The War On Democracy

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This article from the May 2013 edition of the IPA Review is written by Director of Policy at the IPA, Chris Berg.

In 1953 a bitter Bertolt Brecht wrote, ‘Would it not be easier / In that case for the government / To dissolve the people / And elect another?’

With these lines, Brecht brilliantly captured the dripping contempt that some purportedly ‘democratic’ leaders have for those below them.

This contempt has only become more acute in recent decades. Brecht’s words were rich in irony. He was a citizen of the German Democratic Republic—a state democratic in name only—and wrote his poem in the aftermath of the Uprising of 1953, which was crushed by Soviet forces stationed in Germany.

By contrast, in 21st century Australia we enjoy all the trappings of a mature, well-functioning

democracy. But our liberty makes the persistence of such contempt starker.

That contempt is a thread joining a huge number of recent debates. It ties the Gillard government's proposed anti-discrimination changes with the brief furore over compulsory voting and paternalistic controls over what we eat and drink.

The belief—widespread but never stated boldly—is that it is the job of democratic politicians to change the character of the people they govern. In the 21st century, with all the cutting edge findings of behavioural economics, public health and organisational psychology, politicians no longer dream of electing a new people. They can just change them. With the judicious application of legislation and rule-making, Australians can be made better.

It's hard to think of anything more undemocratic than that.

CHANGING THE WAY WE ARE

On 20 March 2013, the government finally admitted that its draft Human Rights and Anti-Discrimination Bill was bunk. The new Commonwealth Attorney General, Mark Dreyfus, announced that he had sent the bill back to his department for a rethink— effectively shelving it until after the next election, which, given the dire state of Labor's prospects in March, is pretty much abandoning the entire project. The bill was toxic. Labor would not spend any more political capital on it.

But this was all the end of a long story. For the two months after the draft Bill was released in November 2012, the then Attorney General Nicola Roxon, other government ministers, and the taxpayer-funded human rights lobby were staunchly supportive of the bill as it stood. They wanted it to pass.

They wanted its restrictions on our personal interactions and relationships to be given the force of Commonwealth law. The bill might be dead. But its profound consequences remain important: this is what the government, and its supporters in obscure lobby groups, actually wanted to do to the Australian public.

The draft anti-discrimination bill was truly radical. At its worst it would have made it unlawful to offend somebody because of their political opinions in any work-related area. It does other things (for instance, it reverses the burden of proof onto the defendant) but this is the most significant. The consequences would have been devastating for our interpersonal relations. It would have opened almost unlimited opportunities for lawsuits based on an individual's opinions.

The legislation was so broadly, absurdly drafted that somebody could claim they were offended by anything as long as it was hypothetically possible that they could, in the future, be associated with somebody who had a 'protected attribute'—like a political opinion. This sounds ridiculous but that's what the draft legislation said.

Most people do not expect to be sued by their colleagues. And the human rights lobby claimed that absurdities would be stopped by the Australian Human Rights Commission, which

‘conciliates’ each anti-discrimination claim before it goes off to court.

But risk management doesn’t work like that. We can only obey the law as it is written, not the arbitrary judgments of bureaucrats and courts. Had the legislation been introduced in its original form, every prudent human resources team would shut down controversial—that is, potentially offensive and unlawful— speech in the workplace. They just couldn’t risk it.

This, it seems, was the point. It was clear before the furious public reaction that this was intended to be a substantial and new era of litigation in the name of anti-discrimination; that the government and its supporters hoped to massively increase the number of anti-discrimination claims. In other words, they believed Australians should have more ways to take each other to court, more grounds on which to do so, and more chances at being successful.

The bill would have made litigation a central element in our interpersonal relationships. The constant threat of court action would hang over every Australian workplace—or anywhere that could conceivably be ‘work-related’. This would be a particularly insidious way to corrupt a society. The bill, as written, presented to the public, and defended by Nicola Roxon for two months, was not a bill about protecting vulnerable people from discrimination. Anti-discrimination is a settled area of law. No, the draft bill created a new body of law. By fudging a crucial distinction between discrimination and harassment it created an entirely original offence: being disagreeable.

The terms offend and insult come from section 18C of the *Racial Discrimination Act,* the section which the Federal Court decided that Andrew Bolt breached in November 2011. This has the advantage of interpretative convenience (courts have already considered in detail what ‘offend’ means) but it also suggests a larger strategy.

When section 18C was added to the *Racial Discrimination Act* in 1995 the purpose was not merely to punish hate speech but to change attitudes. As an approving Senate Committee report argued, the section would ‘set a social standard for the community’. So section 18C is significant for more reasons than simply that it restricts freedom of expression.

In my book *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt,* I argued that freedom of speech is merely the outward function of a deeper freedom: freedom of thought. Our ancestors described this liberty as freedom of conscience. The goal of legislation like the *Racial Discrimination Act* or the Human Rights and Anti-Discrimination Bill isn’t to restrict speech per se, it is to alter thoughts. Indeed, these pieces of legislation are not aimed at simply changing the way we relate to each other, but changing the way we are.

John Stuart Mill made the point that to censor something wasn’t merely to infringe the liberty of a speaker, but the liberty of those who would like to listen. That is, those who might be convinced.

No one disagrees that racism is despicable. Discrimination on the basis of prejudice is despicable. But, in the words of Australia’s diplomats who opposed some of the international law that requires elaborate anti-speech laws, ‘people [cannot] be legislated into morality’. Law must reflect moral truths, certainly—it must protect life, liberty, and property—but if the law tries to impose its vision

of an ideal virtuous citizen, it will inevitably overreach. Indeed, deliberately trying to manipulate the behaviour or beliefs or attitudes of a citizenry is outside the legitimate realm of action of a democratic government.

To see why, we need to look at another illustration of the contempt democratic politicians have for those who put them into power: compulsory voting.

GOVERNMENT AS EDUCATOR

When the Newman government in Queensland floated the idea of Queensland ending the compulsory voting system that was introduced there for the first time in Australia in 1915, the reactions were predictable. Labor luminaries from Prime Minister Gillard on down condemned it. In their view, to make the act of voting a matter of personal choice would be an assault on democracy.

This is obviously absurd. We are one of the very few countries in the world that have compulsory voting. Would Gillard describe the United Kingdom, or France, or Germany as undemocratic?

Support for compulsory voting is deeply felt: in the rare times that it is debated it quickly becomes emotive. We have always been forced to vote in Australia—at least for most in living memory— so it feels somehow intrinsic to democracy. To abandon it would be to move towards a non-democracy. Debates over voting tend to feature words like ‘tyranny’ and ‘dictatorship’.

But more than this, almost all debates about compulsory voting in Australia quickly move to the merits of democracy in the United States. America is seen as a society where a) extremists are in control, and b) the majority of the citizens are completely disengaged. In this view, compulsory voting is a legal mechanism to force people to be interested—a life-long version of compulsory education.

In this way, compulsory voting is seen as a form of mandatory engagement. If we weren’t forced to vote, so the argument goes, we wouldn’t care. We wouldn’t pay attention to politics, we wouldn’t inform ourselves of the best candidate, and many of us wouldn’t vote at all. As the Australian Electoral Commission puts it, by forcing us to vote we are taught the ‘benefits of political participation’.

This is a somewhat circular piece of logic. All compulsory voting does is paper over political disengagement; it merely obscures the phenomenon rather than eliminates it. (Political disengagement is typically measured by voter turnout, but if you make turnout compulsory then it is no longer a measure of disengagement.)

People have fought and died for universal suffrage over centuries. There was much blood split to win the right to vote. Australia took that right and turned it into a requirement. This was a very Australian thing to do. Our government has given us the right to vote but doesn’t trust us to use it.

In other words, we have failed the government, rather than the government has failed us.

DEMOCRACY

Compulsory voting upends the most basic principle of democratic government. All governments need legitimacy. In the case of modern totalitarianism, that legitimacy is brute force. Theocracies claim to take their legitimacy from God or Allah. Democracies, by contrast, draw their legitimacy from the consent of the governed. Democratic governments are subordinate to the choices of those they rule—indeed, 'rule' is a somewhat archaic concept in democratic theory, considering that the wishes of the people are seen as superior to that of the executive government.

So, given that democratic legitimacy is founded on the consent of the governed, what right does a democratic government have to change the behaviour, or seek to control the speech, or thoughts of those that put it in power?

Brecht's great irony—that governments wish the people could be dissolved like a parliament and replaced—is that it reverses the conceit of democracy. The East German democracy he lived under was a sham. Ours is real. But our political authorities nonetheless seem to believe that the people who elect them are incompetent and incapable.

Nanny State policies—those regulations which control what we eat or drink or whether we have food handling certificates at school fetes— epitomise this reversal of authority.

There are many obnoxious Nanny State measures in modern Australia but think briefly about the inherent logic of the most recent and high profile one: are Australians so easily manipulated, so lacking in autonomy, that they are unable to handle the way a cigarette packet is coloured or decorated? The Federal government spent a great deal of time choosing the right shade of greenish brown to maximise the ugliness of its new plain packaging for tobacco products.

The assumption that a corporation could convince somebody to take up an unhealthy habit simply because of a shiny packet speaks poorly for the beliefs of our politicians about the Australian citizenry. If they can't be trusted with colour, then how can they be trusted with the vote? How can a government, elected by these easily manipulated dimwits, ever consider itself to be a fully legitimate one?

There's a basic philosophy at the heart of a democratic system. It's a sort of political egalitarianism. All citizens, no matter what their opinions, what their intelligence or knowledge, have a right to contribute to the decision about who governs them. All citizens may not be equal in ability but they are equal morally and politically. The ignorant have as many rights as the informed. The intelligent have as many rights as the foolish.

The modern contempt of the average citizen—the average voter—attacks the very heart of this philosophy.

Right of centre thinkers have conceived many critiques of modern democracy.

Classical thinkers like the American founders worried that the majority can impose their preferences on the minority. Modern liberals worry that an increasing proportion of the population are dependent on state welfare benefits, and will unsustainably vote to increase their share.

But if we see democracy as a manifestation of the principle of political equality—that the ruled are superior to the rulers— then the problem with modern governments isn't that they're too democratic. It's that they're not democratic enough.