Australian government asks High Court to curb free speech rights

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Against a backdrop of deepening cuts to government spending and rising social tensions, the federal Labor government last month intervened in two key cases in the High Court, Australia's supreme court, seeking to severely limit political free speech. The intervention is the latest in a series of government moves over the past two years aimed at boosting the powers of the police, intelligence agencies and other authorities to monitor and muzzle political dissent.

Having heard the arguments in the two test cases, one after the other, in early October, the judges may take several months to hand down their rulings. Both cases involve further winding back a so-called implied constitutional right to political communication. The Australian Constitution, adopted by British colonial politicians in 1901, contains no bill of rights or guarantee of free speech. However, in several rulings during the 1990s, the High Court said there was a limited protection against laws that cut across political discussion within the framework of the current parliamentary set-up, unless the laws served some other "legitimate object."

In the two cases, the Labor government is relying on a legal precedent for which it argued earlier this year. In March, the High Court dismissed a constitutional challenge by Palm Island Aboriginal leader Lex Wotton to parole conditions that banned him from speaking to the media or attending public meetings on the island without the permission of government officials. Wotton had been jailed for participating in a "riot" on the island after the death in police custody of Cameron ("Mulrinji") Doomadgee in November 2004.

The court said the bans on Wotton did limit political communication, but accepted the government's argument that they were "proportionate" to the "legitimate" purpose of ensuring "community safety and crime prevention." The decision underlined the ease with which federal and state governments could override the supposed implied protection of political speech. (See: "Australia's supreme court upholds free speech ban on Palm Island leader").

As the WSWS warned at the time, the Labor government has now moved to exploit the anti-democratic Wotton decision, which stripped him of basic civil rights, to more directly widen powers to curtail political dissent. Although both the current cases concern religious zealots, the arguments offered by the federal government have wider implications for fundamental democratic and political rights.

In the first case, the federal government, and several state governments, Labor and Liberal alike, joined the South Australian state Labor government in appealing against decisions by that state's District and Supreme Courts that overturned an Adelaide City Council by-law restricting members of a Christian sect from preaching in the city's Rundle Street pedestrian shopping mall.

Two brothers, Samuel and Caleb Corneloup, had initially been convicted in a magistrates court for violating a regulation stipulating that no one may "preach, canvass (or) harangue" on any road without a permit. But the pair successfully argued in the District and Supreme Courts that the word "harangue" was too broad, giving the by-law a "chilling effect" on most forms of normal communication.

When the case was heard in the High Court, Tom Howe, representing the federal government, described the Adelaide City provisions as "analogical" to those upheld in Wotton's case. He claimed that the prohibition on preaching, canvassing or haranguing without a permit served a "legitimate" purpose—regulating competing uses of roads by pedestrians and vehicles—even if it did, in effect, permit the banning of activities based on their political content.

If the High Court rules in the government's favour, similar by-laws can be adopted or enforced across the country, not just against religious preaching but any political campaigns or protests alleged to involve "haranguing" or even

"canvassing"—clearly terms that are wide enough to cover many types of political activity.

The second case is overtly political, being directed against an expression of opposition to the Afghanistan war. A self-styled Muslim cleric, charged with sending "offensive" letters to the families of soldiers who died in Afghanistan, argued that the charges against him infringed political communication. Man Haron Monis, also known as Sheikh Haron, is charged with 12 counts of using a postal service in a menacing, harassing or offensive way, a federal crime which carries a maximum two-year jail sentence.

While the letters, disguised as letters of condolence, may well have caused offence to the bereaved families, their clear intent was to express opposition to the war. Monis's barrister, David Bennett, argued the letters merely wounded the feelings of the recipients, and were political because they sought to persuade the families to oppose Australia's military involvement in Afghanistan. He also pointed out that the word "offensive" could cover a wide range of political debate.

However, the federal government's counsel, John Agius, insisted that the laws were valid because they helped maintain "order" and "public confidence" in the postal system. Moreover, Agius contended that it was constitutional to outlaw communications that were so offensive they could provoke retaliation. He branded Monis's letters as "offensive garbage" and drew a parallel with the recent anti-Islam YouTube video that led to protests in Sydney and internationally. "There is a real question of public order," he stated.

In effect, the Labor government submitted that any political communication that could cause offence and possibly stir public discontent should be banned. This is a perverse principle that would allow political activities to be outlawed on the basis of what hostile reactions they might generate among other people.

How such provisions can be used to suppress political dissent can be seen in another current case. An obscure Melbourne City by-law against erecting tents in public parks was utilised to remove Occupy Melbourne protesters from the City Square and Treasury Gardens last year. Some protesters later challenged the ban in the Federal Court as a denial of the implied constitutional protection of political communication. A decision is still pending in that case, which was heard in March.

In previous decisions, the High Court has emphasised that the implicit protection of freedom of communication in the Constitution is far from absolute, and is also "limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution." In other words, political opinion that opposes the current parliamentary order is not protected at all.

Now, however, Labor is seeking free rein for federal and state governments to criminalise any expression of political opinion that could be characterised as threatening "public order." This is on top of the barrage of laws adopted under the cover of the so-called "war on terrorism," and expanded by the Labor government since 2007, which define terrorism so sweepingly that the measures can be used to target many traditional forms of political dissent. Over the past two years, the Gillard government has also increased the political spying powers of the intelligence agencies, widened the coercive interrogation powers of the Australian Crime Commission and proposed powers to intercept and retain all Internet communications data.

The latest drive to curtail political free speech is a further warning of the anti-democratic and repressive measures to which the Labor government and the political establishment as a whole will resort amid deepening popular disaffection with the parliamentary order, widespread opposition to Australian involvement in US-led wars, and emerging resistance to the government's intensifying austerity program.