

CURBS ON GIVING OFFENCE CAN STIFLE PUBLIC DEBATE

Arguing against same-sex marriage would be unlawful in some jurisdictions

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A Christian group has been heavily criticised by a number of commentators because it raised the question of whether it would be necessary for the Commonwealth to override areas of state and territory legislation if a plebiscite on same-sex marriage were to take place.

But there are various laws in

these jurisdictions that could make it unlawful for bodies opposed to same-sex marriage to put their case to the electorate.

Take the example of Tasmania's Anti-Discrimination Act, not least because it has already been used to bring legal proceedings against the Catholic Church over its distribution of a booklet supporting traditional marriage to the parents of Catholic school students.

This legislation makes it unlawful to offend, humiliate, intimidate, insult or ridicule a person on the basis of various attributes. Those attributes include sexual

orientation, marital status and relationship status, provided a reasonable person would have anticipated that the subject of the conduct in question would be offended or otherwise affected.

It would therefore be open to persons in same-sex relationships to complain they were offended by a "no" campaign in the course of the plebiscite that argued same-sex marriage was sinful in a religious sense or simply socially undesirable.

These views may not represent those of a majority in the community, but that is no reason why they should not be allowed to be put to the electorate.

This is why the proposed plebiscite throws into sharp relief the problems of this kind of legislation in a way that individual cases might not. Laws that make it unlawful to offend various groups in the community inevitably stifle

public debate on contentious social, economic and political issues. This is because some will always be offended if their lifestyles or views are criticised or disparaged.

Proponents of such laws suggest they are necessary to prevent "hate speech". No one argues that incitements to violence against sections of the community should not be unlawful. As it happens, such conduct has always been an offence under criminal law. But real "hate speech" is a far cry from expressing opinions in the course of a vigorous political debate that some people may find offensive.

Of course, freedom of speech is not an absolute value. It has always been subject to many qualifications including the law of defamation (to protect individual reputation) and the law of contempt (to protect the administration of justice). But this is very different from a restriction on

speech designed to protect a person's feelings from being offended. The rationale underlying these laws has been taken to the extreme in some US universities, where lecturers have been required to warn students about passages in textbooks they might find offensive.

No doubt there will be a move to follow suit by some zealous staff in the history and international relations departments of universities in this country. Universities were once thought of as places where the views of students—and teachers—could be challenged fearlessly. Once freedom of speech is curtailed in this way, there is no reason to allow any contrary views to be heard.

Even assuming the Commonwealth could quarantine state legislation for the purposes of a plebiscite on same-sex marriage, it would face greater difficulties in a referendum on the recognition of

indigenous people in the Constitution. The reason is that section 18C of the federal Racial Discrimination Act makes it unlawful to offend racial, national and ethnic groups. It is certainly possible that arguments against amending the Constitution in this way for whatever reason might be offensive to Aboriginal organisations involved in supporting a referendum.

How have we got to the position in Australia where laws might have to be suspended so there can be a proper public discussion of a serious social and political issue in a plebiscite or referendum?

Doesn't it suggest that such laws have the ability at all times to inhibit the freedom of speech without which these issues cannot be fully debated in this country?

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ers for educational justice will call for a redoubling of efforts and,

be found and nurtured in Colling-

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