ACMA Citizen conversations series forum: Decency

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Introduction

Thanks very much for inviting me today.

I have only recently taken up again the role as head of the Commission's policy unit dealing with civil and political rights issues – a role which I last held before the World Wide Web existed – after many years working on discrimination issues, disability discrimination issues in particular and more recently working on the Commission's contribution to the project for consolidation of Federal discrimination law.

Interaction between ACMA codes and discrimination law

I mention consolidation because I was asked to discuss today how ACMA's codes interact with more general provisions on human rights, discrimination and vilification.

This area, like much of the rest of discrimination law, is full of complexities and inconsistencies, both within Federal law and between State/Territory laws and Federal law.

This makes particularly complex the interaction between codes certified by a national body such as ACMA, and other relevant Federal and State/Territory laws.

The Human Rights and Anti Discrimination Bill contained, or contains, provisions which would allow certification of compliance codes. These could be codes developed by industry bodies, or by other regulatory or expert bodies.

This sort of co-regulatory mechanism is quite common – for example in the telecommunications area – but it would be something new in Australian discrimination law, despite having been recommended by the Productivity Commission in its review of the DDA back in 2004.

Certification would be by legislative instrument. This means that the process would be subject to the consultation and quality control provisions of the Legislative Instruments Act. I am not sure that these requirements apply currently to ACMA registration of codes in formal terms, although as far as I can see they are already largely satisfied in substance by ACMA's processes, in particular regarding consultation.

Certification by legislative instrument would mean that compliance with codes registered by ACMA could be certified as satisfying, not only compliance with Federal discrimination laws, but also compliance with relevant State and Territory discrimination laws. This was a feature of the exposure draft Bill that State governments were not all that keen on - but business bodies concerned about regulatory burden and duplication very definitely were.

Certification by legislative instrument would also make certification subject to scrutiny by the Parliamentary Joint Committee on Human Rights. I'll talk more about the implications of that in a minute.

Vilification

More specifically on vilification, the relevant ACMA code provision states that a licensee must not broadcast a program which in all the circumstances

> is likely to incite hatred against, or serious contempt for, or severe ridicule of, any person or group of persons because of age, ethnicity, nationality, race, gender, sexual preference, religion, transgender status or disability

This provision uses a model of incitement which is similar, but not identical, to the model used in all State discrimination laws and in the ACT. It is a rather different model of vilification to that in section 18C of the Racial Discrimination Act.

It applies to a wider range of grounds than those covered in any of the current discrimination laws.

Grounds covered

All jurisdictions (except the NT) cover *racial* vilification.

Beyond that, at the Federal level:

- the Sex, Disability and Age Discrimination Acts do not prohibit vilification as such.
- The DDA (as well as the RDA) covers incitement or promotion of doing an unlawful act rather than inciting hatred, contempt or ridicule.
- The ADA and SDA do not include incitement in those terms. They do, however, make it unlawful to cause or instruct an unlawful act. So there is liability if, but only if, the act incited actually occurs and causation can be demonstrated between what was said and what happened next.

At the State level:

- Victoria, Queensland and Tasmania each cover *religious* vilification.
- NSW, Queensland, Tasmania and the ACT each cover vilification on grounds of *sexual orientation or gender identity*.
- NSW and the ACT cover vilification on grounds of *HIV/AIDS status*.
- Tasmania alone covers disability vilification more generally.

Confusing? There's more.

Models

States

The racial vilification model used in NSW states:

> It is unlawful for a person, by a public act, to *incite* hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

In the consolidation consultations the NSW government recommended that Federal discrimination law adopt this model – but did not note that the NSW legislation is itself under review.

The main difference between the NSW model and the ACMA code model is that the ACMA code model refers to broadcasting a program which "is likely to incite"; while the NSW Anti Discrimination Act model makes it unlawful more simply "to incite".

It seems likely that even in a civil provision this involves a requirement to prove some level of intention to incite, as well as that the action concerned is likely to or at least capable of giving effect to that intention. In the context of criminal provisions such as those in NSW, this requirement of intent rather than just likely consequence seems, appropriately, more certain.

ACMA decisions on complaints raising vilification issues seem to me to reflect similarly a view that an "incitement" model of vilification sets quite a high bar for successful complaints.

RDA model

The main difference between the vilification model in RDA s18C and that in the State/Territory discrimination law model is that rather than referring to incitement, the RDA refers to an act

- which is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate and

- which is done because of the race, colour or national or ethnic origin of the other person or group of people

This, however, is subject to a wide range of exceptions in RDA 18D for anything said or done reasonably and in good faith.

Clearly the intent of these exceptions is to protect freedom of speech, in a different way but with similar intent to the use of the narrower "incitement" model in the ACMA code provision and in State and Territory laws.

Any State provision which prohibits actions protected by these exceptions would be highly likely to be found inoperative if challenged by reference to s.109 of the Commonwealth Constitution.

There are a range of views of course on whether the incitement model or that in RDA s.18C is more appropriate. The Commission thought it best in the consolidation process to leave these issues for another day and I will take the same approach here.

Discrimination law: general provisions

Outside of racial vilification, I cannot recall any instances of complaints to the Commission seeking to use existing federal anti-discrimination provisions to respond to vilification issues.

The Human Rights and Anti Discrimination Bill has been widely interpreted as extending RDA s.18C to all grounds of unlawful discrimination, but without the exceptions provided in RDA s.18D.

The Attorney-General's Department has indicated, in my view correctly, that this was neither the intent nor the effect of the exposure draft Bill.

In any event, the Government has made clear that a re-introduced Bill would not include clause 19(b) regarding conduct which offends or insults, which was the clause interpreted as having this effect.

The Commission has not argued for extension of vilification provisions to cover existing grounds of Federal discrimination law such as sex or disability, let alone proposed additional areas of coverage such as religion or political opinion.

In these areas, apart from such State and Territory laws as there are, codes registered with ACMA are likely to remain the only games in town.

Human rights protections

While the Parliament has enacted enforceable protections against discrimination on a range of grounds, it has rejected repeated calls, including from the Commission, to provide enforceable legal protections for human rights more broadly, including rights such as freedom of religion or belief and freedom of expression.

The Commission does however have a range of functions which relate to the broader spectrum of human rights.

As the Commission President said at our most recent appearance at Senate Estimates, much of our work on human rights beyond discrimination issues is less visible and accessible than it should be. Among other actions we will be undertaking a more substantial program of face to face and online discussions across the range of human rights issues. We are also rebuilding our website to be more interactive and useful.

There are already in place some new links to important materials on the right to freedom of expression, which I will come back to.

Human rights scrutiny processes

As I have said, we did not see from the National Human Rights Consultation an enforceable Charter of Rights which would enhance the role of the judicial branch in protecting the full range of human rights.

We did, however, see significant enhancement of the human rights roles of the executive and legislative branches

- through the institution of requirements for all legislation to be accompanied by Statements of Compatibility with human rights, and

- the establishment of the Parliamentary Joint Committee on Human Rights .

The Commission was closely involved in these initiatives.

The results of the Statement of Compatibility process, while inevitably uneven, have been very encouraging.

While it is still early days, the performance of the Parliamentary Joint Committee on Human Rights has without question exceeded any reasonable expectations:

- in the non-partisan approach the Committee has taken even in dealing with highly partisan issues (such as the recent media reform package);
- in the quality of its work;
- and in its pace and scope, including (what I would have previously thought impossible) keeping up with delegated as well as primary legislation.

If and to the extent that ACMA's functions involve, or come to involve, making or authorising legislative instruments, they will fall within the scrutiny functions of the Parliamentary Joint Committee and the requirement to develop Statements of Compatibility.

Whether or not an activity is within the formal legislative requirements for human rights scrutiny, I would strongly encourage ACMA and stakeholders to act as if it is. In much the same way as the Office of Best Practice Regulation has emphasised that self regulatory and co-regulatory arrangements can have regulatory impacts they can also have human rights impacts.

ACMA codes and decisions on decency

Those of you as old as me or even older will recall Peter Coleman's classic civil liberties book from the 1960s "Obscenity, blasphemy, sedition" which catalogues Australia's history of restrictions on freedom of speech.

The UN Human Rights Committee's *General Comment 34* from 2011 on the right to freedom of opinion, expression, and information under the International Covenant on Civil and Political Rights does not perhaps have such a catchy title.

But it is available online and (I hope) now reasonably easy to find on the Commission website in the Human Rights Scrutiny section, including via the *Human Rights Scrutiny: Right by Right* pages.

As some of you would know the Human Rights Committee is the independent monitoring body established by the Covenant on Civil and Political Rights. Among other things it receives and publishes views on individual complaints of alleged breaches of the Covenant, and also publishes General Comments on particular rights based on its experience in considering these complaints.

I would strongly recommend express reference to this General Comment both in ACMA decisions and in consideration of registration of Codes. There are helpful comments among other things on how specifically any provision restricting freedom of speech needs to tell people what is restricted. There are also comments on specific areas.

On sedition, the Human Rights Committee makes clear that ACMA has been correct in regarding even grossly offensive comments on public figures (throwing the Prime

Minister into the sea in a chaff bag for example) as protected speech: so long as there is no real risk of this constituting incitement to actually do it.

On blasphemy, it may be surprising to some to see the very clear statement from the Committee that blasphemy laws are simply inconsistent with the ICCPR. The Commission has taken the same view.

On obscenity ACMA has I think quite correctly emphasised the importance of looking to generally accepted community standards in an open society, rather than what particular individuals might find indecent.

The difficulty which needs addressing here, though, is how far it is possible to identify community standards on decency with sufficient precision to satisfy the requirement that restrictions on rights under ICCPR Article 19 be "provided by law"

There is also one major gap in current codes.

In one of the several matters involving Mr Kyle Sandilands, ACMA quite rightly found, and the broadcaster concerned conceded, that it was a breach of community standards of decency to broadcast a clearly unwilling young person under sixteen being questioned about her sexual history.

ACMA also correctly pointed to instances where discussion of the same issues with willing participants, appropriately informed of and supported in the exercise of their rights, might be an entirely legitimate part of beneficial discussion of serious issues.

What neither relevant Code provisions nor the decision concerned address, however, is how this fits with Australia's human rights obligations. To take the most obvious consequences of this, neither the Code provision nor decision expressly addresses the rights of children, under both the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, to special protection; or the fact that under the treaties status as a child does not end at 16 but (for almost all purposes) at 18.

These are the sorts of questions which the Parliamentary Joint Committee on Human Rights would be and may be asking.

I don't expect that more explicit reference to the human rights instruments will radically change the nature of ACMA's decisions on complaints or on registration of codes. I do think, though, that it would be helpful in providing a clearer set of reference points for those decisions.

Thanks.