

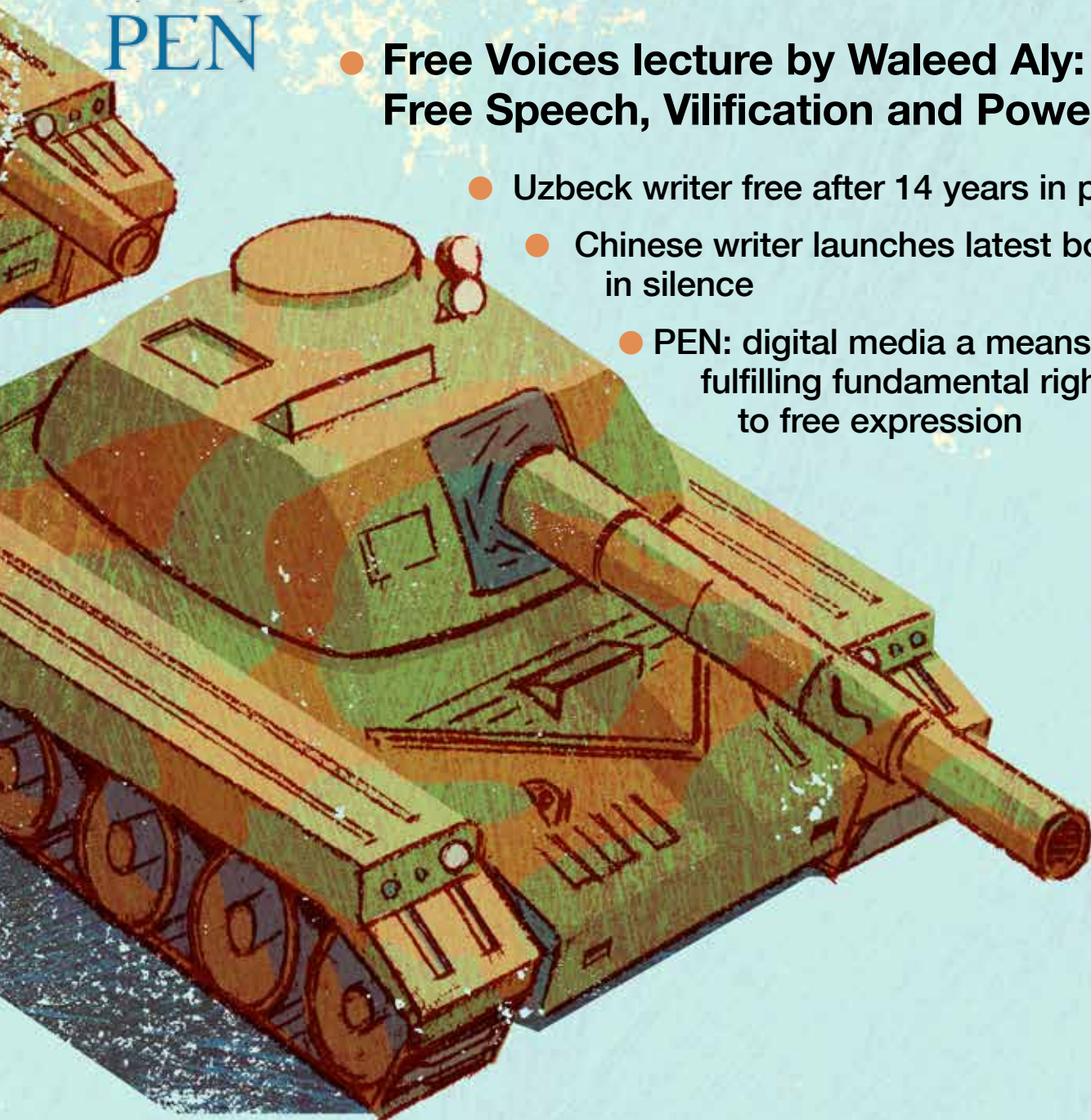


sydney
PEN

PEN magazine

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Onus now on Press Council for industry standards



In 1997 the High Court held that our Constitution gives citizens an implied constitutional right to freedom of political communication (Lange v Australian Broadcasting Corporation).

As citizens have an interest in information about government and political matters, publishers have a duty to publish it. In this regard, the media provide a public resource and it is in the public interest that the media

present a diversity of ideas and views so that citizens can form their own views and participate in the democracy.

The Report of the Independent Inquiry into the Media and Media Regulation by the Hon R. Finkelstein QC assisted by Prof M. Ricketson was presented to the Government on 28 February 2012. It recommended that a new body, a News Media Council, be established to set journalistic standards for the news media in consultation with the industry, and to handle complaints made by the public in respect of news and current affairs coverage on all platforms: print (with circulation of 3,000+ copies/issue) and online (news internet sites with 15,000+ hits/year), radio and television.

The Report proposed that the News Media Council should have secure funding from government and its decisions be made binding, but beyond that government should have no role. The proposed News Media Council was to have power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply. The Report stated that “a guiding principle behind the design of the News Media Council is that it will provide redress in ways that are consistent with the nature of journalism and its democratic role”.

On 30 March 2012 Glen Boreham AM, Malcolm Long and Louise McElvogue, after a two- year review, presented the Convergence Review Final Report to government. The Report recommended that a new communications regulator should have the ability to examine changes in control of content service enterprises of national significance. The communications regulator should have the power to block a proposed transaction if it is satisfied — having regard to diversity considerations — that the proposal is not in the public interest and that ownership of local media should continue to be regulated through a ‘minimum number of owners’ rule.

The Convergence Review Report did not accept the Finklestein recommendations but recommended that an independent self-regulatory news standards body operating across all media should be established by industry to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary. It also recommended that content service enterprises should be required to be members of the news standards body which should be established and adequately funded and resourced by its industry members and government. The proposed news standards body should have credible sanctions and the power to order members to publish its findings prominently. Smaller news and commentary providers should be encouraged to join.

The Convergence Review Report recommended that the news standards body should be able to refer to the proposed

new communications regulator instances where there have been persistent or serious breaches of the media code. The new communications regulator should also be able to request the news standards body to conduct an investigation.

A year later on Tuesday 12 March 2013, the Government response to the Convergence Review and Finkelstein Inquiry was announced in a press release by Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy. Senator Conroy announced “These reforms will ensure for the Australian public a media sector that is fair, diverse, and able to tackle the challenges of the future.”

The proposed reforms included a press standards model for strong self-regulation of the print and online news media and the introduction of a public interest test to ensure diversity considerations are taken into account for nationally significant media mergers and acquisitions. A proposed Public Interest Media Advocate would decide whether a media merger of national significance could proceed and would authorise the independent self-regulatory bodies for dealing with news media standards and complaints. The Government also established a parliamentary committee to inquire into certain further reforms. The issue of privacy protection, on which the Attorney General had called for submissions in 2011, was referred to the Australian Law Reform Commission for detailed examination, for what is now the third time.

The Government released the six bills of the 2013 Media Reform Bills Package two days after the press release, on Thursday 14 March and they were listed for debate in the House of Representatives on the following Tuesday afternoon 19 March with a deadline for passage of all six Bills by the end of the week. A joint select committee and Senate Committee were convened to look at the Bills during that week.

Two of the six bills passed: the Television Licence Fees Amendment Act 2013, reducing commercial TV licence fees by 50 per cent and the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Act 2013, concerning the level of Australian content to be broadcast. On Thursday 21 March the Government withdrew the remaining media reforms.

The two measures which passed were the only results of the 31 recommendations for media reform made by the Convergence Report and the recommendations for the establishment of a new Media Council made by the Finklestein Report.

As far as press regulation is concerned, the long established Australian Press Council continues in its role. The Press Council was established in 1976 as an industry self-regulatory body to promote “standards of media practice, community access to information of public interest, and freedom of expression through the media” including principles of accurate, fair and balanced reporting, correction of inaccuracy, publishing responses and respect for privacy. The Council is also responsible for responding to complaints about the press.

Today, practically all of the reform proposals made by the extensive expert reviews commissioned by government have come to nought. Press standards are a significant issue and the onus is now on the Australian Press Council as the self-regulatory body to reform and improve regulation of the press and their digital outlets in the public interest.

Michael Fraser

Writer Mamadali Makhmudov released after more than 14 years in prison

The award-winning Uzbek writer, Mamadali Makhmudov, has finally been released after over 14 years in prison. PEN International has been campaigning for Makhmudov’s release from the outset, alongside that of other writers and journalists. Today there are at least 10 others thought to still be detained.

While welcoming Makhmudov’s release, PEN calls for the release of all those detained in violation of their right to freedom of expression and for an end to the widespread censorship in Uzbekistan.

In the late evening of 19 April, Mr Makhmudov, 72, walked out of prison and met his five grand-children for the first time. He had been held since February 1999, convicted on charges of involvement in a series of bombings in Tashkent, an apparent assassination attempt against President Karimov. There was little evidence to back this up and human rights groups in Uzbekistan and world wide rose to his defence.

When he appeared in court in August, 1999, Mr Makhmudov testified about the beatings and threats he suffered in gaol, including electric shock treatment. He also told of how female members of his family had been threatened with rape.

Reports of torture, particularly in the late 1990s, were rife, and accounts from prisons such as his were common. Mr Makhmudov was able to smuggle out further testimony on prison ill treatment in the early 2000s.

His sentence expired in February this year, but he was not freed. Instead he was taken from the Chirchik labour camp to a detention centre in Tashkent. On 8 April, he was sentenced to three years additional imprisonment for breaking prison regulations. He had appealed against this new sentence and was waiting for the response when he was unexpectedly released.

Mamadali Makhmudov is a celebrated writer. In the early 1980s his novel, *Eternal Mountains*, was published to critical acclaim. An historical fiction of the events of the Russian occupation of Central Asia in the 1800s, the book

won him Uzbekistan’s prestigious Cholpan Award. It was published in French by l’Aubre in 2008.

In 1991, encouraged by the fall of the Iron Curtain, he joined a number of other writers and intellectuals to form the Erk party led by another writer, Muhammad Salih, who stood for president in that year’s elections. Official figures claimed Erk won 12 per cent of the votes, yet the party contests this, saying it got over 50 per cent.

Since 1993, the party and its newspaper have effectively been banned and Muhammad Salih went into exile. Erk supporters were targeted for arrest and harassment. Mr Makhmudov himself was first arrested between in 1994 and 1996. Then, in February 1999, a series of bombs exploded in the Uzbek capital, Tashkent. The authorities were swift to accuse Muhammad Salih in absentia, and his supporters were arrested, among them Mamadali Makhmudov, and several others, including journalists and contributors to the Erk newspaper, Muhammad Bekjanov and Yusuf Ruzimuradov.

Mr Makhmudov was sentenced to 14 years in prison, while Mr Bekjanov and Mr Ruzimuradov each received 15 years. Mr Bekjanov’s sentence was reduced to 12 years and he should have been freed in 2011, but instead he was given a five-year sentence, apparently for breaking unspecified prison rules, like Mr Makhmudov earlier this year. Mr Bekjanov is not due to be freed until 2016 or 2017. Little has been heard from Yusuf Ruzimuradov in recent years.

So why was Mr Makhmudov freed? One reason could be that on, 24 April, 2013, Uzbekistan came before the United Nations Human Rights Council in Geneva, as part of its Universal Periodic Review process.

However, unless Uzbekistan releases all prisoners of conscience, and, as importantly, revises its legislation and practice so as to end suppression of free expression once and for all, it is likely to find itself under continued scrutiny.

That will not be alleviated by the release of one emblematic figure.

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Cover illustration acknowledging *The Day of The Imprisoned Writer* by Tom Jellett

What China press censorship protests say about digital shift and democracy

It is telling that the protests in China earlier this year over government control involved a newspaper and censorship — not a military tank in a public square, **Tom Rosenstiel** reports.

China has walked the fragile road of modernism and capitalism without democracy. But history keeps repeating one message about trying to balance economic advances without freedom. Information by its nature is democratising.

In China, the information box is already open. Half of the Chinese public is online, according to the data by the Pew Research Centre. Fully 93 per cent of Chinese have cell phones; 62 per cent engage in social networking. And half the Chinese public, according to Pew's data, share their personal views on social networks.

What the Chinese are willing to share in these spaces is equally fascinating. Most - 86 per cent - say they share their views about "movies and music", but only 10 per cent are willing to share their views about "politics". At the same time, fully half say they share their views about "community issues".

Those answers hint at the problem for authoritarians. The line from culture to community to politics at a certain point is only rhetorical.

The old Soviet Union tried to control thought by registering every typewriter owned in the country. When in the late 1980s fax machines, satellite TV and VCRs made it impossible to know what ideas people were learning and sharing, Soviet leaders created the first institutes in the country to conduct public opinion polling. When they could no longer control what people knew, they began to try to study what people thought so that they might begin to try to manage it. They also had to relax TV and radio programming to adapt to new popular demands, then tried to pull back, which led to similar frictions as we see now.

The Chinese for a time tried to post soldiers by every fax machine in the country.

That brings us back to the source of the protests in China. They began when authorities censored the New Year's editorial in *Southern Weekend*, a well-known liberal newspaper, which had called for the new leaders of the Chinese government to make good on rights articulated in the Chinese constitution.

That led journalists and their supporters to issue an open letter. "By Sunday night," *The New York Times* reports, "the protests had transformed into a melee in the blogosphere."

The initial flashpoint over the Tiananmen Square protests in 1989 was journalism, too — a series of



The Tiananmen Square protests in 1989 before the blogosphere: then people met in a square and faced tanks. Jeff Widener, AP.

columns in the *World Economic Herald*, as Jonathan Mirsky reminds in a fine essay in the *New York Review of Books*. There was no blogosphere then for people to gather. So they met in a square and faced tanks.

The spark this time is similar. And they are a reminder that even in the digital age, journalism and democracy are inevitably and inextricably linked.

Fundamentally, the act of producing journalism is an act of putting more information and ideas in the hands of more people. That, in turn, inspires public conversation. Look back and you see that the birth of a periodical press can be traced to the Enlightenment and the evolution of democratic theory. Look wider and you find that societies with more journalism, of all sorts, have tended toward more freedom.

The march toward freedom engendered by making information transparent is not a straight line. It is often closer to two steps forward and one step back, or dancing a box step. The protests in China may lose momentum rather than presage immediate change. Mirsky reports that the words "Southern" and "Weekend" have now vanished from the Chinese Internet.

But the long view reveals something inexorable. As information begins to flow, so do ideas.

Republished with permission from the author and the Poynter Institute. Tom Rosenstiel is an author and journalist, a member of Poynter's National Advisory Board, and the Executive Director of the American Press Institute.

Increasing cyber attacks threaten the free press in Burma

Cyber attacks on news websites and apparent government hacking into journalists' email accounts have raised new questions about the integrity of media reforms in Burma, reports Shawn Crispin.

The New York Times reported late February that several journalists who regularly cover Burma-related news recently received warning messages from Google that their email accounts may have been hacked by "state-sponsored attackers".

Burma-based Associated Press reporter Aye Aye Win and Thailand-based Swedish reporter Bertil Lintner both received the Google warnings, according to *The New York Times* report. *Irrawaddy* reporter Saw Yan Naing and *Weekly Eleven News Journal* executive editor Nay Htun Naing said they, too, had recently been warned by Google that their accounts may have been compromised.

All of the journalists have reported on the armed conflict between ethnic guerrillas and government forces in the country's northern Kachin state, despite official attempts to bar reporting from the area. *Weekly Eleven* was the first local publication to report in late December that government forces had used air power against rebel positions — news that sparked international condemnation of the conflict's escalation.

While President Thein Sein's quasi-civilian administration has loosened restrictions on the press — for example, ending pre-publication censorship of newspapers and magazines last year — many local journalists and editors remain sceptical about his government's commitment to press and Internet freedoms.

The Electronic Act, a law used to prosecute and jail journalists under the previous military junta, is still on the books and allows for seven to 15-year prison terms for receiving or sending information over the Internet deemed a threat to state security, community peace and tranquility, or national solidarity.

The Google warning said that "we believe that state-sponsored attackers may be attempting to compromise your account or computer" and "it's likely that you received emails containing malicious attachments, links to malicious software downloads, or links to fake websites that are designed to steal your passwords or other personal information".

The warnings follow cyberattacks against independent local media. *Weekly Eleven's* website was hacked and temporarily disabled in January, according to a memorandum of complaint, addressed to the National Press Council and copied to Thein Sein, calling for an

independent investigation into the attacks. The letter, written by *Weekly Eleven* chief editor Wai Phyo, said the hackers identified themselves as "Red Army Team".

The Voice, another local news publication, reported that anonymous hackers referring to themselves as "MMFC" and "Anonymous Myanmar", infiltrated and posted unsanctioned information to their Facebook page in February, according to the same memorandum.

Irrawaddy reporters, who've been publishing articles on the Kachin conflict, have received Google warnings.

Exile-run media groups like *Irrawaddy* and *Democratic Voice of Burma* have been hit in the past with anonymously distributed denial-of-service (DDoS) attacks that disabled their websites at crucial news junctures, such as during the 2007 government crackdown on Buddhist monk-led street protests. Government officials have consistently denied responsibility for those attacks.

This time, however, there are significant leads that a truly independent probe should actively pursue. In his complaint letter, Wai Phyo noted that the military-aligned *Myanmar Express*, in reports on its website, rightly predicted the cyber attacks against *Weekly Eleven* and had previously published the same information that was posted by hackers to *The Voice's* Facebook page.

"It is strongly suspected that the people representing *Myanmar Express* website seem to be some army officers with a hardline attitude and outlook who are collaborating with some department that is displeased with ongoing democratisation," Wai Phyo wrote.

Burma's Ministry of Defence has chafed at critical reporting, saying in a rare public statement on January 29 that international organisations, embassies, and media were "fabricating news" about the Kachin conflict. If peeved army officials are indeed responsible for the recent cyber attacks, Thein Sein can make good on his reform vows by punishing them under the law while allowing the media to report freely on the conflict without fear of reprisal on the ground or in cyberspace.

This story is republished with permission of MediaShift. Shawn W. Crispin is Senior Southeast Asia Representative of the Committee to Protect Journalists based in Bangkok. He is a reporter and editor for Asia Times Online and has led CPJ missions throughout the region.



Committed to creating spaces for marginalised voices

Miriam Cosic, the former literary and arts editor of *The Australian*, recognises the importance of freedom of expression. Born and raised in Melbourne, she now lives in Sydney where she has written two books, *Only Child* and *The Right to Die*. Miriam Cosic has just joined the Sydney PEN Management Committee. **Rose Fittler** reports.

In a democracy, the right to free speech and freedom of the press are considered fundamental rights. But in many countries, writers do not necessarily enjoy the same freedoms. Instead those who dare to speak out against governmental tyranny and oppression risk persecution, prison and torture.

According to Miriam Cosic, what makes journalists who stand up to oppression different from a journalists sitting, say, in an Australian newsroom is merely an “accident of birth”.

Creating spaces for marginalised voices to be heard is something of utmost importance to Ms Cosic. She considers PEN’s work particularly relevant. “We need people talking, writing, helping us think, and shining a light on what is really going on in the world around us. Organisations like PEN act as an advocating voice. This is crucial to our world.”

Ms Cosic says she fell into journalism after completing a Bachelor of Politics and Philosophy at Melbourne University. However, her grandmother disputes this, saying that Miriam always had a yen for telling other people’s stories.

Initially recruited as a writer for a friend’s computer magazine, Ms Cosic says, ‘I told

him I wasn’t a journalist. He said ‘but you can write and you know about computers’. That was 30 years ago, journalists didn’t know about computers then.” She was promoted to editor, and later worked on *Rag Trader*, a clothing industry paper.

It was at *Rag Trader* that her passion for fashion writing was ignited and eventually she was appointed fashion editor of *The Age* newspaper. At that time, fashion journalism wasn’t all about the smart people sitting in the front row at fashion parades.

“It was all about style,” Ms Cosic says. “Then you wouldn’t dream of naming the models; they were just walking clothes hangers.” Instead, she says “the leading fashion journalists wrote appraising articles about changes of style and choice of fabric and colour, and the designer’s creative innovations.”

For Miriam Cosic, documenting fashion was not a frivolous affair. As she says, “Clothing is important as a social indicator, of personality, class, taste and character. Fashion is as much about socio-historical context as it is about personal preference. This fascination with the interconnection between culture, arts, politics and society would guide Miriam Cosic for the rest of her career.

In 1996, after three years of teaching



Clive Collins

Miriam Cosic

journalism to students at Deakin University in Victoria, Miriam Cosic relocated to Sydney to take a job with *The Sydney Morning Herald*. She later moved to *The Australian* for eight years as Arts Editor and later Literary Editor.

Currently she works as a freelance writer while completing her doctorate on Kantian ethics and cosmopolitanism, with a focus on the moral obligation individuals owe to one another.

The central principle underpinning her doctorate and much of her earlier writing has been the recognition that all people should have access to basic human rights. And that it is up to individuals as independent moral agents, to strive on behalf of others to achieve those rights.

Miriam Cosic hopes for a future where, “every person is able to hold and express opinions without fear of censorship, repression, incarceration or death”.

She considers her recent appointment to the PEN Management Committee as a great opportunity, saying, “Now I can work on creating a channel to help those voices that are shut down by governments and organisations.”

Miriam Cosic believes that not only do journalists owe a duty to the society in which they live, but also to the broader international community and their colleagues around the world.

“Each of us individually and collectively can do small things,” she says.

“As writers we can support writers in other countries who are trying to explain and expose the politics of cruelty, and to suggest ways of ameliorating the lives of their fellow citizens.

“Writers are the first line of public critique, and the first ones thrown in goal when governments feel insecure.”

Li Chengpeng: why I signed in silence

Earlier this year, a book tour by celebrity blogger and social critic Li Chengpeng was hijacked by local authorities, and by vocal leftists who oppose his critical writings on China, reports **David Bandurski**.

Ahead of his first signing in his hometown of Chengdu to promote his new book, *Everybody in the World Knows*, Li Chengpeng was ordered not to say a word. In a now widely known act of silent protest, Li appeared at the signing wearing a black mask and then opened his coat to reveal the words, “I love you all”, written on his undershirt.

In Guangzhou, the final leg of Li’s tour, the signing was cancelled at the last minute because the building where it was being hosted was closed for fire safety inspections.

Li Chengpeng apologised to his readers for the Guangzhou cancellation with a tongue-in-cheek post to his Sina Weibo account playing on the title of his book: “Once again I apologise to everyone: Because fire safety inspections are happening at the Tianya Building, outsiders cannot go in, and therefore my book signing for readers is cancelled. I’m accepting this fact, because this place is really in need of a fire safety inspection. Everybody in the world knows, fire safety is really important.”

For all of its hitches and hijinks, Li Chengpeng’s book tour illustrates the limitations of control in the era of social media. Li’s “silent” signing in Chengdu was anything but silent — it was broadcast loudly across the internet. Every leg of his tour became the subject of fevered discussion online, pitting the values of speech and openness against controls that appeared foolish and anachronistic.

Li Chengpeng reflected on his book tour with an interview published on Sina Weibo addressing some of the questions he has faced since it all began in Chengdu. The following is a partial translation: “There are some strange questions that deserve answers. These are not responses. They are not counterattacks. I just want to explain exactly what happened. I hope I can answer lingering doubts people have. Here are my answers:

Question: I really don’t understand why the government would allow you to publish [your book], but not permit you to say anything at book signings. That seems like a huge contradiction.

Answer: “This is what they call special characteristics [Li is playing here on the Party term “socialism with Chinese characteristics”]. Here only publishing houses under the leadership of the Party can issue publishing numbers.

Because for many years they’ve been trained a certain way, many harmful works are refused publishing numbers and cannot circulate. But there are also some bolder publishing houses, the ones that haven’t been trained so well, that go against the grain and publish works [others will not].

“But the publishing of a book is just the beginning. Because of the post-publication censorship, some books are banned from sale after they’ve been quietly published despite this high-pressure environment. For example, the book *Urban Dirge*. There are also books that [authorities] got wind of only after they were published, and which to this day sit in the warehouse — for example, Mr Yu Jianrong’s *True Account of Anyuan*. There are plenty of examples like this. For a book to be published is just the beginning. After that there is still a tortuous road ahead. And who can say that one day someone might just deal the final blow [to your book]. Under this sort of situation, you have to understand the fact that although *Everybody in the World Knows* has been published I cannot speak at signings as a part of the normal process of publishing [in China].

“Authorities in Chengdu were worried because I have a lot of readers, and [they thought] if they weren’t careful they might have a mass incident on their hands. So it was out of a concern for stability that they made their decision. It makes no difference that in my view there is no connection whatsoever between these two.

“When the several heavy-fisted orders came down that I sign in silence, the poet Li Yawei and the scholar Ran Yunfei were both there to witness it. In case you suppose these two, who are my friends, might speak untrue then let me tell you I also have an audio recording. I don’t think recording the unreasonable demands of public power is a base act at all. In any case, it is a good way to avoid these strange questions I’m now getting.

“In all likelihood, you will find it base of me to have done so. I can only say by way of comparison that after suffering a rape it is a shame if you decide to destroy the physical evidence.”

Question: If things were that unreasonable, couldn’t you just have avoided book signings altogether?



Chinese writer Li Chengpeng appears at his book launch before thousands of readers in Chengdu wearing a black mask after he was ordered not to say a word.

Answer: “My first response was to not go through with it. Everyone who was there at the time can vouch for what I said — basically, that this was an insult, and one’s dignity is more important than the selling of books. Why, otherwise, would I have said no to a substantial advance of the kind Lu Jinbo gets? Why would I have opted for the Xinxing Publishing House, which couldn’t offer a cent but could promise to preserve the draft in relatively complete form?

“However, one of my friends made the compelling point that avoiding the signing was improper, that I had to consider my readers. A sudden cancellation of the book signing, they said, was irresponsible to my readers. How many readers had come from other places to take part? (Indeed, there were readers from Xi’an, Chongqing and even Shanghai there).

“I remember very clearly that that night when I posed this question on *Sina Weibo* and asked, “What should I do?”, the majority of readers supported signing in silence as a form of silent protest. Some people even suggested that I hold the signing instead on the side of the street next to the bookstore. When I considered that suggestion my feeling was that this would seem to the authorities like a provocation. There was the risk that readers could

come to harm. And I couldn’t turn an ordinary book signing into a street movement. This just wasn’t my character.

“Late that night a reader from Shanghai even went to a hotel near the bookstore to see if the signing could be held in the lobby. I wouldn’t agree to that. It would impact the normal business of the hotel, and people with sensitive nerves would claim I had orchestrated it this way, wanting purposely to cause trouble. I worried this problem over until very late and finally sought the advice of Tu Jia Ye Fu, who was far off overseas. He said, first ensure that your book gets out there and your ideas reach an audience, then see how it goes from there. This is the most important work of the writer, he said. What do other indignities matter?

“In the balance, my decision was to sign in silence. I don’t have powerful backing from anyone. I don’t have the support of insiders. I don’t have high-level leaders giving me the green light. All I could do was sign in silence.

Question: Even though they didn’t allow you to speak, I don’t believe that if you had said something they really would have done anything. I still think you were just trying to put on a show.

Answer: “This question is logically unsound. The forces that be were very strong in their insistence that I sign in silence. How is there any problem in my complying? But another important reason was that the two people responsible at the bookstore repeatedly pressed us on this point: if we violated the orders, even speaking a single sentence, they would both be let go from their jobs. This was a hard order sent down from the leaders. I didn’t entirely believe it, so I said, look, it can’t be that serious. They said very seriously to me: you can’t say a single word. The leader is waiting . . . for your answer right now.

“Li Yawei and Ran Yunfei also asked me to consider their situation [as well-known local dissidents who could face punishment or intimidation]. At around midnight that night, I asked one final time whether I could just say, “Happy New Year!”, or just introduce [the poet] Liu Shahe [who planned to attend the signing]. We pledged not to say a single thing having to do with ideology. But this boss from the bookstore said: No, if you say a single thing I’ll lose my job. Brother, please consider my position . . .”

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Digital media as a means of fulfilling the fundamental right of free expression

PEN International promotes literature and freedom of expression and is governed by the PEN Charter and the principles it embodies — unhampered transmission of thought within each nation and between all nations.

Citizens in many countries have faced severe restrictions in their access to and use of digital media, while governments have exploited digital technologies to suppress freedom of expression and to surveil individuals. The private sector and technology companies in particular have at times facilitated government censorship and surveillance. PEN therefore declares the following:

1. All persons have the right to express themselves freely through digital media without fear of reprisal or persecution.
 - a. Individuals who use digital media enjoy full freedom of expression protections under international laws and standards.
 - b. Governments must not prosecute individuals or exact reprisals upon individuals who convey information, opinions, or ideas through digital media.
 - c. Governments must actively protect freedom of expression on digital media by enacting and enforcing effective laws and standards.
2. All persons have the right to seek and receive information through digital media.
 - a. Governments should not censor, restrict, or control the content of digital media, including content from domestic and international sources.
 - b. In exceptional circumstances, any limitations on the content of digital media must adhere to international laws and standards that govern the limits of freedom of expression, such as incitement to violence.
 - c. Governments should not block access to or restrict the use of digital media, even during periods of unrest or crisis. Controlling access to digital media, especially on a broad scale, inherently violates the right to freedom of expression.
 - d. Governments should foster and promote full access to digital media for all persons.
3. All persons have the right to be free from government surveillance of digital media.
 - a. Surveillance, whether or not known by the specific intended target, chills speech by establishing the potential for persecution and the fear of reprisals. When known, surveillance fosters a climate of self-censorship that further harms free expression.
 - b. As a general rule, governments should not seek to

access digital communications between or among private individuals, nor should they monitor individual use of digital media, track the movements of individuals through digital media, alter the expression of individuals, or generally surveil individuals.

c. When governments do conduct surveillance—in exceptional circumstances and in connection with legitimate law enforcement or national security investigations—any surveillance of individuals and monitoring of communications via digital media must meet international due process laws and standards that apply to lawful searches, such as obtaining a warrant by a court order.

d. Full freedom of expression entails a right to privacy; all existing international laws and standards of privacy apply to digital media, and new laws and standards and protections may be required.

e. Government gathering and retention of data and other information generated by digital media, including data mining, should meet international laws and standards of privacy, such as requirements that the data retention be time-limited, proportionate, and provide effective notice to persons affected.

4. The private sector, and technology companies in particular, are bound by the right to freedom of expression and human rights.

a. The principles stated in this declaration equally apply to the private sector.

b. Companies must respect human rights, including the right to freedom of expression, and must uphold these rights even when national laws and regulations do not protect them.

c. Technology companies have a duty to determine how their products, services, and policies impact human rights in the countries in which they intend to operate. If violations are likely, or violations may be inextricably linked to the use of products or services, the companies should modify or withdraw their proposed plans in order to respect human rights.

d. Technology companies should incorporate freedom of expression principles into core operations, such as product designs with built-in privacy protections.

e. If their operations are found to have violated the right to freedom of expression, technology companies should provide restitution to those whose rights were violated, even when governments do not provide remedies.

PEN Pays Tribute to Chinua Achebe: the tree that made a forest

by Tade Ipadeola, President of the PEN Nigerian Centre

World literature acknowledges an immortal in the transition of Chinua Achebe (1930-2013) whose quiet dignity brought unprecedented attention to African literature written in English, translated into more modern world languages than any other African writer before him and studied in every notable institution of learning around the world. As Aretino said upon the death of Michelangelo, the world has many kings but only one Michelangelo. I acknowledge that the world has many potentates but only one Achebe. He was the tree that made a forest, the one voice that travelled beyond the seven seas.



Nigerian writer Chinua Achebe

Chinua Achebe lived as the poet Robert Browning before him prescribed: he kept one end, writing, in view – and made everything else serve that end. Adversity and prosperity, war and peace, love and indifference all were transformed by that alchemist we knew as Chinua Achebe into a different substance universally recognised, and acclaimed, as literature. The total effect of that way of living cannot be calculated in simple terms. Achebe compelled attention, commanded respect. One did not have to agree with him but one had to listen to him. Few writers ever achieve that degree of relevance in their lifetimes. Achebe set out in the morning of his life to be the writer with whom you had to engage. Book after pertinent book, this wordsmith stunned the literary world with his writings. No one gave him any quarters, he had to fight for every inch of glorious ground.

Many people know *Things Fall Apart*. Not as many know of *Arrow of God* or *A Man of the People*. These were his finest works of fiction, creations over which he laboured when he was young, when the sap flowed strong in the trunk of what became his magnificent Iroko tree. He wrote for children too. He wrote essays and even attempted poetry. He wrote short stories and only last year published his memoir, *There Was a Country*.

It wasn't possible to be indifferent to Achebe. You loved him or hated him. Sometimes you did both at the same time. He wrote so beautifully, so efficiently that his medium was as much a means of spreading his message. He wrote as he spoke, in a spare, stern way. He was, nevertheless, intricate in his creations. His writings, examined, consisted of a balance that was not always apparent. If we borrowed from one of his own favourite images, his work was lattice work. Achebe was no mean craftsman and no ordinary warrior of the word. His simplicity hid an advanced degree of sophistication that every young writer will do well to study.

Achebe knew how to place his finger on the pulse of his environment. If we consider the fact that he wrote the bulk of what became his first book, *Things Fall*

Apart, at about age 26, we have to conclude that he must have paid uncanny attention to both the language of his people and the structure of their society in a way that we hardly ever see any more in new writers.

Achebe harnessed his prodigious talent early and set about the task of portraying his environment with as much realism as any man in the literary trade could have hoped to do. Of the quartet of Okigbo, Clark, Soyinka and Achebe, the most readable prose belonged, by far, to Achebe. He ran with it. The world won't ever forget that accumulative narrative voice that built and built until his denouement shattered the ambience [...]

Any literary life will ultimately be measured by two simultaneous indices as Berryman suggested: that of talent and that of achievement. A life like Chinua Achebe's, however, is in a class all by itself, a class *sui generis*. When such a life has run its course, it'll require an encomiast of the stature of Xenophon who wrote the classic tribute to Agesilaus. Achebe had huge talents and achieved astronomical successes. He worked very hard, he dug very deep.

On the 11th of September 2012, in the city of Gyeongju, South Korea, strolling with the veritable John Ralston Saul, international President of PEN, the oldest writer's organisation in the world, that writer and philosopher regaled me with the story of Achebe and PEN. In the mid-eighties, Ralston Saul and a few other radical elements in world literature had canvassed for Chinua Achebe to be voted as President of PEN International. They lost narrowly at the elections.

I saw in Saul's eyes the conviction that he had been the equivalent of a cardinal rooting for a black Pope, a dancer to a distant tropic drum. Few had seen what he saw back then. Not anymore. Africa's best are at the forefront of the writing profession everywhere today and it is undeniably due to the labours of such great spirits as Chinua Achebe. Let him rest now that he belongs to the ages.

(This is an edited extract of a tribute first published in *Nigeria's Premium Times*)

Viewing the challenges to free speech in Australia through the prisms of power

Broadcaster, writer, commentator and lawyer Waleed Aly focuses on the discourse of power and its fundamental relationship to free speech in his Free Voices lecture at the Sydney Writers' Festival. He says the key function of free speech is the ability to hold power to account and to uphold the right of the powerless to speak their mind in the face of the powerful. Report by **Francesca Millena**



Waleed Aly

“We cannot have free speech conversations that are divorced from the notions of power,” says Waleed Aly. “I view the challenges to free speech in Australia through the prisms of power, not through the prisms of law.”

The broadcaster, writer and commentator will deliver the first in PEN's Free Voices lectures for 2013 at the Sydney Writers' Festival. The lecture, entitled 'Free Speech, Vilification and Power', explores the discourse of power and its fundamental relationship to free speech, but with a twist.

It's an interesting position for the 35-year-old former lawyer to take in light of the recent legal battles that have involved journalists on the subject of free speech. From *Herald-Sun* columnist Andrew Bolt's racial vilification stoush and talk-back radio host Alan Jones' court-enforced mea culpa, free speech has been mentioned as frequently in the courts in recent times as it has been a tenet of the media mandate itself.

“I understand the law, but if you look at it as the basis for examining the operation of free speech in Australia, you won't get very far,” says Waleed. “The key function of free speech is the ability to hold power to account and to uphold the right of the powerless to speak their mind in the face of the powerful.”

“What I want to examine is the extent to which that has been forgotten in our free

speech arguments in Australia. As far as the Australian conversation is concerned, free speech is typically an argument deployed by those who have cultural power against those that don't, and that's where vilification comes in.”

Waleed Aly is a respected commentator on Muslim affairs and his 2007 book *People Like Us, How Arrogance is Dividing Islam and the West*, explored the gulf between Muslims and non-Muslims in Australia. His awareness of the power disparity between the haves and the have nots, and the impact on free speech, crystallised after the events of September 11.

“After September 11, I found myself in a social minority that was being vilified and didn't have the social capital or power to respond. There was this incredible sense of powerlessness in the conversation, this idea that you were being spoken about like you weren't in the room, and there was really nothing you could do about it.

“People can say it's a free country, there's free speech, and you can say what you want. But it doesn't work that way. Who's going to print it and who's going to broadcast it? What's a community newsletter going to go when it's up against a major current affairs program?”

A 'flash-point' is how Waleed describes September 11 in the development of his consciousness around power and prejudice in Australia. Although growing up in the eastern

suburbs of Melbourne, he was always aware of being the only Egyptian child on his block. He says after September 11 being a non-white became more of an issue.

Yet he concedes that unlike most Muslim Australians, his ability to contribute to public dialogue post-September 11 was largely enhanced. As a Melbourne University law and engineering student in 2001, Waleed would go on to work as a legal associate for Joseph Kay, one of Australia's most senior Family Court judges, before branching into journalism where he would find multiple platforms from which to communicate. But the September 11 experience was nonetheless formative.

“When you witness first-hand the effect of power disparity, you realise it's incredibly important. Once you're attuned to it, you see this power disparity everywhere.”

An outspoken commentator on women's rights, Waleed was a White Ribbon ambassador for the United Nations' International Day for the Elimination of Violence Against Women in 2005. He draws on the recent uproar over reverse sexism as an example.

“It's an obnoxious argument for people to complain about women making sexist comments about men because it discounts power. It discounts the fact men have been in a dominant position for a very long time and they still are. So the use of their power to vilify women is not remotely equal to women

vilifying men, because they're coming from very different social positions.”

Today Waleed is a prolific journalist who writes for *The Age*, *The Australian*, and *The Monthly* and is presenter of ABC's Radio National Drive program. Yet he cites the lack of media diversity and its concentration in the hands of few as the key challenges to freedom of speech in Australia.

“What this means is that radical opinions aren't broadcast. You're not going to see an anti-democracy rally being broadcast, unless it's pretty major, of course. What happens with a concentration of media diversity is almost similar to political correctness, but it's closer to what I've heard called 'patriotic correctness'. It essentially limits which arguments are admissible into public conversation.”

Although he doesn't deny the right of media proprietors to set their own agendas, Waleed Aly suggests that when those proprietors are few in number, as the case is in Australia, the public conversation can become very “contained”.

“I'm not saying it's a human rights issue in the sense that people aren't going to be thrown into prison. The questions of power and diversity are more central to understanding how we experience free speech in Australia, because the way our speech is limited is not through coercion, political power, or through human rights abuses, but through other reasons and other means.”

While most Australians would probably take free speech and freedom of expression for granted, Waleed believes Australians on the whole are engaged in the subject.

“I don't think Australians are blasé about free speech. We're not a country that was founded on the idea of freedom like the United States, so in some ways the significance of free speech to our self-image is an interesting concept and possibly owes something to the influence of the United States our culture.”

As articulate as his arguments are, Waleed says that coming up with solutions isn't his bag. “I'm an academic. I don't solve problems,” he says with a laugh.

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PEN's Free Voices lecture series was designed to explore the diverse perspectives of a range of writers exploring the concepts of freedom to read, freedom to write, freedom to speak. In his 2013 Free Voices lecture, broadcaster and writer **Waleed Aly** argues that as long as considerations of power are excluded from our debates on free speech, the debates are destined to be distorted.

If I were giving this speech about two-and-a-half thousand years ago, there might well have been an empty chair beside me representing Socrates. To be sure, the window for this would have been small – he was tried, convicted and executed within a year – but on principle he seems an ideal candidate. His offences against Athenian society were to fail to acknowledge the city's gods, and to introduce new deities. In short, his were offences of speech. Socrates was a provocateur. He revelled in his dissent. His self-proclaimed function was to be a nuisance: to sting the city with his philosophical questions.

He was contemptuous of democracy, believing that the best policies were the product of the wisdom, insight, knowledge and competence possessed by an elite few. This was no small claim in Socrates' Athens, which of course prided itself on the audacity of its democratic experiment. In this, it stood in stark contrast with Sparta and Crete. Naturally, Socrates went on to express his admiration for those societies. Then there was the fact that one of his students, Critias, was part of a group, backed by Sparta, that briefly seized power in Athens, running a brutal, undemocratic government. Eventually these interlopers were vanquished and democracy restored. Socrates was tried soon after. There are seditious overtones to all this. Still, his execution was significant precisely because Athens valued free speech and dissent. And yet, a majority of voting Athenians resolved to put him to death for his words. No doubt his case is more complicated than that of your average dissident, but it stands as a symbol of the fragility of free speech. Even in societies that value it, vigilance is important.

It is therefore a good thing that free speech is never far from the surface in Australian political debate. But that doesn't make its application a straightforward matter. Recently that debate has turned to the question of racial vilification laws. This is partly because the Gillard government has declared its plans to pass new legislation consolidating all anti-discrimination legislation that would make some changes to the racial vilification laws we currently have. But it is also because of a recent Federal Court judgment against News Limited columnist Andrew

Bolt that found he had racially vilified some Indigenous complainants.

The government's legislative plans now seem largely theoretical. Recently, Attorney-General Mark Dreyfus made clear that this legislation would not be rushed through, and has refused to give a timeline even for its final drafting, much less its introduction into parliament. Clearly there is no rush. Given there are now very few sitting days before the September election, that the government is almost certain to lose that election, and that the Opposition has made plain its rejection of that legislation, there is now little practical point in considering it in detail. But the issue is still a live one because the Opposition has also signalled its intention to amend our current racial vilification laws, to loosen some of the restrictions on speech that currently apply. So now the most politically relevant question becomes whether or not the legislation we currently have is an odious restriction that we should abandon.

I'm interested in answering that question, not so much for its own sake, but because it gives us an opportunity to think deeply and systematically about the whole concept of free speech. Frankly, we don't do this enough. We cite it as a bedrock of our politics and society, but perhaps because we tend to agree it is so fundamental, we rarely engage with what it really means, on what basis we should guarantee it, and therefore on what basis it can legitimately be restricted. And in discussing this, I want to emphasise an extremely important part of the equation that is almost never meaningfully discussed in our public discourse: power. Whatever your position on racial vilification laws, it must account for the way in which power is distributed in our society. To ignore power is to ignore the most basic social context in which we are having this debate. It condemns us to a deeply impoverished consideration of free speech. And that matters because if we approach free speech with vigilance, we need the ability to tell when it is really under threat, and when it is not.

Already, I'm assuming that not every restriction on free speech constitutes a threat. That, I think, should be uncontroversial. Even the most liberal approaches to free speech – such as that of the great liberal thinker John Stuart Mill – accepts limitations are necessary. This is probably

why every single society in human history has adopted such limits. Defamation law – which is a thriving legal area in the United States, even with its shiny first amendment – is the most obvious example of this. Another might be speech that incites to violence, or the publication of child pornography, since such speech does direct harm to others and so cannot be protected by the doctrines of liberalism. Free speech arguments are really arguments about the extent to which speech should properly be restricted, and which means are the most appropriate for doing so. Indeed Mill himself concedes some restrictions are desirable and important.

All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things which are not fit subjects for the operation of law.

There are two ideas here. First, that where some action should be restrained, we must ask whether the law is a necessary method of doing this. Second, that other forms of restraint and control are available, and specifically that we may be restrained by social forces. Society can – and indeed, should – restrain us even where the law doesn't. It can censor us. And this much, simply cannot

“Disempowered people lampoon their overlords as a means of seeking equality. Empowered people vilify their underlings as a means of subjugation. The two are simply not equivalent.”

be denied. In any society, or even any social setting, some statements will be riskier than others. Some will cause the speaker to be celebrated, others will have them ostracised. And as social beings, we typically weigh up the likely consequences before we open our mouths. That's why we adjust what we say – and especially the tone of it – to suit our audience. We are forever asking ourselves: “what reaction am I looking for, and what is the best thing to say to get it?” In my broadcast work, I interview politicians all the time. The answers they give me on air will be different to what they tell me in private. Off air they will be more prepared to admit party weaknesses, they will

speak more frankly about social issues. That is, they will be less *restrained*, because they know the consequences of their speech are unlikely to be dire in the same way they might be if they spoke so frankly to a broadcast audience. If you're honest about yourself, you'll probably find you're much more diplomatic to your boss, than you are about your boss. This isn't necessarily a character flaw. In fact, it's a good sign of our social intelligence. People who barrel on without any regard for social sensitivities or the social consequences of their speech are exhibiting one of the classic traits of autism, or in *extremis*, sociopathy.

That doesn't mean we never say anything controversial. We might decide what we have to say is important enough to be worth the social cost of being the target of moral outrage, or we might believe that there is some social benefit to being a controversialist. The point, though, is that social pressure will almost always be a factor in our decision.

So let us grind this out, beginning with a trite observation: that, in some sense, we are always free to speak. Even if our speech will land us in prison or before an executioner, there is nothing anyone can really do to stop us saying whatever it is we want to say. The only question is whether or not we are prepared to bear the costs of our statements. We can never escape those costs. Even an imaginary society with no legal restrictions on speech at all will still have mechanisms for making certain speech costly in one way or another. Only when speech is entirely meaningless to the audience can it have no cost, benefit or consequence (which is why swearing in a foreign language is nowhere near as crude as swearing in the dominant one). Put simply, there is simply no such thing as free speech. There are only different costs. When we say we support free speech, we're actually saying something very imprecise. What we really mean is that the costs of speech should not be imposed by the State, and where possible, social pressure should decide.

As general rules go, that's a pretty good one. Throughout human history, the State has repeatedly demonstrated an awesome ability, and preparedness to kill or imprison people who say things it doesn't like. State intervention is generally worse than social intervention because it is typically more brutal and heavy-handed. Certainly, social opprobrium can have extreme consequences. We can easily imagine how, for example, the cost of saying “I am gay” in a particularly rough school yard could have been extremely high. The consequence could be relentless bullying, perhaps even violence. It could drive someone to self-harm or even suicide. Weighing this up, you might choose not to say anything. In fact, you'd have to say a social cost like that is a far bigger restriction on free speech than, say, having to pay a fine for something you say. But it would be perverse to deal with this by imposing some kind of legal penalty for

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admitting your sexuality. The main problem is the social stigma behind the bullying. That won't go away by fining on the victims of bullying. In fact, that would probably amplify the stigma. And that is often the problem with State-regulation of speech. It doesn't replace the social cost of speech, and it doesn't reduce its chilling effects. It just compounds them.

So, a presumption against State intervention is a good idea. But it's just that: a presumption, not a rule that should be applied in every case. Only rarely should that be overturned. The trick is to figure out when those cases should be. We therefore need to identify – as a matter of principle – how we decide when State regulation of speech is a good idea.

So let's start with liberalism. Mill would like to see offensive arguments left to society to sort out. Much as we might rely on the free market to separate the quality products from the shonky, we should allow the marketplace of ideas to put offensive speech in its place, or alternatively, discover some hidden merit in them. It's a neat idea, and for the most part it's persuasive. But there's a problem here.

Leaving things to social regulation means we're relying on social power. And the thing about social power is that it's not distributed evenly, or fairly. There are those with social power, and there are those without it. The social regulation of speech therefore places regulation in the hands of the powerful. And while it is true that not all powerful people will use their social power in their own interests and against the interests of the powerless, it is also surely true that plenty of them will. Social regulation becomes largely the regulation of the powerless by the powerful.

This, as it happens, is one of the major reasons we are suspicious of government regulation. We don't trust the political class to resist silencing voices that speak against their interests. But why should those with other forms of power be trusted so much more? Are they somehow free from self-interest? Are they incapable of abusing their power, of being corrupt dishonest, bigoted or otherwise odious influences on society? If not, we're confronted with the very real prospect that the social regulation of speech will mean that the most costly speech is that which doesn't serve the interests of the powerful: those in our society with economic, social and cultural power.

All this is utterly central to the issue of racial vilification. In fact it is central to the whole politics of racism. Racism is such an odious social and political

force, not simply because it is a baseless prejudice, but because it mobilises hatred against those who are powerless to protect themselves. This is why what is so often called "reverse racism" – where those who are typically thought to be the victims of racism begin racially stereotyping their assailants – is simply nowhere near as socially or politically significant. The grotesquely anti-Semitic cartoons published in Nazi publications in 1930s Germany were far more contemptible than if Jewish publications of the same period started similarly lampooning Germanic people. Not because Jews have a special licence for prejudice, or because there is something inherently worse about anti-Semitic racism than anti-Germanic racism as a matter of abstract principle. But because it is dangerous and frightening when one social group with power and influence demonises another without them. Disempowered people lampoon their overlords as a means of seeking equality. Empowered people vilify their underlings as a means of subjugation. The two are simply not equivalent.

It's the same reason women can say things about men that men could never say in reverse. Men, frankly, have no place complaining of sexism in these circumstances and challenging for the right to demean women. Not while they dominate our corporate boardrooms, or our parliament. Not while they're earning significantly more than women. Not while they claim a disproportionate presence in (particularly commercial) media. Not while their career and social prospects are far less limited by their physical appearances. And not while they are overwhelmingly perpetrators, rather than victims, of inter-gender violence. In that context, we cannot dismiss calls for affirmative action as indistinguishable from discrimination. The intentions, as well as the consequences, are completely different.

This sort of reasoning could easily apply to a range of circumstances: gay and straight people, or rich and poor people, for example. But for present purposes, let us consider what it means for the issue of racial vilification. If, for example, a white, middle-class male with a mainstream media platform embarks on a racist tirade against black people, relying on questionable information and a septic reservoir of stereotypes to build the case he is making, he is doing this in a particular social context. If he's a broadcaster, his manager is almost certainly white, and probably male. If he's a columnist, the same might be said for his editor. Indeed the same might be said all the way up the chain until we reach the most influential person in the organisation, whether that's a managing director, a major shareholder,



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an editor-in-chief or indeed a newspaper proprietor. Every day these influential people will make decisions about what to place on the national agenda. Those decisions will inevitably reflect their priorities; their sense of what is really interesting and important. And those priorities will necessarily be informed by their own social circumstances and experience. In this way the society presented to the public will be to some extent the society as it looks from that privileged vantage point. Taking all this together, we can safely say the person responsible for the racist tirade belongs to about the most socially powerful subset there is in Australian society. Moreover, he is among the more socially powerful members of that subset given the media platform he commands.

Consider, now, his victims. They almost certainly have no institutional power in the mainstream media. They are unlikely to have any influential representatives in the editorial meetings that determine what the public conversation of the day will be. Ultimately they have little to no access to mainstream media platforms – certainly not of right, and certainly not to the same extent as the white middle-class male that has just assailed them.

Here, it is worth noting two things. First, that it is possible that some individuals among the vilified group will have the skills, the connections and the access to make their voice heard. But those voices will always be buried by the onslaught of privileged voices. Their existence does not put the discourse on a level playing field at all. Second, there's no doubt that some amongst the empowered social subset will be sympathetic to the plight of the vilified and perhaps even come to their defence. But this must not be mistaken

for an equalisation of social power. Here, the vilified group remains a kind of supplicant, relying on the discretionary magnanimity of its social superiors. It is not mounting its own argument on its own behalf informed by its own experiences and intimate knowledge of itself. It is hoping for the benefit of arguments made by those who probably cannot truly understand the nuances of its social existence. The bottom line is that so many of the public conversations we have about minorities, and especially racial and ethnic minorities, take place as though those minorities are not in the room. They are variously accused, prosecuted, defended, convicted, exonerated and deconstructed, but they are very rarely heard.

If free speech is meant to be analogous to the free market, if bad ideas are to be vanquished by good ones in the contest of ideas, then what happens where that contest scarcely exists? Really, it's like an abuse of market power: a kind of market distortion. There is at the very least a case to be made for regulating speech in these circumstances to ensure that the discourse of the socially empowered is held accountable in some way. Not because it is offensive or hurts people's feelings, and not because I think the law is always an effective instrument for curing society's bigotry (in fact I don't think society can ever be free from bigotry). But rather because it serves to marginalise vilified minorities from the public conversation, and from participating in our democratic life. In the long run, that risks silencing such communities, thereby reducing the range of contesting opinions. That serves almost no principle on which the case for free speech is based.

But it's a difficult balance. Ideally, we would avoid outlawing certain opinions *per se*. There is something inherently objectionable about making it legally impossible to state a given position – even an offensive one. But it is possible to place requirements on how certain inflammatory arguments should be put. We can require, for example, that they are put honestly: that they are not full of fabrications or gross distortions. We can also require that, particularly in the case of dangerously inflammatory ideas, that they are conducted with a certain tone that reduces the likelihood of some manner of social explosion. Such limits would not be moralistic or paternalistic, which means they are still broadly consistent with the liberal structure of our society. I accept that, as a practical matter, all this might make certain arguments extremely difficult to run. Holocaust denial comes to mind. But it does leave open the theoretical possibility

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of someone arguing a Holocaust denial position, provided they can do so without factual fabrication or distortion and in a non-incendiary manner. And if that is impossible to do, we are entitled to ask why such arguments are of such a benefit to society that the right to air them must trump whatever rights a vilified racial group should otherwise enjoy.

With that in mind, let us consider the recently controversial racial vilification provision in the *Racial Discrimination Act*. The battle centres on section 18C, which says makes public speech unlawful if it “is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people” because of their “race, colour or national or ethnic origin”. Shadow Attorney-General George Brandis has frequently complained that this makes it unlawful for people to say offensive things. And that is true in certain circumstances, but it’s misleading to leave it at that. For a fuller picture, we must read the next section, 18D, which specifies exactly what sort of statements are not unlawful. Those include:

anything said or done reasonably and in good faith:

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

(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.

So let’s be clear about this. The law allows you to insult, humiliate, intimidate and of course offend a racial minority, on racial grounds, if it’s a fair comment on a matter of public interest based on a genuinely held belief. The requirements that the comment is “done reasonably and in good faith” are, I would argue, limitations of tone rather than content. A racist tirade that fabricates “facts” and misrepresents the people it is vilifying is unlikely to qualify. An uncomfortably racist argument that is nonetheless honest and intellectually defensible is far

more likely to be legal, no matter how offensive it is. It does not make it a crime merely to offend people. The restriction here is not on the scope of the debate, or indeed on the level of offence. The law simply requires that if you’re going to publish racist arguments that impugn disempowered people, you must do so in a manner that is honest and fair. The argument itself doesn’t have to be fair. But the way in which it is put together and expressed, does. Certainly it imposes a greater burden of diligence on the speaker. But given the potential social and political dangers of racism, there’s a strong case this is no bad thing. If it enforces anything, it is a norm of civility in cases with high risks of combustion.

It is simply untrue to insist, as George Brandis does, that Australians “are not free to make critical or unpopular remarks in the course of ordinary political exchange”. We are. There is no provision of the *Racial Discrimination Act* or any other Act that outlaws “critical or unpopular remarks”. For better and worse, we do it constantly. Brandis was speaking in response to the Federal Court judgment against Andrew Bolt for racial discrimination, but even that further context doesn’t make Brandis’ critique any truer.

In that case, Bolt had published two articles suggesting that a group of fair-skinned Aborigines were emphasising their Aboriginality over their European lineage for some kind of professional gain. This provides a classic basis for a defamation claim, but the offended parties pursued a racial discrimination claim because there was something bigger at stake here than their own personal reputations. This was a privileged white person attempting somehow to police the extent to which people with Indigenous heritage should indentify as such. This is of amplified significance when we consider the history of white people attempting to determine what the identities of black people should be; whether it be attempts in Australia to raise “half-caste” children as white, or the Southern American “one drop rule” that deemed anyone with even a single drop of “black blood” wouldn’t be treated as white. For Bolt, the argument may have been about the motivations of individuals, but for the complainants it was about (in the Court’s language) the freedom “to fully identify with their race without fear of public disdain or loss of esteem for so identifying”. That is to say, it was about their freedom to declare themselves Aboriginal without bearing a significant social cost – a freedom they have not always enjoyed. Theirs was a free speech claim of sorts, too. Just not one our public discourse trains us to recognise.

But crucially, the Court did not simply say Bolt’s argument was too critical or unpopular. It specifically said the offending articles “contained errors of fact, distortions of the truth and inflammatory and provocative language”,

which indicated that Bolt was trying to be “destructive of racial tolerance”. That is, his writing was not reasonable, in good faith or even honest. Brandis has been at pains to make clear he is not criticising the judge who “was merely applying the word of the statute to the facts of the case before him”. But if Brandis accepts the Court’s findings about Bolt’s error-ridden, distorting work, he simply cannot pretend the case was about “critical or unpopular remarks in the course of political exchange”.

And surely it is an exaggeration to cite this as proof that Australian commentators are not free. The sanction in Bolt’s case was that his newspaper would have to print an apology or correction, and refrain from publishing anything substantially similar – presumably that means something similarly factually suspect – in future. Frankly, newspapers should refrain from publishing such material at all times. That’s the function of a newspaper. The bigger cost here is really the social cost of being named as someone guilty of racial discrimination. This is hardly heavy-handed State intervention. It is a principally social cost, triggered by a legal finding. All that considered, the question really is why Brandis thinks well-paid, socially powerful columnists should be free to write factually incorrect, racially vilifying material against Indigenous Australians without even the slightest legal sanction.

The answer to that question surely lies in the concept of power. Brandis’ response does not account for it at all. The only power he sees here is the Court’s power to censure Bolt, albeit lightly. That is, in some ways, a classically liberal point of view. Brandis’ position on this case throws into stark relief the limits of liberalism; namely that it is overwhelmingly blind to power in its approach to freedom.

Indeed, that’s perhaps liberalism’s greatest conundrum. It is a philosophy born of a radical spirit. It exists precisely because it doesn’t trust majoritarian authority. It wants to free the individual from the constraints of society’s sensitivities. And yet, to the extent it leaves these things to the regulation of social pressure, it cannot help but privilege those who already have power. In this way, and especially in societies that are already liberal, it acts in a surprisingly conservative way, because it reinforces the status quo, which is probably why the conservative side of politics in Western democracies tends to be more avowedly liberal than their more typically socialist, progressive opponents. This is why conservative parties usually end up promoting policies that work in the interests of the elite, even while being liberal.

I believe free speech is one of the most fundamental features of a plural, open, democratic society like ours.

But it’s not the only one. The equality of citizens is another. Equal opportunity of democratic participation is another still. I don’t think it’s good enough simply to declare the supremacy of free speech over all other social interests as though it is some unproblematic truism. I believe we must always be asking that most fundamental question: what is the point of free speech? Is it its own end? Or does it serve some other purpose? Put another way, should we organise our society to maximise free speech, or calibrate free speech to serve society in some way or other?

It’s for that reason that I don’t think racial vilification laws are some kind of blot on our free speech landscape. In fact, I think they serve an important democratic function. In saying this, I’m alive to the dangers. I understand that it is easy for the State to silence dissent on the pretext that it undermines social cohesion when what they really mean is that it undermines State authority. But our vilification laws are not designed to give the State power to lock up dissidents, and in any event I can’t think of a single case of this happening. They are used rarely, and provide mainly for civil action. Remedies are typically low-cost gestures like publishing statements of acknowledgment.

Of course, the mere existence of vilification laws on the books does not undo the power disparities in society, and I accept that even those who have civil rights under this legislation will often lack the means to enforce them. But that only suggests the effect on limiting speech will be minimal. What effect there is will be some form of “chilling”, where self-censorship operates. That is, of course, a concern. But it must be weighed against the fact that the victims of vilification rarely have access to any significant platform for public speech at all. They are censored by social and economic barriers that are far less voluntary, and far more comprehensive than a chilling effect.

Ultimately, we mislead ourselves if we think we can examine free speech in any meaningful way without paying attention to its relationship with power. In fact, being mindful of power dynamics should only amplify the importance of free speech as a foundational issue, and make clear to us the circumstances in which it is so essential to fight for it. It is for precisely this reason that I regard the PEN message as fundamentally important. It is, almost quintessentially, about defending the powerless from the tyranny of the powerful. The poets, essayists and novelists who inspire it are overwhelmingly those persecuted, imprisoned or exiled for their dissent. It has been a voice for the powerless in – and often excluded from – our society, such as asylum seekers and Indigenous Australians. These are laudable aims and at their core, rarely if ever discussed, is the concept of power.

Dashed hopes after Spring

After the Arab Spring and other protest movements that prompted many rises and falls in last year's index, the 2013 Reporters Without Borders World Press Freedom Index marks a return to a more usual configuration. The ranking of most countries is no longer attributable to dramatic political developments. This year's index is a better reflection of the attitudes and intentions of governments towards media freedom in the medium or long term.

The same three European countries that headed the index last year hold the top three positions again this year. For the third year running, Finland has distinguished itself as the country that most respects media freedom. It is followed by the Netherlands and Norway. Although many criteria are considered, ranging from legislation to violence against journalists, democratic countries occupy the top of the index while dictatorial countries occupy the last three positions. Again it is the same three as last year – Turkmenistan, North Korea and Eritrea.

"The Press Freedom Index published by Reporters Without Borders does not take direct account of the kind of political system but it is clear that democracies provide better protection for the freedom to produce and circulate accurate news and information than countries where human rights are flouted," Christophe Deloire, Secretary-General of Reporters Without Borders, said.

"In dictatorships, news providers and their families are exposed to ruthless reprisals, while in democracies news providers have to cope with the media's economic crises and conflicts of interest. While their situation is not always comparable, we should pay tribute to all those who resist pressure whether it is aggressively focused or diffuse."

Coinciding with the release of its 2013 Press Freedom Index, Reporters Without Borders is, for the first time, publishing an annual global indicator of worldwide media freedom. This new analytic tool measures the overall level of freedom of information in the world and the performance of the world's governments in their entirety as regards this key freedom.

In view of the emergence of new technologies and the interdependence of governments and peoples, the freedom to produce and circulate news and information needs to be evaluated at the planetary as well as national level. Today, in 2013, the media freedom indicator stands at 3395, a point of reference for the years to come.

The indicator can also be broken down by region and, by means of weighting based on the population of each region, can be used to produce a score from zero to 100 in which zero represents total respect for media freedom. This produces a score of 17.5 for Europe, 30.0 for the

Americas, 34.3 for Africa, 42.2 for Asia-Pacific and 45.3 for the former Soviet republics. Despite the Arab springs, the Middle East and North Africa region comes last with 48.5.

The high number of journalists and netizens killed in the course of their work in 2012 (the deadliest year ever registered by Reporters Without Borders in its annual roundup), naturally had a significant impact on the ranking of the countries where these murders took place, above all Somalia (175th, -11), Syria (176th, 0), Mexico (153rd, -4) and Pakistan (159th, -8).

From top to bottom

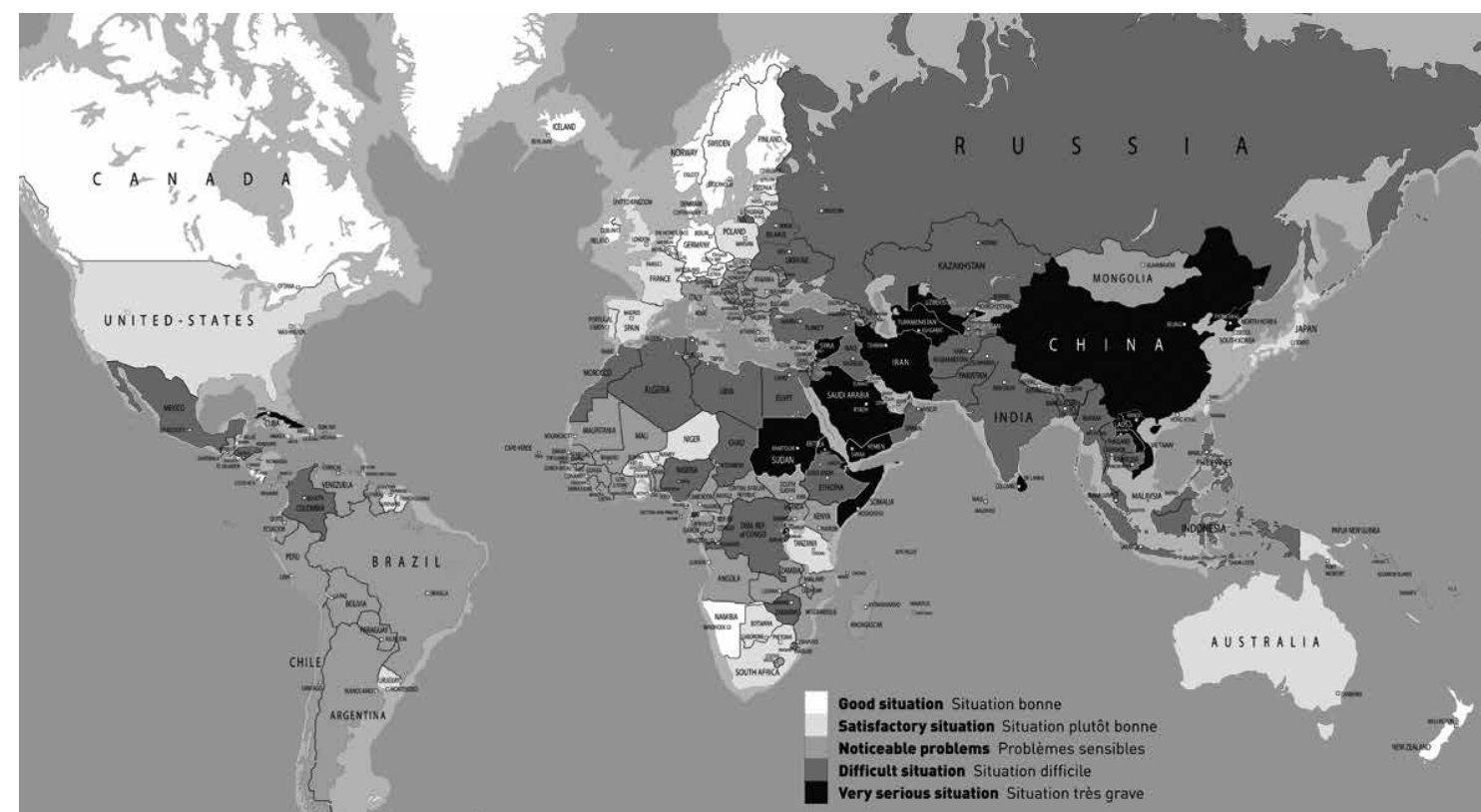
The Nordic countries have again demonstrated their ability to maintain an optimal environment for news providers. Finland (1er, 0), Netherlands (2nd, +1) and Norway (3rd, -2) have held on to the first three places. Canada (20th, -10) only just avoided dropping out of the top 20. Andorra (5th) and Liechtenstein (7th) have entered the index for the first time just behind the three leaders.

At the other end of the index, the same three countries as ever – Turkmenistan, North Korea and Eritrea – occupy the last three places in the index. Kim Jong-un's arrival at the head of the Hermit Kingdom has not in any way changed the regime's absolute control of news and information. Eritrea (179th, 0), which was recently shaken by a brief mutiny by soldiers at the information ministry, continues to be a vast open prison for its people and lets journalists die in detention. Despite its reformist discourse, the Turkmen regime has not yielded an inch of its totalitarian control of the media.

For the second year running, the bottom three countries are immediately preceded by Syria (176th, 0), where a deadly information war is being waged, and Somalia (175th, -11), which has had a deadly year for journalists. Iran (174th, +1), China (173rd, +1), Vietnam (unchanged at 172nd), Cuba (171st, -4), Sudan (170th, 0) and Yemen (169th, +2) complete the list of the 10 countries that respect media freedom least. Not content with imprisoning journalists and netizens, Iran also harasses the relatives of journalists, including the relatives of those who are abroad.

The big rises

Malawi (75th, +71) registered the biggest leap in the index, almost returning to the position it held before the excesses at the end of the Mutharika administration. Côte d'Ivoire (96th, +63), which is emerging from the post-electoral crisis between the supporters of Laurent Gbagbo and Alassane Ouattara, has also soared, attaining its best position since



2003. Burma (151st, +18) continued the ascent begun in last year's index. Previously, it had been in the bottom 15 every year since 2002 but now, thanks to the Burmese spring's unprecedented reforms, it has reached its best-ever position. Afghanistan (128th, +22) also registered a significant rise thanks to the fact that no journalists are in prison. It is nonetheless facing many challenges, especially with the withdrawal of foreign troops.

The big falls

Mali (99th, -74) registered the biggest fall in the index as a result of all the turmoil in 2012. The military coup in Bamako on 22 March and the north's takeover by armed Islamists and Tuareg separatists exposed the media in the north to censorship and violence. Tanzania (70th, -36) sank more than 30 places because, in the space of four months, a journalist was killed while covering a demonstration and another was murdered.

Buffeted by social and economic protests, the Sultanate of Oman (141st) sank 24 places, the biggest fall in the Middle East and North Africa in 2012. Some 50 netizens and bloggers were prosecuted on lèse majesté or cyber-crime charges in 2012. No fewer than 28 were convicted in December alone, in trials that trampled on defence rights.

Journalists in Israel (112th, -20) enjoy real freedom of expression despite the existence of military censorship but the country fell in the index because of the Israeli military's targeting of journalists in the Palestinian Territories.

In Asia, Japan (53rd, -31) has been affected by a lack of transparency and almost zero respect for access to information on subjects directly or indirectly related to Fukushima. This sharp fall should sound an alarm. Malaysia

(145th, -23) has fallen to its lowest-ever position because access to information is becoming more and more limited. The same situation prevails in Cambodia (143rd, -26), where authoritarianism and censorship are on the increase. Macedonia (116th, -22) has also fallen more than 20 places following the arbitrary withdrawal of media licences and deterioration in the environment for journalists.

Varied impact of major protest movements

Last year's index was marked by the Arab spring's major news developments and the heavy price paid by those covering the protest movements. A range of scenarios has been seen in 2012, including countries such as Tunisia, Egypt and Libya, where regime change has taken place, countries such as Syria and Bahrain where uprisings and the resulting repression are still ongoing, and countries such as Morocco, Algeria, Oman, Jordan and Saudi Arabia, where the authorities have used promises and compromise to defuse calls for political and/or social and economic change.

Some of the new governments spawned by these protests movements have turned on the journalists and netizens who covered these movements' demands and aspirations for more freedom. With legal voids, arbitrary appointments of state media chiefs, physical attacks, trials and a lack of transparency, Tunisia (138th, -4) and Egypt (158th, +8) have remained at a deplorable level in the index and have highlighted the stumbling blocks that Libya (131st, +23) should avoid in order to maintain its transition to a free press.

The deadliest country for journalists in 2012 was Syria (176th, 0), where journalists and netizens are the victims

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Dashed hopes after Spring

of an information war waged by both the Assad regime, which stops at nothing in order to crack down and impose a news blackout, and by opposition factions that are increasingly intolerant of dissent. In Bahrain (165th, +8) the repression let up slightly, while in Yemen (169th, +2) the prospects continue to be disturbing despite a change of government. Oman (141st, -24) fell sharply because of a wave of arrests of netizens.

Other countries hit by protests saw changes for the better and worse. Vietnam (172nd, 0) failed to recover the six places it lost in the previous index. The world's second biggest prison for netizens, it has remained in the bottom ten. Uganda (104th, +35) has recovered a more appropriate position although it has not gone back to where it was before cracking down on protests in 2011. Azerbaijan (156th, +6) and Belarus (157th, +11) both fell last year after using violence to suppress opposition demonstrations and this year they just moved back towards their appalling former positions. Chile (60th, +20) is beginning to recover after plummeting 33 places to 80th in last year's index.

Political instability puts journalists in the eye of the storm

Political instability often has a divisive effect on the media and makes it very difficult to produce independently-reported news and information. In such situations, threats and physical attacks on journalists and staff purges are common. Maldives (103rd, -30) fell sharply after the president's removal in an alleged coup, followed by threats and attacks on journalists regarded as his supporters. In Paraguay (91st, -11), the president's removal in a parliamentary "coup" on 22 June 2012 had a big impact on state-owned broadcasting, with a wave of arbitrary dismissals against a backdrop of unfair frequency allocation. Guinea-Bissau (92nd, -17) fell sharply because the army overthrew the government between the first and second rounds of a presidential election and imposed military censorship on the media. In Mali (99th, -74), a military coup fuelled tension, many journalists were physically attacked in the capital and the army now controls the state-owned media. This index does not reflect the January 2013 turmoil in the Central African Republic (65th, -3) but its impact on media freedom is already a source of extreme concern.

Regional models found wanting

In almost all parts of the world, influential countries that are regarded as regional models have fallen in the index.

Brazil (108th, -9), South America's economic engine, continued last year's fall because five journalists were killed in 2012 and because of persistent problems affecting media pluralism. In Asia, India (140th, -9) is at its lowest since 2002 because of increasing impunity for violence against journalists and because Internet censorship continues to grow. China (173rd, +1) shows no sign of improving. Its prisons still hold many journalists and netizens, while increasingly unpopular Internet censorship continues to be a major obstacle to access to information.

In Eastern Europe, Russia (148th, -6) has fallen again because, since Vladimir Putin's return to the presidency, repression has been stepped up in response to an unprecedented wave of opposition protests. The country also continues to be marked by the unacceptable failure to punish all those who have murdered or attacked journalists. The political importance of Turkey (154th, -6) has grown even more because of the armed conflict in neighbouring Syria but it has again fallen in the index. It is currently the world's biggest prison for journalists, especially those who express views critical of the authorities on the Kurdish issue. There is no comparison with South Africa (52nd, -10), where freedom of information is a reality. It still has a respectable ranking but it has been slipping steadily in the index and, for the first time, is no longer in the top 50. Investigative journalism is threatened by the Protection of State Information Bill.

Democracies that stall or go into reverse

The situation is unchanged for much of the European Union. Sixteen of its members are still in the top 30. But the European model is unravelling. The bad legislation seen in 2011 continued, especially in Italy (57th, +4), where defamation has yet to be decriminalized and state agencies make dangerous use of gag laws. Hungary (56th, -16) is still paying the price of its repressive legislative reforms, which had a major impact on the way journalists work. But Greece's dramatic fall (84th, -14) is even more disturbing. The social and professional environment for its journalists, who are exposed to public condemnation and violence from both extremist groups and the police, is disastrous.

Japan (53rd, -31) plummeted because of censorship of nuclear industry coverage and its failure to reform the 'kisha club' system. This is an alarming fall for a country that usually has a good ranking. Argentina (54th, -7) fell amid growing tension between the government and certain privately-owned media about a new law regulating the broadcast media.

Syria, Somalia, cause spike in journalists' deaths

Committee To Protect Journalists, New York: The number of journalists killed in the line of duty rose sharply in 2012, as the war in Syria, a record number of shootings in Somalia, continued violence in Pakistan, and a worrying increase in Brazilian murders contributed to a 42 percent increase in deaths from the previous year. Internet journalists were hit harder than ever, while the proportion of freelancers was again higher than the historical average, the Committee to Protect Journalists found in its yearly analysis.

With 67 journalists killed in direct relation to their work by mid-December, 2012 is on track to become one of the deadliest years since CPJ began keeping detailed records in 1992. The worst year on record for journalist killings was 2009, when 74 individuals were confirmed dead because of their work—nearly half of them slain in a massacre in Maguindanao province, Philippines. CPJ is investigating the deaths of 30 more journalists in 2012 to establish whether they were work-related.

Syria was by far the deadliest country in 2012, with 28 journalists killed in combat or targeted for murder by government or opposition forces. In addition, a journalist covering the Syrian conflict was killed just over the border in Lebanon. The number of fatalities related to the Syrian conflict approached the worst annual toll recorded during the war in Iraq, where 32 journalists were killed in both 2006 and 2007.

Paul Wood, a BBC Middle East correspondent who covered Iraq and numerous other wars, said the Syrian conflict "is the most difficult one we've done". Bashar al-Assad's government sought to cut off the flow of information by barring entry to international reporters, forcing Wood and many other international journalists to travel clandestinely into Syria to cover the conflict. "We've hidden in vegetable trucks, been chased by Syrian police — things happen when you try to report covertly."

With international journalists blocked and traditional domestic media under state control, citizen journalists picked up cameras and notepads to document the conflict — and at least 13 of them paid the ultimate price. One, Anas al-Tarsha, was only 17 years old. At least five of the citizen journalists worked for Damascus-based Shaam News Network, whose videos have been used extensively by international news organisations.

"This feels like the first YouTube war," Paul Wood said. "There's a guy with a machine gun and two guys next to him with camera phones." Local journalists, he said, have faced risks from all sides. "We've seen pro-regime journalists targeted by rebels — it is well known. But opposition journalists say the regime is intent on targeting them as journalists."

Among those murdered was Ali Abbas, head of domestic



Somalis carry the body of journalist Abdisatar Dahir Sabriye who was killed in an attack on a Mogadishu café.

Pic: AFP/Mohamed Abdiwahab

news for the state-run SANA news agency, whose shooting in Damascus was claimed by an Islamist group linked to Al-Qaeda. Mosaab al-Obdaallah, a reporter for the state-owned daily Tishreen, was shot point-blank in his home by Syrian security forces; colleagues and friends said he was targeted after the authorities learned he was sending news and photos about the conflict to pro-opposition websites.

Worldwide, the vast majority of victims — 94 percent—were local journalists covering events in their own countries, a proportion roughly in line with historical figures. Four international journalists were killed in 2012, all of them in Syria: American Marie Colvin, who wrote for the U.K.'s Sunday Times; French freelance photographer Rémi Ochlik; France 2 reporter Gilles Jacquier; and Japan Press journalist Mika Yamamoto.

Deaths attributed to combat represented a higher proportion of the toll than in past years. Combat-related crossfire was responsible for more than one-third of journalist fatalities worldwide in 2012, about twice the historical proportion. About half of the deaths in 2012 were targeted murders, less than the 69 percent average over the past two decades. The balance of the 2012 fatalities came during dangerous assignments, such as coverage of street protests.

Murder accounted for all 12 deaths in Somalia in 2012, the deadliest year on record for a country that has a long history of media killings. Not a single journalist murder has been prosecuted in Somalia over the past decade, CPJ research shows. Local journalists say this perfect record of impunity can be attributed to corrupt and weak institutions, a situation that encourages more killing. The first victim in 2012 was Hassan Osman Abdi, known as "Fantastic," director of the Shabelle Media Network. The slaying prompted then-Information Minister Abdulkadir Hussein to pledge a thorough investigation, but Shabelle

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Journalists' deaths spike in Syria, Somalia



Pakistani journalists protest the murder of Abdul Haq Baloch, a television reporter killed in Baluchistan. Pic: AFP/Banaras Khan

lost three more staff members to murders during the year.

Somalia's high death toll was due in part to a complicated and sensitive political transition and in part to Al-Shabaab militants, who were largely ousted from the capital, Mogadishu, in 2011, according to Mohamed Odowa, deputy director of the independent station Radio Kulmiye. Several of the station's journalists were seriously injured in attacks in 2012.

"Al-Shabaab was losing ground and it was forced from large areas, so the group wanted to send a message to the outside world that they were still in the capital," Mr Odowa told CPJ. Al-Shabaab claimed involvement in at least four of the killings in 2012, CPJ research shows.

Journalists who worked online made up more than one-third of the 2012 toll, a sharp rise from the one-fifth proportion in 2011 and the largest segment CPJ has documented for online journalists. In parallel, the proportion of print journalists who died in the line of duty fell to a record low of 31 percent. Over the past two decades, print journalists have accounted for more than half of those killed. Television and radio journalists constituted the balance of the 2012 toll.

Twenty-eight percent of journalists killed in 2012 were freelance, in line with 2011 but twice the percentage that freelancers have represented over time. Freelancer Mukarram Khan Aatif, a Pakistani who contributed to the private TV station Dunya News and to Deewa Radio, a Pashto-language service of the U.S. government-funded Voice of America, was shot outside a mosque in Shabqadar, about 15 miles north of Peshawar. Although the Taliban claimed responsibility for the January slaying, Aatif's in-depth coverage of conflict along the Pakistan-Afghan border had made him numerous enemies.

Pakistan, the deadliest place for journalists in 2010 and 2011, dropped two notches this year, but the number of fatalities held steady at seven. Four of those killings took place in Baluchistan, Pakistan's poorest region and a scene of protracted violence between separatists, anti-separatists,

various tribes and ethnic groups, Pakistani security forces and intelligence agencies, and groups aligned with the Taliban. Among the victims was Abdul Haq Baloch, a correspondent for ARY Television, who was shot in September as he was leaving the Khuzdar Press Club, where he served as secretary-general. The authorities have held no one accountable in the killing, which is the near-universal result in media murders in both the region and across the nation.

"The fact that journalists are targeted so frequently in Baluchistan has to do with the nationalist movement," said Malik Siraj Akbar, founder and editor of *The Baloch Hal* and a native of Baluchistan who now lives in the United States. "There is a revolt across the entire province of Baluchistan against the government. As one journalist gets killed in Khuzdar, and the government takes no action, it promotes a culture of impunity and emboldens the targeting of journalists elsewhere."

In Brazil, four journalists were killed in direct relation to their work, representing the country's highest annual toll in more than a decade and bringing the total number of fatalities over the past two years to seven. CPJ is investigating four other killings during that period to determine the motive. Brazil, historically one of the most dangerous places for the press, had seen few fatalities in the years 2005 through 2010, making the recent spike especially alarming to local journalists.

"In small cities, bloggers and writers for small newspapers and web portals who are calling out corruption are being targeted," said Gabriel Elizondo, a correspondent for Al-Jazeera in São Paulo. "The profile is usually the same: It's a small-town journalist, working for a small outlet, who gets gunned down."

Among the 2012 victims was Décio Sá, who wrote about politics for the newspaper *O Estado do Maranhão* and delved into political corruption on his widely read blog, *Blog do Décio*. The authorities in Maranhão have arrested several suspects, including the alleged gunman and mastermind, who are awaiting trial, according to news reports. Sá had been threatened repeatedly in connection with his coverage; roughly one-third of murder victims worldwide had reported receiving threats.

CPJ began documenting the deaths of media supporter workers such as translators, drivers, and fixers in 2003. The toll reached as high as 20 in 2007, when 12 media workers were killed in Iraq. The absence of media worker deaths in Syria, despite so many journalist fatalities, reflects conditions particular to the conflict and the changing nature of news. International reporters have not been able to work openly in the country and have been forced to rely on activists and smugglers, rather than traditional fixers, for assistance. At the same time, local individuals have stepped up to do their own front-line reporting, starting websites and uploading videos online.

Here are other trends and details that emerged in CPJ's analysis:

With two weeks remaining in the year, the 2012 death toll is already the third-highest CPJ has recorded. Along with the 74 deaths recorded in 2009, CPJ documented 70 deaths in 2007, a year marked by a high number of fatalities in Iraq.

War, politics, and human rights were the three most common beats among the 2012 victims.

About 35 percent of those killed in 2012 were camera operators or photographers, a proportion considerably higher than the 20 percent they have constituted in the death toll over the past two decades. About two-thirds of those killed in Syria carried a camera.

In Mexico, where criminal violence has posed extraordinary dangers to the press, one journalist—freelancer Adrián Silva Moreno—was confirmed killed for his work in 2012. However, CPJ is still examining the motive in five other murders during the year. The Mexican government's failure to carry out basic investigations in many cases makes it extremely difficult for CPJ to determine a motive.

One journalist was confirmed murdered for professional reasons in the Philippines, the lowest number since 2007. In Russia as well, one journalist was killed: Kazbek Gekkiyev, news anchor for an affiliate of state-owned broadcaster VGTRK, was shot in the North Caucasus city of Nalchik. Both countries rank poorly on CPJ's Impunity Index, which spotlights countries where journalists are murdered regularly and killers go free.

In addition to the 28 work-related deaths in Syria, CPJ has documented the cases of four other journalists whose deaths in Syria came in unclear circumstances. CPJ is also examining the reported deaths of a number of individuals described by local groups as citizen journalists. In these cases, few details beyond the identities are known as yet.

Outside Syria, fatalities declined in the Middle East and North Africa. Three work-related deaths were reported elsewhere in the region. In Bahrain, freelance videographer Ahmed Ismail Hassan was shot after filming a pro-reform protest. In Egypt, newspaper reporter Al-Hosseiny Abou Deif died after being struck by a rubber bullet fired by person whom witnesses identified as a Muslim Brotherhood supporter.

For the first time since 2003, CPJ did not confirm any work-related fatalities in Iraq. A total of 151 journalists have died in direct relation to their work in Iraq, most of them during the years 2003 through 2008. CPJ is still investigating the deaths of three Iraqi journalists in 2012 to determine whether their work could have played a role.

Tanzania recorded its first work-related fatality since CPJ began keeping detailed records in 1992. Daudi Mwangosi, a reporter with the private television station Channel Ten and chairman of a local press club, was killed during a confrontation with police over the arrest of another journalist.

CPJ documented the deaths of one imprisoned journalist and one reporter under arrest. Critical Iranian blogger Sattar Beheshti died four days after being arrested on allegations



Russian journalist Kazbek Gekkiyev killed in December. Pic: AP/VGTRK Russia

of "acting against national security." Fellow prisoners said he was tortured while being held at Evin Prison. In Colombia, freelance reporter Guillermo Quiroz Delgado died after being hospitalized for injuries suffered when he was arrested by police while covering a street protest.

Other countries where CPJ documented work-related fatalities were Nigeria, India, Ecuador, Thailand, Bangladesh, Indonesia, and Cambodia.

CPJ began compiling detailed records on all journalist deaths in 1992. CPJ staff members independently investigate and verify the circumstances behind each death. CPJ considers a case work-related only when its staff is reasonably certain that a journalist was killed in direct reprisal for his or her work; in combat-related crossfire; or while carrying out a dangerous assignment.

If the motives in a killing are unclear, but it is possible that a journalist died in relation to his or her work, CPJ classifies the case as "unconfirmed" and continues to investigate. CPJ's list does not include journalists who died of illness—such as New York Times correspondent Anthony Shadid, who suffered an apparent asthma attack while traveling covertly out of Syria—or were killed in car or plane accidents unless the crash was caused by hostile action. Other press organizations using different criteria cite higher numbers of deaths than CPJ.

CPJ's database of journalists killed for their work in 2012 includes capsule reports on each victim and a statistical analysis. CPJ also maintains a database of all journalists killed since 1992. A final list of journalists killed in 2012 will be released in early January.

This report was compiled by CPJ staff with additional reporting by CPJ Steiger Fellow Sumit Galhotra and CPJ East Africa Consultant Tom Rhodes.

<https://cpj.org/reports/2012/12/journalist-deaths-spike-in-2012-due-to-syria-somal.php>

Hate speech and free speech: drawing the line



James Spigelman

James Spigelman AC QC delivered the 2012 Human Rights Day Oration at the Australian Human Rights Commission's 25th Human Rights Award Ceremony on December 10.

I thank the Australian Human Rights Commission, and particularly its President, Gillian Triggs, for this opportunity to participate in the recognition of so many fine Australians for their contribution to the protection of the rights of their fellow Australians, and of others. I am invited to deliver an 'Oration', which may be

a somewhat grandiloquent title in view of the 10 minute time limit which I have been given.

Of course, length is not a criterion of quality or of impact. One of the most memorable of all speeches is Lincoln's Gettysburg Address – note the title, "address" not "oration". Lincoln spoke in a minor role at the Consecration of the National Cemetery at Gettysburg on 19 November 1863 – the sesquicentenary of which next year will be quite an event. The principal speaker for the occasion was Edward Everett, who delivered what was called 'the Oration'.

Lincoln spoke for just over two minutes and uttered about 267 words (depending on the version of the speech), some of which are amongst the most memorable words of the English language. Everett spoke for over two hours, and uttered 13,607 words, not one of which anyone remembers.

The Gettysburg Address is one of the most eloquent statements in support of the theme which the Commission has chosen for this year's Human Rights Day: "Inclusion and the right to participate in public life". Consistent with the Commission's theme, I wish to discuss the boundary between hate speech, a significant factor in social inclusion, and free speech, perhaps the most fundamental human right underpinning participation in public life.

Human rights discourse, which has always been comfortable with privileging a right over an interest, has never successfully dealt with situations in which rights conflict. This is a context bedevilled by a conflict of metaphors: from "rights as trumps" to "balancing". As Benjamin Cardozo warned us: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it".

"Balancing" is often a fraught process, particularly in the usual context where the conflicting values are simply incommensurable. As one United States Supreme Court

Justice put it, the process is often like asking "whether a particular line is longer than a particular rock is heavy". In the present context, the issue requires determination of how much weight is to be given to the right to freedom of speech. For many, albeit not all, that right is usually entitled to determinative weight when it conflicts with other rights, relevantly, those protected by anti-discrimination statutes.

This issue has been controversial in Australia in recent years, in the context of the racial vilification provision in section 18 C of the Racial Discrimination Act, 1975, which is proposed to be re-enacted as section 51 of the new omnibus legislation, the Human Rights and Anti-Discrimination Bill, 2012. The Bill was recently released for comment, an invitation I will take up in this address.

There may now have elapsed sufficient time for us to debate the issue dispassionately, and not on the basis of whether or not you like Andrew Bolt. The focus of that debate was not on the existence of a racial vilification provision, but on the breadth of the conduct to which section 18 C extends, namely, conduct "reasonably likely ... to offend, insult, humiliate or intimidate another person". The key criticism was directed to the fact that the section made speech which merely "offends" unlawful. A similar, but less powerful objection, can be made to the reference to "insult". The critique did not, generally, extend to the words "humiliate or intimidate".

These matters have long concerned me, but my thoughts have crystallized after reading a book, published earlier this year, which contains an insightful treatment of the principles involved in regulating hate speech. It was written by Jeremy Waldron, one of the foremost jurisprudential scholars of our time, with joint appointments to Oxford University and New York University Law School. I have drawn on his writing over several decades.

His recent book, *The Harm in Hate Speech*, is primarily directed to an American audience. The strength of US First Amendment jurisprudence is such that hate speech is not regulated at all. In order to explain why he believes the scope of the First Amendment can properly permit regulation of hate speech, Professor Waldron has sought to identify with precision the rights that the regulation of hate speech seeks to protect. Essentially, he approaches this from two perspectives: first, in terms of society's interest and, secondly, in terms of individual rights.

From the perspective of society, Waldron emphasizes inclusiveness as a public good, providing an assurance and sense of security to all members of the society that they can live their lives without facing hostility, violence, discrimination or exclusion. This assurance affirms each person's status as "a member of society in good standing".

From the other perspective, of those who are meant to benefit from this assurance, the fundamental human right that is affirmed is the right to dignity. Hate speech undermines the sense of assurance and denies the dignity of individuals.

In his 2009 Berkeley Tanner Lectures, also published this year, Waldron considered the philosophical traditions on the concept of human dignity. He sought to reconcile the treatment of human dignity as the conceptual basis for human rights and as providing the content of some recognised rights. These lectures provide a philosophical underpinning for the focus on human dignity in the hate speech debate. I believe this focus is correct.

The section of Professor Waldron's hate speech book, which is of particular significance for our debate, is the chapter he devotes to establishing the proposition that protection of dignity does NOT require protection from being offended. As he puts it:

Laws restricting hate speech should aim to protect people's dignity against assault. I am referring to their status as anyone's equal in the community they inhabit, to their entitlement to basic justice, and to the fundamentals of their reputation. Dignity in that sense may need protection against attack, particularly against group-directed attacks ... It understands dignity as a status sustained by law in society in the form of a public good.

However, I do not believe that it should be the aim of these laws to prevent people from being offended. Protecting people's feelings against offence is not an appropriate objective for the law.

...

To protect people from offence or from being offended is to protect them from a certain sort of effect on their feelings. And that is different from protecting their dignity and the assurance of their decent treatment in society.

I agree with Professor Waldron. His detailed analysis supports the proposition that declaring 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.

I am not aware of any international human rights instrument, or national anti-discrimination statute in another liberal democracy, that extends to conduct which is merely offensive. I have not conducted a detailed review of the international position in this respect. However, so far as I have been able to determine, we would be pretty much on our own in declaring conduct which does no more than offend, to be unlawful. In a context where human rights protection draws on a global jurisprudence, this should give us pause when we re-enact s18C and before we extend such protection to other contexts.

Section 19(2)(b) of the proposed Human Rights and Anti-Discrimination Bill 2012, introduces "offending" into the definition of discrimination for all purposes, not just for racial vilification. None of the other pre-existing Commonwealth Acts – covering sex, disability and age

discrimination – extends the concept of discrimination to conduct which only offends.

The new s19 defines, for the first time, discrimination by unfavourable treatment to include "conduct that offends, insults or intimidates" another person. As has always been the case with s 18C, the relevant conduct must occur "because the other person has a particular protected attribute". Significantly, unlike existing s 18C (or its replacement by the new s 51), there is no element of objectivity, as presently found in the words "reasonably likely to offend". It appears to me the new Bill contains a subjective test of being offended.

There are 18 separate "protected attributes" set out in section 17 of the draft Bill, seven of which apply only in the employment context. These are wide ranging and, in a number of respects, novel. One such attribute is "race". This is not just redundant. It extends the protection of proposed s 51 because of the absence of an objective element.

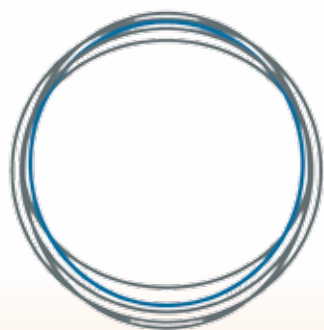
The inclusion of "religion" as a "protected attribute" in the workplace, appears to me, in effect, to make blasphemy unlawful at work, but not elsewhere. The controversial Danish cartoons could be published, but not taken to work. Similar anomalies could arise with other workplace protected attributes, eg. "political opinion", "social origin", "nationality".

Further, each of the four existing Commonwealth anti-discrimination Acts proscribe publication of an advertisement or notice which indicates an intention to engage in discriminatory conduct. Section 53 of the new omnibus Bill goes further into freedom of speech territory, by extending this proscription beyond advertisements to any publication.

The new Bill proposes a significant redrawing of the line between permissible and unlawful speech. This is so, notwithstanding the ability to establish that relevant conduct falls within a statutory exception. A freedom that is contingent on proving, after the event, that it was exercised reasonably or on some other exculpatory basis, is a much reduced freedom. Further, as is well known, the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception.

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.

None of Australia's international treaty obligations require us to protect any person or group from being offended. We are, however, obliged to protect freedom of speech. We should take care not to put ourselves in a position where others could reasonably assert that we are in breach of our international treaty obligations to protect freedom of speech.



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