

IN DEFENCE OF FREEDOM OF SPEECH

The Third Sir Harry Gibbs Memorial Oration

by

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Sir Harry Gibbs, to whose memory this Oration is dedicated, was the greatest judicial lawyer Queensland produced in the twentieth century, just as Sir Samuel Griffith had been the greatest judicial lawyer Queensland produced in the nineteenth. Both were the leading barristers of their time. Both began their judicial careers as members of this State's Supreme Court. Sir Samuel was appointed as the third Chief Justice in 1893. Sir Harry was appointed to the court in 1962 at the then relatively young age of 44; had he not been recruited to the Federal judiciary in 1967, it is likely that he too would have become the Chief Justice of Queensland. Instead, via a detour through the then Federal Court of Bankruptcy, Sir Harry was appointed to the High Court by the Gorton Government in 1970. The Attorney-General who had the good sense to select him was Tom Hughes. In 1981, Sir Harry Gibbs succeeded to the office first held by Griffith, becoming the eighth Chief Justice of Australia. When Sir Harry joined the Court the Justices were appointed for life, however by accepting the Chief Justiceship Sir Harry became subject to the 1977 amendment to s. 72 of the *Constitution*, which imposed a statutory retirement age of 70 – one of the Fraser Government's worst legacies. So his occupancy of the office was foreshortened after only 6 years, and he was required to retire from the Court, at the height of his very formidable intellectual powers, in 1987. In 1992, Sir Harry became the inaugural President of this Society.

I met Sir Harry only briefly on a few occasions. Although I cannot say I knew him, I had several connections with him. Charles Sheahan, the judge whose Associate I was, had been one of Gibbs' close friends in the small fraternity of the Brisbane Bar in the late 1940s and 1950s, and often regaled me with tales of those days and affectionate anecdotes about Sir Harry (or "Bill", the nickname by which he was known). His former Associate and protégé, David Jackson, was my master when I first went to the Bar and my cousin, the Brisbane writer Joan Priest, was his biographer.<sup>1</sup> There is a sense in which everyone who practised as a barrister in Queensland in the second half of the twentieth century lived under Sir Harry Gibbs' long shadow, for he was, by common accord, the gold standard of professional excellence.

Similarities notwithstanding, there is one important respect in which the career of Sir Harry Gibbs was quite different from that of Sir Samuel Griffith. Unlike Griffith, who served in the Queensland Parliament for almost 21 years, with two periods as Premier, Gibbs never became involved in politics, and Joan Priest's biography contains no suggestion that a political career ever interested him. But it would be a mistake to think that Gibbs did not care deeply about political affairs, as his acceptance of the Presidency of the Sir Samuel Griffith Society demonstrates. In the years after his retirement from judicial office, his fine, crystalline mind addressed many of the important constitutional and political issues of the day – on several occasions, in lectures delivered to this Society. It is apparent from his speeches that Gibbs' political values were largely similar to those of Griffith. He was what I would call a liberal conservative – a man who was devoted to the rule of law, who respected tradition, was suspicious of ideology and hostile to radicalism, and who regarded the rights and freedoms of the individual as paramount values.

It is about one of those freedoms that I want to speak tonight: freedom of speech, and its closely related value, the freedom of the press. For there can be no doubt that those freedoms are under a concerted attack in Australia today, so that which could be taken for granted only a decade or so ago now needs to be defended.

The attack upon freedom of speech is being mounted on many fronts and, I am sorry to say, it has the overt sanction of the current Federal Government. When, last week, the Leader of the Opposition Tony Abbott addressed the Institute of Public Affairs in a speech provocatively entitled “The Freedom Wars”, and offered a fine, full-throated defence of freedom of speech and of the press,<sup>2</sup> the reaction of the Commonwealth Attorney-General, Nicola Roxon, was to accuse Mr Abbott of having an “obsession with free speech”, and – I am not making this up - to liken the right to free speech with the American view of the right to bear arms.<sup>3</sup>

Now if, as the dictionary tells us, an obsession is an idea which dominates the mind, I as a Liberal gladly and willingly confess to sharing Tony Abbott’s “obsession” with free speech, and I wonder why the Attorney-General of the Commonwealth does not. But I suppose Ms Roxon’s scorn for those who care deeply about freedom of speech merely reflects the spirit of an age characterized by the rise of an alarming new intolerance not merely of the views of those who do not subscribe to the current preferences and values of a conceited, self-anointed cultural elite, but an intolerance of their right to express those views at all.

The measure of a society’s commitment to political freedom is the extent of its willingness to respect the right of every one of its citizens to express their views, no matter how offensive, unattractive or eccentric they may seem to others. As Sir Robert Menzies said, in one of his “Forgotten People” broadcasts, in June 1942:

“Let us, on the threshold of our consideration, remember that the whole essence of freedom is that it is freedom for others as well as for ourselves; freedom for people who disagree with us as well as for our supporters, freedom for minorities as well as for majorities. ... The more primitive the community, the less freedom of thought and expression is it likely to concede. ... As you probably know, I am one who has in recent years had a severe battering from many newspapers, but I am still shocked to think that intelligent men, in what they believe to be a free country, can deny to the newspapers or to critics of any degree the right to batter at people or policies whom they dislike or of whom they disapprove.”<sup>4</sup>

Menzies quoted with approval John Stuart Mill’s observation:

“Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth ... and on no other terms can a being with human faculties have any rational assurance of being right.”<sup>5</sup>

Yet it is that which is under attack in Australia today. Although the attack takes many forms, what they all have in common is a shared intolerance.

The first of the assaults upon freedom of speech with which I want to deal takes the form of what has come to be known as “political correctness”. The origins of the term political correctness can be traced to the 1970s, when it began to emerge in the writings of the New Left, particularly in feminist literature, largely as a critique of language which was seen to be patriarchal or otherwise socially discriminatory. What began as a vaguely annoying quibble about linguistic usages has developed, in the course of the past forty years, into a very deliberate and sophisticated form of political censorship, whose advertent purpose is to eliminate from political discourse ideas which offend beliefs and prejudices of the Left.

The report of the Finkelstein Inquiry into media regulation, to which I will return later in this speech, contains a discussion of various theories of the role of the press. Of the two theories it identifies as “non-democratic models” it has this to say:

“Authoritarian theory ... reflected societies which held that all persons were not equal, that some were wiser than others and it was those persons whose opinions should be preferred ... Totalitarian theory shared many of these characteristics, but contained one important additional dimension: the education of the people in the ‘correct’ truth.”<sup>6</sup>

Although Mr Finkelstein was describing authoritarian and totalitarian ideologies, he could hardly have written a better description of political correctness, the whole point of which is to narrow the boundaries of civil discourse by proscribing the expression of opinions which are objectionable to it.

In the 1960s and 1970s, progressives of the Left shared many of the values of liberalism, and they adopted much of its language. The emancipation of women was called women’s liberation. Following the Wolfenden Report in England, the repeal of laws which prohibited homosexual conduct came to be called gay liberation. The relaxation of censorship was a liberal cause, supported by the progressive Left, based upon the belief that adults should be free to make their own decisions about what they read and saw. Progressive social policy was all about the extension of freedom. Within the Liberal Party and similar centre-right parties elsewhere, this created tensions between the liberalizing elements and conservatives, who continued to value social control over personal freedom.

Today, it is the self-styled progressives of the Left who want to ban things. In particular, they want to eliminate the expression of opinions which they find offensive. Sometimes this takes the form of overt prohibitions, of which section 18C of the *Racial Discrimination Act* is an egregious example. As witnessed in the Bolt case, freedom of speech – and its corollary, freedom of the press – are for these people values of less importance than “respect” for certain favoured groups, which are identified in their minds by their alleged victimhood. Thus, paradoxically, victimhood becomes the basis of a new kind of privilege: showing respect to their

special status is a more important value than the freedom to call that status into question. And so, as in the Bolt case, by making certain classes of citizens immune from criticism, the boundaries of legitimate political discussion are restricted.

When he introduced s. 18C in 1995, the then Minister for Immigration, Senator Nick Bolkus, oblivious to the Orwellian resonances of his rhetoric, told the Parliament that it was designed to eliminate “speechcrimes”<sup>7</sup>.

Is it really the role of government to be telling people what they might say? But this is the very point of the political correctness movement: to shape the language so that ideas of which it disapproves are eliminated from public discourse. This insidious tactic has never been better described by George Orwell (who was himself a victim of it):

"At any given moment there is an orthodoxy, a body of ideas which it is assumed that all right-thinking people will accept without question. It is not exactly forbidden to say this, that or the other, but it is 'not done' to say it, just as in mid-Victorian times it was 'not done' to mention trousers in the presence of a lady. Anyone who challenges the prevailing orthodoxy finds himself silenced with surprising effectiveness. A genuinely unfashionable opinion is almost never given a fair hearing, either in the popular press or in the highbrow periodicals."<sup>8</sup>

The manipulation of language to limit public discourse has an even more dangerous consequence. The practitioners of political correctness have grasped the close connection between language and thought, so that by limiting that which may be said, they seek to limit that which may be thought. (It is no coincidence that one of the early prophets of political correctness, the American writer Noam Chomsky, began his career as a professor of linguistics, whose pathbreaking work was in the study of the relationship between language and the cognitive structures of the brain.) As Winston Smith discovered, there is hardly any distance at all between speechcrime and thoughtcrime. So the attack upon freedom of speech is not merely about the censorship of language which the Left finds objectionable. At a deeper level, it is an attack upon intellectual freedom itself.

Sometimes the elimination of language takes the form of overt prohibitions like s. 18C. But the attack upon freedom of speech is usually more subtle. Another technique which is used by the practitioners of political correctness is to eliminate competing views from the debate by denying them a platform at all – whether in the media, the academy, or any other public forum where ideas are discussed. Janet Albrechtsen calls this technique “death by silence”:

“The trick is to exclude certain people from the national discourse. It is best summed up by a German word. The word is *totschweigtaktik*. To be “totsched” is to be subject to death by silence – books, ideas, people that challenge the status quo are simply ignored ... Those who are totsched find

that “their efforts left to expire soundlessly like a butterfly in a jar.” It happened to Orwell when he wrote his 1938 classic *Homage to Catalonia*, which addressed Stalinist Russia’s involvement in the Spanish Civil War. The left-wing *literati* simply ignored it. By the time Orwell died in 1950, barely 1,500 copies had been sold.”<sup>9</sup>

We have seen many examples of this technique in Australia in recent years: for example, the silencing of the journalist Chris Kenny, when he sought to expose the fraudulent claims of the so-called “secret women’s business” in the Hindmarsh Island Bridge affair; and the refusal for years of most of the mainstream media to give appropriate coverage to the then-heretical views about aboriginal disadvantage championed by Noel Pearson. But perhaps the most infamous application of the technique was the conspiracy of silence which sought to eliminate from the important national debate on climate change the views of the so-called climate sceptics. Aping the Government line on anthropogenic global warming, the national broadcaster, in particular, sought so strenuously to deny the sceptics a hearing that when, on one infamous occasion, it eventually deigned to broadcast a sceptical documentary, it was bookended with a one-sided panel discussion put to air specifically for the purpose of explaining why the claims made in the documentary were wrong.

The debate – or, at least in its early stages, the non-debate – on climate change brings to mind another of the techniques used to erode freedom of expression: the attempt to convert public policy questions into technical questions, in which the opinions of the Government’s preferred experts are deployed as a means to remove essentially contestable issues from the scrutiny of ordinary political debate. This is a technique which the Gillard Government has used again and again. I have lost count of the number of times I have heard Senator Penny Wong declare to the Senate, in relation to the complex question of climate change, and the equally complex question of what is the appropriate design of policies to deal with its alleged consequences – “the science is settled.” Now not only is this a profoundly ignorant thing to say – a denial of the very essence of the scientific method. More disturbingly, it is an assertion that this is not an issue which can properly be the subject of political debate, because it is a technical issue – an issue for scientists to decide; not an issue about which the general public – or even the Parliament - are capable of having an informed opinion, and so not a matter of legitimate public discussion at all.

It has become a standard tactic of the Gillard Government, to seek to place controversial issues beyond public discussion by invoking the superior wisdom of favoured “experts”. You disagree with the mining tax? But Dr Henry says it is a good thing, and who are you to disagree with Dr Henry? You disagree about global warming? Who are you to disagree with Professor Garnaut? You disagree with onshore processing of refugees? Who are you to disagree with Mr Andrew Metcalfe? And so it goes on.

Although this is, at one level, merely a tactic to stifle public debate, the impulse behind it is an ancient and profoundly anti-democratic one. It lies in the Platonic conception of rule by the wise. It is a recurring theme throughout the ages. Saint Augustine imagined a ruling class of clergy – and so it was in Western Christendom for more than a millennium. At the dawn of the Industrial Revolution, Saint Simon envisaged an ideal society ruled by technocrats and scientists. In the twentieth century, social theorists such as Max Weber and Julien Benda identified an elite class of bureaucratic rulers, to which Robert Nesbit gave a new name, “the clerisy”, which suitably evoked its quasi-priestly nature. In every iteration, across every age, faith in a ruling caste of the good and the wise has, at heart, been based on the belief that the core questions should be decided for the good of the people, but not by them. And therefore, since these are not matters fit for public decision, they are hardly matters requiring public discussion.

Censorship of opinions deemed to offend the canons of political correctness, and the attempt to place matters of legitimate public interest beyond the reach of public debate by dressing them up as matters exclusively within the understanding of favoured “experts”, are but two of the ways in which not merely freedom of speech, but intellectual freedom itself, is under attack in Australia today. But there is a third front in the freedom wars that I cannot forbear from addressing. That is the attack by the Gillard Government on freedom of the press itself.

Now let us remember how the current attack on press freedom began. Last year, the Prime Minister, seeking to distract public attention from her Government’s failings on so many fronts, used the revelations of the *News of the World* scandal in the United Kingdom to create a straw man argument to justify an attack upon the media in Australia. Notwithstanding the complete absence of any evidence of similar abuses here, the Prime Minister said that News Limited had “hard questions” to answer, and misrepresented the findings of an Australian Law Reform Commission report on privacy to provide an additional, specious, ground to justify a public inquiry into media regulation. On 14 September last year, terms of reference were issued and the Hon. Ray Finkelstein QC, a retired Federal Court judge, was appointed to conduct the inquiry. It reported on 28 February. Its principal recommendation was to replace the existing industry-based Australian Press Council by a new regulatory body, a “News Media Council”, funded by the government and whose decisions are enforceable in the same way as the decisions of government agencies – in other words, by the imposition, in certain circumstances, of punitive sanctions.

The Opposition has announced that it will oppose the creation of our own antipodean version of Orwell’s Ministry of Truth. The Government has yet to announce its response to the recommendations of the Finkelstein Inquiry, although there seems little reason to doubt that Ms Gillard’s or Senator Conroy’s appetite for ever-increasing government control of the news media is likely to result in the recommendations being embraced.

For those who take the trouble to read the Finkelstein Report, of even greater concern than the recommendations is their rationale. For the underlying argument

of the Finkelstein Report is itself an attack upon what he calls the “libertarian” case for press freedom, in favour of what he describes as the principle of “social responsibility”. Now, there are few who would argue that the press, as a powerful institution, does not have responsibilities to society. But Finkelstein’s approach goes much further than that: by favouring the “social responsibility” argument over the “libertarian” argument, freedom of the press is not seen as the paramount public value, qualified by necessary but jealously circumscribed exceptions. Rather, it is displaced.

Much of the second chapter of the Report, which deals with the justifications for freedom of the press, is devoted to a sustained critique of Mill’s argument for the liberty of thought and discussion. Finkelstein makes no secret of his own ideological sympathies. He writes:

“Libertarian theory was developed in the period of the Enlightenment ... The theory was informed by a liberal belief that truth would emerge from the clash of competing opinions, and by a belief in the ‘self-righting’ capacities of public debate to ensure that in rational and reasoned discourse, error would be vanquished. It was analogous to the free market theories of Adam Smith ... However, Libertarian theory was to prove inadequate in the face of the new forces created by the industrialisation of the press and by the realities of 19<sup>th</sup> and 20<sup>th</sup> century media economics. ... On top of these economic and technological challenges to Libertarian theory, the intellectual climate of the 20<sup>th</sup> century was radically different from that of the 17<sup>th</sup> and 18<sup>th</sup> centuries, when Libertarian ideals flourished. The new intellectual climate placed higher store in collectivist, societal values and less on individualistic values.<sup>10</sup>

Elsewhere, he adopts the patronizing tone towards public opinion which has become so wearily familiar among cultural elitists. Thus, criticizing Mill’s argument that freedom of speech is essential for an active and engaged citizenry, he quotes with approval the evidence of one witness that “citizens must have the capacity to engage in debate, in the form of the relevant critical reasoning and speaking skills”, and observes:

“There is real doubt as to whether these capacities are present for all, or even most, citizens and, even if they are, both speakers and audiences are often motivated by interests or concerns other than a desire for truth – including, of course, the desire to make money and personal, political and religious motivations...”<sup>11</sup>

Shame on them!

Finkelstein is unambiguous about the purposes of the new regulatory body which he proposes:



“It could not be denied that whatever mechanism is chosen to ensure accountability speech will be restricted. In a sense, that is the purpose of the mechanism.”<sup>12</sup>

So there is no excuse for us having any doubt about the purposes and rationale of the Finkelstein Report, for its author could not have been more explicit.

At risk of being stubbornly out of sympathy with what Mr Finkelstein is pleased to call “the new intellectual climate”, I must confess to being something of an admirer of the Enlightenment, and less than an admirer of the *dirigiste* philosophies which disfigured so much of the twentieth century. And although there is somewhat of a mocking tone in Mr Finkelstein’s reference to the 17<sup>th</sup> and 18<sup>th</sup> centuries, those ages saw many of the most notable advances in the history of liberty. I freely admit that I prefer the Cavaliers who restored the theatres to the Puritans who closed them; I prefer Milton’s *Areopagitica* to Hobbes’s *Leviathan*; and I certainly prefer the Declaration of Independence to the Communist Manifesto. Conversely, the past century, in which emerged the “new intellectual climate” of which Mr Finkelstein is apparently so enamoured, which “placed higher store on collectivist values,” witnessed a greater sacrifice of human lives, in the name of the power of the State, than in the whole course of human history beforehand. So I am unashamed of being at odds with the *zeitgeist* in believing that Adam Smith still has more useful things to teach us than any of the avatars of the “new intellectual climate”; and of preferring the teachings of Mill to those of Marx, or Mao, or Marcuse.

And so it is with Mill – the political philosopher who, when I was a teenager, first inspired my lifelong commitment to liberalism – that I close. Writing in 1859, he said:

“The time, it is to be hoped, is gone by when any defence would be necessary of the ‘liberty of the press’ as one of the securities against corrupt or tyrannical government. No argument, we may suppose, can now be needed against permitting a legislature or an executive ... to prescribe opinions to [the people] and determine what doctrines or what arguments they shall be allowed to hear.”<sup>13</sup>

What Mill thought was no longer necessary in mid-Victorian England more than a century and a half ago, is now, astonishingly, necessary in Australia in the second decade of the twenty-first century. Almost four centuries after Milton’s ageless plea for the freedom of the press, more than two centuries after the newly-born American republic adopted the First Amendment, we in Australia find that fundamental prerequisite to political freedom challenged. And the challenge is not merely a challenge to the freedom of the press arising from an expert report. It is a comprehensive challenge, arising from a modern-day Puritanism, driven by an ideologue’s intolerance of alternative or dissenting views, and condoned if not actually encouraged by a complicit Government, to the very centrality of freedom of speech as one of our society’s core values.

It is a challenge whose techniques are sometimes subtle, like the manipulation of language; sometimes explicit, like s. 18C; and sometimes stunningly brazen, like the Gillard Government's attempts to limit the freedom of the press. But the danger to our liberal democratic polity must not be underestimated, and therefore it is a challenge to which those who share my political values – the political values of Sir Robert Menzies, of Sir Samuel Griffith and of Sir Harry Gibbs - must and will respond resolutely and without compromise.

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<sup>1</sup> Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers Publishing, 1995)

<sup>2</sup> Hon. Tony Abbott, "The Freedom Wars", Speech delivered to the Institute of Public Affairs, Sydney, 6 August 2012

<sup>3</sup> Hon. Nicola Roxon, interview with Rafael Epstein, ABC Radio 774, Melbourne, 8 August 2012.

<sup>4</sup> Robert Menzies, "The Four Freedoms – Freedom of Speech and Expression", in *The Forgotten People and other Studies in Democracy* (Sydney: Angus & Robertson, 1943), pp. 11-12.

<sup>5</sup> *ibid.* p. 14, quoting John Stuart Mill, *On Liberty* (1859) p. Ch. 2.

<sup>6</sup> Hon Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012), p. 44.

<sup>7</sup> Senator Nick Bolkus, Senate *Hansard* 23 August 1995.

<sup>8</sup> George Orwell, "Freedom of the Press" (unprinted introduction to *Animal Farm*), first published in the *Times Literary Supplement* September 15 1972.

<sup>9</sup> Janet Albrechtsen, "Freedom in the Western World", address to Institute of Public Affairs dinner, Melbourne, 25 February 2012, quoting Shelly Gare, "Death by Silence in the Writers' Combat Zone", *Quadrant* July 2010, pp. 28 – 37.

<sup>10</sup> *Finkelstein Report, op. cit.* pp. 45-46.

<sup>11</sup> *ibid.* p. 30

<sup>12</sup> *ibid.* p. 52

<sup>13</sup> John Stuart Mill, *On Liberty*, Ch. 2