. As the *National Post* points out in a scathing editorial:

> No human right is more basic than freedom of expression, not even the 'right' to live one's life free from offence by remarks about one's ethnicity, gender, culture or orientation. Ms Lynch seems mistakenly to believe there is a delicate balance between free expression and other, newer human 'rights'.

Fortunately, the courage of Conservative MP Brian Storseth helped change the law of the land for the better. Storseth introduced a private members' bill into the Canadian Parliament to repeal

section 13 in full.

It passed with support from the Harper Conservative government. Harper and his government argued that existing criminal laws were the appropriate legal mechanism against racial hatred—not subjective and vague so-called human rights legislation that curtailed freedom of expression.

In a speech on the repeal, Justice Minister Rob Nicholson argued that

> Our government believes that section 13 is not an appropriate or effective means for combatting hate propaganda … We believe the Criminal Code is the best vehicle to prosecute these crimes.

So too is the case in Australia. Existing criminal laws are the most effective mechanism against hate speech, with section 18C duplicating other Commonwealth and State laws to the extent it prohibits conduct which 'intimidates'.

The repeal of section 13 in Canada was met with the same arguments as we are hearing for the repeal of section 18C in Australia.

Canadian Senator Nancy Ruth said that the repeal would 'remove protection from disadvantaged groups', and would be a 'victory for hate-speech'.

Canadian academic Jane Bailey declared that Canada's democracy needs provisions like section 13 if Canada 'wish[es] to be seen as nation that protects and advances the equality of the socially vulnerable'. Bailey contends, 'Provisions such as section 13 … represent democratic decisions to take a collective public stand to intervene in the dehumanization process, rather than waiting to see if it culminates in violence and bloodshed.'

The House of Commons passed the section 13 repeal bill in June 2012. After an unusually lengthy delay in the Senate, it became law in June 2013. Although there was officially a one-year phase-in period, no new cases could be brought to the Human Rights Commission and current cases were essentially dismissed.

In Australia one of the left's key arguments against the repeal of section 18 of the Racial Discrimination Act is that Australia needs laws for redress against racism.

Race Discrimination Commissioner Tim Soutphommasane contends that laws like section 18C are 'part of our legislative architecture of racial tolerance and multicultural harmony' and that these laws simply reflect the fact that in Australia we 'don't accept discrimination, exclusion, restriction or preference based on race or ethnicity'. In his view, repealing section 18C will allow racism and bigotry to flourish, threatening Australia's social cohesion.

Yet the provisions in Canada have now been inoperative for well over a year and there is no evidence that Canadians are any less tolerant than before.

The exposure draft legislation offered by George Brandis in March 2014 to replace section 18C would have been a substantial improvement on the current law in Australia and gone 95 per cent of the way towards ensuring that what happened to Andrew Bolt will not happen again. Yet in August the government announced it was abandoning its promise to repeal 18C.

Unfortunately the Abbott government has not found the fortitude of the Harper government on free speech. Hatred and bigotry has not been unleashed in Canada; nor would it have been in Australia.

A shorter version of this piece first appeared in The Australian *on 13 June 2014.*