Monis v The Queen; A-G South Australia v City of Adelaide – Consequences for Freedom of Expression

Katharine Gelber

The last year has been an unusually high profile one for freedom of speech. In addition to the Monis and City of Adelaide judgments, free speech was in the news, and formed a somewhat unexpected focus in the September 2013 federal election campaign and afterwards. Several issues combined to generate that focus. The first was the Finkelstein inquiry into the Australian media, launched by the previous federal government in 2011 in response to international media coverage of illegal phone hacking by journalists in the United Kingdom, the report of which was released by the government in March 2012. The report recommended inter alia the formation of a new, publicly-funded regulatory body that would set journalistic standards in consultation with industry, and provide a complaints mechanism for breaches of those standards, which could include requiring a media outlet to publish an apology, correction, retraction or reply. Media organisations in Australia responded hostilely to this suggestion, describing the proposal as a ‘super-regulator with far-reaching powers’, and arguing the ‘preposterous’ proposal threatened media freedom and freedom of speech. The proposal was not carried forward by the government.

The second was the seriously ill-advised proposal also by the previous federal government, in the context of reforming and harmonising anti-discrimination laws, to revise the definition of discrimination in federal law to include ‘conduct that offends, insults or intimidates’ on any of the

1 Katharine Gelber is a Professor and ARC Future Fellow (2012-2015) in the School of Political Science and International Studies at the University of Queensland.
specific grounds, one of which was political opinion. This provision was widely opposed in submissions relating to the draft bill, and in public commentary including by former NSW Chief Justice Jim Spigelman.\(^7\) Even when the government tried to sever this provision and proceed with other elements of the Bill, public disquiet remained.\(^8\)

The then Opposition’s criticism of this proposal dovetailed neatly with the criticism they had been making of federal anti-vilification laws, in the two years since the judgment in the Bolt case.\(^9\) It also melded with their publicly stated commitment to amend or repeal those laws, a commitment they now appear to be exploring as the newly elected government. The phrase the then Opposition held to be so disagreeable in the federal law is the definition of vilification as conduct likely to ‘offend, insult, humiliate or intimidate’\(^10\) – which very closely mirrored the ill-fated proposal to extend anti-discrimination laws. However, the case law in relation to racial vilification has made it clear that these terms apply only to conduct with ‘profound and serious effects, not to be likened to mere slights’.\(^11\) Nevertheless, Senator Brandis made it clear publicly that he regarded the federal racial vilification laws as in the same category as other undertakings by the previous federal government, and that taken together these represented a serious assault on freedom of speech, understood in the libertarian tradition.\(^12\)

**High Court judgments**

In this charged atmosphere and in comparison, the two free speech decisions in the High Court’s 2013 term received relatively little public commentary or fanfare, which is perhaps surprising given their extensive and far-reaching implications for the protection of freedom of speech. There was an excellent public commentary in *The Australian* newspaper on the gender split among the justices on...
the question of how to construe offensiveness, and of course there were articles detailing the outcomes of the cases. But the cases received no significant commentary from politicians on the ground that they upheld significant inroads into freedom of speech, or that in the case of Monis, the term ‘offensive’ was included in a criminal provision that impacted on freedom of speech.

City of Adelaide

The City of Adelaide case concerned two members of the ‘Street Church’, Caleb and Samuel Corneloup, who had violated a City of Adelaide by-law that prohibits ‘haranguing, canvassing or preaching’, conducting a survey, or distributing printed matter on a road without a permit. There are exceptions for speakers’ corner and activities conducted during an election or referendum. The case turned both on the question of whether it was within the Council’s law-making power to enact the by-law, and whether the provisions were consistent with the implied freedom of political communication. The High Court found that the by-law was within the power of the Council to enact, that the by-law (in the terms elucidated in Coleman) was a reasonable and proportionate exercise of power in that it prevented obstruction to the use of roads, and that the provisions were reasonably adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (namely, to prevent obstruction of roads). This was especially the case given the express exceptions for elections and referendums.

The City of Adelaide by-laws that were at issue in this case are not at all unusual in Australia. In 2004 I conducted a national audit of 105 pedestrian malls – areas previously designated as roads, but closed to through-traffic in favour of pedestrian access. The regulations governing these pedestrian malls were not always as easily obtainable as those possessed by the City of Adelaide. Indeed, some

17 The High Court also found, relatedly, that the by-law did not require a ‘licence’ (which has a confined meaning), and that a missing signature was overcome by electronic production of the certificate and thus did not invalidate the relevant provision (Attorney-General (SA) v Corporation of the City of Adelaide & Ors (2013) 295 ALR 197 at 204-5, 226-35, 251).
outdoor pedestrian malls are regulated by private sector organisations (such as real estate agencies) that do not reveal the basis for their regulatory activities at all.

The study showed that typical limitations on political speech in pedestrian malls include prohibitions of, or imposition of restrictions and permit requirements on: the distribution of pamphlets or ‘any written matter whatsoever’; setting up temporary stalls; public speaking (variously defined as haranguing, preaching, declaiming, delivering an address, or addressing a gathering of people); election campaigning; and, in the most severe cases ‘any activities’ at all that might convey a message to a bystander or inconvenience another person within the mall. Between 37 and 53 malls regulated pamphlet distribution, the use of temporary stalls and public speaking. A further 20 regulated any activity at all that could be considered political speech. Between 54% and 69.5% of malls regulated (usually requiring a permit for), or prohibited, political speech freedoms as a normal part of their regulatory frameworks.

Requests for permits typically required the lodging of a written request in advance (up to 7 days), often accompanied by a fee. Some Councils required the applicant to secure public liability insurance before they would grant a permit, which is typically prohibitively expensive. Additionally, Councils frequently had powers to refuse permits, often on unspecified grounds. For example Brisbane City Council could refuse an application in its discretion. 20 Councils were often not required to provide reasons for their decisions to applicants or the general public, nor were they often required to conform to publicly available guidelines or standards in making their determinations. 21

When I contacted Councils to enquire further into their regulatory approach to political speech activities, I received interesting replies. These included:

- we don’t permit political activities because ‘they create conflict and we can’t allow that in the mall’,
- ‘we don’t want people doing those kinds of things, that’s going too far for us’,
- in relation to requests by politicians to speak before a State election, that these kinds of requests for public speaking are ‘usually declined’; and
- that the Council ‘discourage[s] political use of the mall’.

20 Ch 19: Queen Street Mall Ordinances, ss 11, 13, 15.
21 eg in Palmerston City Council (NT), Tennant Creek Town Council (NT), Brisbane City Council, Ipswich City Council, Ballarat City Council (Vic) and Nillumbik Shire Council (Vic).
Other Councils saw their powers to restrict activities as being even wider than these quite broadly applicable comments suggest. Hawkesbury City Council required a permit to be obtained at least 14 days in advance for ‘any activity’ at all, stated that activities needed to be ‘acceptable to current community standards’ and allowed that the Council could refuse applications it considered ‘unsuitable’. Hobart City Council prohibited a person from taking ‘part in or attend[ing] a meeting to discuss, protest or speak on any political matters or issues’, and Great Shepparton City Council’s local law required permits for ‘all activities of a religious, charitable, education, political, social and recreational nature’.

There were some notable exceptions to this trend, with some Councils emphasising to me that people had a right to freedom of speech, but these tended to be the exception. When I called an agency in relation to one pedestrian area, I was admonished by the person I spoke with on the phone. When I asked what regulations they had governing political activities in that area, she replied, ‘we don’t have any regulations like that; we have free speech in this country you know’. Some Councils also had exemptions for elections and referenda – as occurred in the City of Adelaide case – but at the time of the study this was the case in only about 10% of the by-laws studied.

The research concluded that local governments tend to be reluctant to confront the scope of their own regulatory capacities in the context of the protection of freedom of speech, and that when they are forced to by public events (such as protests), they tend to choose to close down debate rather than to facilitate it. Often, this happens in the context of a desire by local governments to facilitate economic interchange above other forms of social interaction or community self-governance.

It is to be noted that in the City of Adelaide judgment an important factor rendering the provisions reasonably appropriate and adapted to the purpose of preventing obstruction to roads was the inclusion of express exceptions in the by-law for conduct authorised by candidates in elections and referendums. This is not the first time the High Court has found an exception in such restrictions to be important. In 1999, the same Patrick Coleman of Coleman v Power22 one Sunday morning during a normal market day in the pedestrian mall in the centre of Townsville held up a flag, stood on the concrete rim of a fountain, and loudly discussed a number of issues including bills of rights, mining, Indigenous land rights and free speech.23 He was convicted of breaching the Townsville City Council’s Local Law No. 39 (Pedestrian Malls, para 8(2)), which required that a person taking ‘part in any

public demonstration or public address ... in or upon a pedestrian mall’ requires a permit in writing from the Council to do so. His appeal against this conviction to the Supreme Court, on the ground that the by-law infringed the implied freedom of political communication, failed. When Coleman applied to the High Court for special leave to appeal this decision, his application was denied. The primary reason given by Gaudron J for this decision was that the by-law contained an exception that allowed political speech to occur without a permit if the speaker set up a ‘booth’.

The *City of Adelaide* case attracted some attention from the States precisely because the question of local governments’ law-making power (derived from local government Acts enacted by State governments) was at issue. As it turned out, they had little cause for concern. As French CJ put it, the majority of the Court regarded the impugned provisions as not ‘gravely oppressive’, or even ‘fundamentally directed at banning most forms of communication in most public places’. This was because the regulation of roads was seen to be a necessary end of government, and the regulation of the behaviour in question was important to enable people to go about their business unimpeded. The exceptions for elections and referendums were important in reaching the conclusion that the provisions were not excessive. Only Heydon J in dissent found the provisions to be invalid because they were too ‘general, ambiguous, and uncertain’ to confer the relevant power, and were overburdensome on common law rights of freedom of speech.

**Monis**

The *Monis* case concerned two men who had written letters to parents and relatives of soldiers killed in Afghanistan and an Austrade official killed in Indonesia. The letters were critical of Australia’s military presence and used what was described as ‘intemperate and extravagant language’ to criticise Australia’s presence and to insult the dead soldiers. The letters accused the dead soldiers of being murderers of innocent civilians and children, and compared them to Hitler.

This case turned on s471.12 of the *Criminal Code*, which states that is in an offence to use a ‘postal or similar service’ ... ‘in a way ... that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive’. Although the term ‘harassing’ had been considered in the District Court, in the Court of Criminal Appeal and in the High Court the appeal

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24 Coleman v Sellars (2000) 181 ALR 120.
27 Attorney-General (SA) v Corporation of the City of Adelaide & Ors (2013) 295 ALR 197 at 239-43.
rested only on challenges to the use of the term ‘offensive’ in the relevant provision. The focus of decision-making was not whether the material in question was offensive, but rather whether it was within statutory power to create an offence under the Criminal Code for using a postal service in a way that is ‘offensive’.²⁹ The judgment – unusually – was split 3/3, which meant that the Court of Appeal’s decision that the section was valid was affirmed. French CJ, Hayne and Heydon JJ found that the provision impermissibly burdened the implied freedom and was invalid.³⁰ Crennan, Kiefel and Bell JJ read the provision to apply narrowly, and concluded that it was a permissible restriction. Following the High Court’s judgment, Mr Monis pleaded guilty to 12 counts of breaching the Code.³¹

What is interesting about the Monis decision is how it speaks (albeit unintentionally and indirectly) to broader concerns about how freedom of speech is best to be understood, and therefore its limits calibrated, in society. In Monis, the three justices who concluded that the restriction on using the postal service in a way that is harassing or offensive was valid, were engaged in quite a thoughtful construction of two things: first, what speech can do – a matter long recognised in the literature on freedom of speech, but rarely acknowledged in broader public debate; and secondly, the particular force of this expression in the domain of the private home, and the intrusion that this represented.

The first idea – that speech can do things – reaches beyond the traditional libertarian view that speech is simply an expression of one’s opinion. Speech act theory (derived from J. L. Austin in the 1950s) tells us this clearly. When someone knocks on your office door and you say, ‘come in’, you are not only expressing an opinion, you are giving them permission to come in. Should they enter without that permission, you would consider them to have ignored or overridden rules of social conduct. So the act of knocking, and the act of saying ‘come in’, or alternatively saying nothing or saying ‘go away’ are acts that do certain things. In a similar way, receiving a letter likening a deceased loved one with Hitler, and insulting them in other ways was recognised as not just expressing an opinion about those soldiers as individuals, or even just expressing an opinion about the war in Afghanistan. The judgments of Crennan, Kiefel and Bell JJ in particular recognised that the letters sought to do more than express an opinion – which could have been done in a range of different ways. Rather, it sought to insult the dignity of the deceased and their families. In this way, the judgment in Monis came to terms with the force and meaning of speech as more than just an expression of opinion, but as a speech-act that is capable of harm.

²⁹ Criminal Code, s471.12.
³¹ Editor, The Australian, 6 August 2013, p. 8.
However, the type of harm considered to be validly regulable in this instance is to be distinguished from the type of harm that was held to be a requirement for the validity of an offence against public order in *Coleman v Power*. In that case, it was held that public debate requires the acceptance of ‘robust and unpleasant forms of political expression and is rather dismissive of the value of civility’. It was decided that insult as a public order offense is only regulable in the context of the implied freedom when ‘it is an element of the offence that a violent response is either an intended or reasonably likely result’. So in *Coleman*, the harm required for the offence to be valid was an exogenous harm, an external harm that arose directly from and was a consequence of the expression being used – a violent response. The harm was consequential, related to and arising from, but also distinguished from the expression itself. By contrast, in *Monis* the issue was the harm caused by the speech itself. No exogenous harm, such as the intended or likely creation of a violent response, needed to be identified. On this point, *Monis* is to be distinguished from *Coleman*.

Relatedly, *Monis* acknowledged that the family home is an environment within which one ought normally to possess greater freedom from intrusion than in public life. Crennan, Kiefel and Bell JJ stated that the fact that the communication was ‘unsolicited’ was a relevant consideration, and that the provision in question recognises ‘a citizen’s desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive’. They cited First Amendment jurisprudence that regards the home as a domain in which one ought to be free from gratuitous offence, that one ought not to be ‘captive’ inside one’s home to unwanted intrusions. This is, in the language of the First Amendment, the ‘captive audience’ doctrine; the idea that an audience cannot avoid being subjected to an expression, as they would in an open public space or forum where they could simply choose not to listen or walk away. Inside our own homes, we are unable to avoid being subjected to the content of letters that are posted to us, so the corollary is that this domain is deserving of greater protection (and is more likely to render speech-based conduct ‘harmful’) than would have been the case had the recipients been in a public arena.

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36 Ibid.
In analysing *Coleman* in 2006, Adrienne Stone and Simon Evans argued that the approach of the majority showed ‘some affinity with the law associated with the First Amendment’, in so far as it expressed a commitment ‘to protecting unpleasant, caustic, insulting and vulgar forms of speech’.\(^{38}\) It may also have had some affinity with the First Amendment ‘clear and present danger’ doctrine in regarding offensive and insulting speech as only regulable if, and to the extent to which, it led to an exogenous, immediate and causally related breach of the peace. However, Stone and Evans were careful not to overstate their case, noting that just because incivility in *Coleman* had been regarded as not an appropriate focus for regulation, this did not mean other types of uncivil (or offensive) speech might also be found to be not validly regulable. This, indeed, was the case in *Monis*, with French CJ stating that ‘many statutes’ use ‘the word “offensive” as an element of the relevant offence’, including police and summary offences Acts and that therefore ‘[n]o single definition of “offensive” was or is apt for every different form of crime’.\(^{39}\) In *Monis*, in spite of Mr Droudis’ submission referring to *Coleman*,\(^ {40}\) a particular type of offensiveness was found to be regulable, although the 3/3 split on the judgment does not leave us with a great deal of confidence on this issue regarding potential future cases.

Additionally, shortly after the 1992 judgments that founded the doctrine of an implied freedom of communication was handed down, Gerald Rosenberg and John Williams argued that those judgments had also shown an affinity with the First Amendment. They argued that the judgments had applied a free market of ideas understanding of the relationship between democracy and free speech, which ‘mistakenly understood political communication as operating in an unregulated free market’.\(^ {41}\) Instead, they undertook empirical analysis of the relationship between the impugned legislation in *Australian Capital Television*, finding that it had enhanced democratic practice and participation during the elections held while the legislation was in operation, by encouraging grassroots campaigning and giving minor parties a greater voice.

A further example of the potential influence of First Amendment ideas was *APLA*,\(^ {42}\) in which the validity of a NSW regulation preventing advertising by lawyers for personal injury services was upheld, on the basis that the communication in question was commercial, rather than political – a

\(^{38}\) Ibid, at 686.
\(^{42}\) *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.
distinction common to First Amendment jurisprudence. Indeed, in APLA Callinan J declared that ‘there must, in the practical world, be some limits’ on what may be construed as a government or political matter, otherwise the concept ‘would be absolute and unbounded, as wide as, or even wider in operation than, the First Amendment’.

Concerns about the influence of First Amendment jurisprudence should not be overstated. Since 1992 here has been a lot of water under the bridge, and the development of the implied freedom of political communication has shown little evidence of a close affinity with most aspects of First Amendment jurisprudence. It is far more narrow in its application to political communication than the First Amendment is in its application to speech generally. It does not operate as a ‘right’, but rather as a limitation on government. It also allows for far greater restrictions and limitations on speech than the First Amendment. Nevertheless, it is of note that in Monis again we had the interpolation of a First Amendment idea into the High Court’s reasoning (the ‘captive audience’ idea), and relevantly that the Justices qualified their consideration of it by declaring openly that ‘[t]here is little to be gained by recourse to jurisprudence concerning the first amendment’.

Implications for public debate
These two cases upheld restrictions on communications that are wide ranging and intrude significantly into freedom of speech. City of Adelaide, in a way, was a fairly straightforward case, one that gives further weight to the view that the doctrine of the implied constitutional freedom of political communication does relatively little work in Australia in extending the boundaries of freedom of expression. With some exceptions such as Aid/Watch in 2010 and the more recent decision in the NSW election donation case, the doctrine has failed to live up to either the high expectations of its supporters for rights extension and protection, or the dire forewarnings of its critics (of the same) when it was first developed. Monis reminds us that if we are genuinely to extend the parameters of freedom of speech in Australia, one way to do this would be to champion free speech rights at a local government level and, through intergovernmental arrangements, to

43 See Virginia Pharmacy 425 US 748 (1976). In APLA the distinction rendered regulation of that speech possible, despite the fact that in the United States pure commercial speech has attracted First Amendment protection (Barendt 2007: 400).
47 Unions NSW & Ors v State of New South Wales [2013] HCA 58
encourage State and local governments to take more seriously their commitments to enabling
citizens to enjoy their free speech rights, instead of shutting them down. In doing so, however, we
should also be mindful that a libertarian view of freedom of speech, in which speech is viewed as
simply the expression of an opinion, is not the only way to protect free speech, and of the view
expressed in Monis; namely, that a substantive understanding of speech respects the fact that in
some contexts and circumstances it can also harm.