WITHHOLDING GOVERNMENT FUNDING
A breach of freedom of political communication
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In recent times, we have witnessed attempts by state governments to restrict the ability of government-funded services, such as community legal centres, to engage in lobbying or advocate political change. The Queensland Attorney-General is on record as stating that money provided to community legal centres should not be used for political campaigns on political issues.1 Queensland Health is apparently requiring funded organisations to agree they will not advocate for legal change.2 In New South Wales, conditions in government funding agreements to community legal centres are similarly prohibiting the use of funding on lobbying activities and public campaigns.3 There are reports that these agreements prevent a funded organisation from including links on their website to an organisation that does engage in the relevant advocacy.4 Earlier this year legislation was passed by federal parliament to prohibit the use of such clauses in contracts involving the federal government.5 However, this Act does not preclude their use in contracts involving state governments, the source of the current controversy.

In principle, attempts by government to suppress speech are a very bad idea. As John Stuart Mill said:

No argument, we may suppose, can now be needed against permitting a legislature or executive, not identified with the interest of the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear... all silencing of opinion is an assumption of infallibility.6

We could debate what limits, if any, do or should apply to the right of an individual or organisation to express a view on something. There are some areas in which reasonable people might disagree on the proper limits of free speech ('the contested zone'). So-called hate speech is an example of speech in this zone. However, the right to advocate legal or political reform is surely not in the contested zone. Most would agree that it is fundamental in a democratic society like Australia that people have the right to advocate change. Without lobby groups or champions for change, change is that much harder. Lobby groups have power as a collective voice that an individual would not have. Community legal centres are very well positioned to be aware of grassroots community concerns about how laws are impacting on particular groups in society, groups that are often marginalised or otherwise without a strong voice.

As a result, I am very concerned from a public policy point of view with state government attempts to silence voices that would advocate change, and particularly concerned that the effect of silencing community legal centres is to silence those voices that would otherwise struggle to be heard. This article considers the extent to which such attempts might be challenged on constitutional grounds and, if so, whether the government would have a good constitutional defence.

The implied freedom of political communication
In a series of cases decided in the 1990s,7 a progressive High Court recognised an implied freedom of political communication in the Constitution. The High Court held that sections of the Constitution, in particular ss 7 and 24 established representative democracy as a hallmark of our governance. The government had to be chosen directly by the people, and that in order for representative democracy to operate effectively and for this choice to be exercised effectively, political communication needed to be protected.8 This was established as a negative freedom, in the sense of protection from laws that infringed the freedom, rather than a positive source of rights. Further, the freedom was not absolute. A kind of proportionality test was applied in order to test the constitutional validity of laws that interfered with such a freedom. The Court in Lange9 developed a two-stage test:

- Does the law effectively burden freedom of communication about government or political matters in terms or effect?
- If it does, is the law reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with the maintenance of representative and responsible government which the Constitution prescribes.10

If the answer to the first question is yes, and the answer to the second is no, then the law is unconstitutional.

The High Court has decided that the implied freedom of political communication can apply to both state and federal laws.11 It has determined that the freedom applies to political protests.12 It also applies to different modes of communication of "political" speech.13 The freedom protects not only communication by or to politicians. The meaning of politics has been broadly interpreted, to include discussion of possible police corruption,14 or comments on Australia's involvement in war.15 The freedom includes not just the right to express views, but the right to hear views of others.16

REFERENCES
1. Chris Morris, "Legal Centres on Collision Course over Right to Lobby", The Australian (Sydney), 14 September 2012.
2. Daniel Hurst, "NGOs Told They are Right to Remain Silent to Keep Funding", Brisbane Times (Brisbane), 21 August 2012.
3. Inre Sakamovski, "Legal Centre Pays Price for Bid to Cripple Coal", The Australian (Sydney), 20 December 2012. NSW Govt's Principles for Funding of Legal Assistance Services, states "NSW legal assistance services funded by Legal Aid and Public Purpose funding will not include activities which may reasonably be described as political advocacy or political activism.
4. Hurst, above n 2.
5. Myfair Paycheck Sector Freedom to Advocate Act 2013 (Cth). The passage of this Act was supported by members of the Coalition.
8. The people also have an important role in any attempt to formally amend the Constitution (s 128). Other relevant provisions include s 1, s 8, s 30, s 41, s 61, s 62 and s 69.
9. Lange.
13. Ibid specifically the Court found it was not limited to verbal communications: 199 (Broome), 513 (Tooley and Gummow (B)); 522 (McHugh J). 527 (Kiefel J).
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However, to date, the implied freedom has not been used to strike out a clause in a funding agreement making funding conditional on the recipient not lobbying. The novel question thus arises — could the freedom be applied in such a context, to constitutionally prevent this kind of precondition being attached to government funding?

Two issues arise from this question. The first is that it is reasonably likely that a government law which simply banned an organisation or individual from communicating about law reform or political change would likely infringe the constitutional freedom, in terms of the two-stage test. It would burden communication about political matters. It would be difficult to justify it under the second limb — what legitimate end could possibly justify a law directly banning political debate in Australia? The law would be constitutionally invalid.

However, the present scenario is slightly different, because the government has not directly passed a law banning political speech. Rather, it has made it a condition of government funding — a term of a contract — that a funded organisation not participate in such speech. Arguably, according to the strict terms of the two-limbed test, we don’t meet the first limb, because there is no low burdening freedom of communication, rather a term of a contract which does so. On the other hand, there is legal authority suggesting the freedom is applicable to actions of the executive as well as the legislature, and the entry into a contract by government can be seen as an executive act. Further, such a law is likely to be directed at the same end, and to achieve the same effect, as if legislation had been passed banning political speech. The question thus arises as to whether the High Court should allow to be done indirectly, through a clause in a funding contract, what could not be done directly, through legislation.

The High Court has considered these issues recently in the context of the power of the federal government to spend the Commonwealth’s money. It has tied the expenditure of money with respect to a particular subject matter to questions regarding whether the Commonwealth has the legislative power with respect to that subject matter. An argument could be made that, consistent with this recent case law, limits on Commonwealth legislative power (like the implied freedom of political communication) should be applied to spending. The High Court has recently shown itself to be willing to look at the practical realities of regulation through funding.

The second issue is that no individual or organisation has a constitutional right to government funding. The argument is that if the government is free to decide whether to fund an individual or agency or not, it can impose conditions on the recipient of the funding. If the recipient doesn’t like the conditions, it doesn’t have to accept the money. According to this argument, funding on condition of non-lobbying is constitutionally valid because the recipient voluntarily accepts the terms of the funding.

How would, or how should, the High Court reconcile these different questions? While there is no current Australian precedent on the issue, using funding agreements to suppress speech is not a new concept. The United States Supreme Court has considered this issue on many occasions and it is worth looking to see how that Court has reconciled spending powers of government with free speech rights. Certainly, there are differences between the US freedom of speech provision and the Australian implied constitutional freedom. One difference is that the US provision applies to all speech, whereas the Australian version applies (at present) only to political speech. However, since clearly the context in which these issues arise (in both jurisdictions) concerns speech that is “political”, this difference is not relevant here. Nor is the other difference — that the United States right is a positive right, whereas the High Court has said the right in Australia is a negative one, in the sense of a freedom from interference with such a right, rather than a ground upon which a law claim may be asserted.

United States case law
The first thing to note about United States jurisprudence is that it has moved well away from the literal text of the First Amendment. For instance, the First Amendment applies to (a) laws (b) by Congress. The Court has departed from a literal interpretation of this text in two ways. In the first place, the First Amendment has been deemed to extend to State laws as well as laws by Congress. Secondly, it has also been applied not only to laws but also actions. An example is Perry v Sindermann, where a teacher claimed the non-renewal of his teaching contract was based on his criticism of the college board. The Supreme Court accepted that First Amendment principles were implicated in the case:

16. ("The people have a right to convey and receive opinions, arguments and information concerning matters intended to or likely to effect voting") (Australian Capital Television, 323 (McHugh J)).
17. Lange, 560 (Brennan J, Dawson J, Gaudron J, McHugh J, Gummow J and Kirby J). This suggestion did not form the basis of the decision in that case, and no case has been decided on the application of the implied freedom to actions of the executive.
18. Williams v Commonwealth (2012) 26 ALJR 713. The case also re-confirmed executive power was subject to the Constitution.
19. Ibid.
20. Such argument has impressed the High Court in the context of federal government grants to the states upon conditions. The court has interpreted broadly the Commonwealth’s power to place conditions on the receipt of money, on the basis that if the state finds the conditions objectionable, it doesn’t have to accept the money as Latham J put it, “temptation is not compulsion” (South Australian v Commonwealth (1942) 65 CLR 373, 417).
21. Australian Capital Television, 143 (Mason C J), 150 (Brennan J, L 169 (Deane and Toohey J J) and 234 (McHugh J).
23. Cantwell v Connecticut, 310 US 296 (1940); Gitlow v New York, 268 US 652 (1925); 14th Amendment prevents states from making any law which abridges the privileges and immunities of US citizens and guarantees equal protection.
Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. US courts have extended the freedom beyond "laws" to include aspects of funding agreements. They have done so knowing that a narrow insistence that the provision offensive to free speech be placed in law would allow governments to circumvent the requirement by resorting to other methods, equally invasive of free speech. This could be used to overcome the argument in the Australian context that the implied freedom does not apply to the conditions in government funding contracts. The High Court has suggested in obiter in Longe that the implied freedom could apply to the exercise of executive power, as well as legislative power.

Of direct relevance to the current issue, the Supreme Court has recognised on many occasions that conditional funding or denial of funding can potentially interfere with free speech. For instance, in Speiser v Randall, the Court considered the constitutionality of a law allowing a property tax exemption, provided the taxpayer signed an oath pledging allegiance to the US government. This law was passed during the McCarthy era of paranoia about communism. A taxpayer who refused to sign the oath was denied the exemption. Effectively, the law was compelling speech as a condition of a government benefit. The taxpayer successfully challenged the decision on First Amendment grounds. The Court found that to deny an exemption to claimants who engaged in certain forms of speech was in effect to penalise them for such speech. It had the same deterrent effect as if the state were to fine them for such speech and was invalid as being offensive to First Amendment principles.

In Federal Communications Commission v League of Women Voters of California, the Court struck out a section in legislation for funding to be provided by a government agency to non-commercial providers of television and radio services. A section of this Act forbade any provider who received such government funding from engaging in "editorialising". The Court noted that the editorial had traditionally played an important role informing the public by critical comment on matters of public interest, to ensure a full and broad discussion of matters of public importance. Speech of that kind was entitled to the highest protection, and the government had not demonstrated a compelling interest in regulating it in the manner that they had. Congress has also attempted to limit funding to groups that might make particular legal arguments. For example, in Legal Services Corporation v Velazquez, legislation empowered the Corporation to distribute money to allow the representation of claimants with respect to welfare disputes. Congress prohibited the Corporation from using the money to allow the representation of clients in proceedings commenced to challenge or amend existing welfare law. "Challenge" here included a challenge on constitutional law grounds. The appellant successfully challenged the constitutional validity of this funding condition. A majority of the Court found it was unacceptable to make funding conditional in this manner. Congress could not seek to insulate its own laws from legitimate judicial challenge. The Court also confirmed that Congress’ funding decision could not be aimed at the suppression of ideas thought to be contrary to the government’s own interests. Such a law struck at the heart of First Amendment freedoms.

In summary, the US Supreme Court has been alert to the possibility that Congress, aware that it cannot directly proscribe speech based on content or viewpoint, might seek to achieve its aims indirectly by refusing to fund speech with which it disagrees. It has not permitted funding agreements that prohibit the recipient from speaking out on matters of interest to it, or prohibit the recipient from advocating for law reform. These American precedents are considered highly analogous and appropriate to the current moves by the Queensland and NSW governments to limit the contribution to public debate that recipients of government funding can make. Many of the past Australian cases concerning the implied freedom of
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Political communication have referred to the American First Amendment case law, including the first case in which the implied freedom was recognised in Australia, although some courts appear to doubt the relevance of the American material. The US Supreme Court has struck out funding agreements conditional on the recipient agreeing to restrictions on speech as being contrary to the First Amendment; likewise our High Court should apply the implied freedom of political communication to strike out similar agreements here.

As conceded, there are differences between freedom of speech in the United States and the narrower freedom of political communication in Australia. Specifically, the Australian freedom is confined to political discussion. The Australian right is a negative right in the sense of a freedom from interference. As mentioned above, these differences are not relevant here. As a result, you should be broad-minded and take on board the American learning and wisdom, rather than turn our backs on what we can learn from overseas jurisprudence, in this case the application of the United States First Amendment to restrictions in funding agreements. We should not pretend that the problem of government attempts to suppress speech is confined to this country, or that the answer is to be found only among Australian precedent, or Australian scholars. Australians deserve first-rate protection of political speech in a robust democracy, and it makes sense to consider how another democratic government protects free speech.

Waiver of constitutional rights in another context: Australia

The question of whether or not conditional funding agreements might infringe the implied freedom of political communication has not been addressed by the High Court. Likewise, the issue of whether a funding recipient can waive their constitutional rights has not yet been considered. However, the High Court has considered in another context the extent to which constitutional rights may be waived.

In Brown v The Queen, the High Court considered whether an accused could waive the requirement under s 80 of the Constitution that their trial on indictment for a Commonwealth offence be heard by a jury. The accused wanted a judge-only trial. A majority of the Court found that the constitutional imperative of trial by jury could not be waived. For example, Deane J stated that the right to jury trial was not just a personal right or privilege of the accused, but reflected broader community interests. Justice Dawson argued that the use of the jury had public advantages, and its benefits were not confined to the individual accused.

Further Dawson J pointed out that in other cases where a person had been allowed to waive statutory benefits, the right was considered merely a personal or private one, and not one of a broader nature, or involving higher matters of public policy.

Similarly, I would argue that the implied freedom to political communication is not merely a personal right of the community legal centre. The right is broader, including the right of members of the public to hear about any disaffection with current laws or government policy vote. Therefore a community organisation cannot waive its freedom of political communication. As the High Court has repeatedly confirmed, it is critical to the proper working of the representative democracy for which the Constitution provides that members of the public be exposed to a full range of views on matters of a political nature. Community groups play a pivotal role in giving voice to matters of public concern.

Application of the two-stage test to the conditional funding agreement

The Court considers the application of the implied freedom of political communication in terms of a two-stage test. I will now apply the two-stage test to the question of speech restrictions in funding agreements. I consider there is a strong argument that such restrictions in funding agreement are constitutionally invalid, as outlined below.

(a) Does the law effectively burden freedom of communication about government or political matters in terms or effect?

I have earlier explained how the Court could deal with the problem that the freedom as currently constructed is confined to ‘laws’ rather than funding agreements. There is a suggestion in Longe that the freedom applies to executive action, and the court said in Williams that provision of government funding through a contract is an executive activity. There is US case law for broadening the freedom beyond application to laws, and contracts making government funding conditional on the recipient not speaking about certain topics have been struck out as offensive to constitutional free speech in that country. Otherwise, the requirement clearly burdens freedom of communication about...
political matters. An argument for law reform is a 'political' argument, given the main purpose of parliaments is to make and change laws.41 (b) is the law reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with the maintenance of representative and responsible government which the Constitution prescribes?42

I will consider here possible arguments on both sides that might be made concerning whether such restrictions serve a legitimate end in a manner compatible with representative and responsible government.

The government might argue that the conditions are appropriate and adapted on the basis that the government is the trustee of public funds, and so does have a legitimate interest in ensuring that scarce funds are allocated to their most efficient use. It should have the right to dictate how scarce funds are to be spent, so that an organisation does not engage in wasteful activity with public money. In this way, while a direct ban on political speech could not be justified, a ban on publicly-funded organisations from using public money for such purposes might be justified, according to the government.

On the other hand, members of the High Court have sometimes pointed out in this context that government claims of the need for restrictions on speech must not be taken at face value.43 In weighing the government's arguments that these restrictions are appropriate and adapted to achieve a legitimate objective of careful expenditure of public funding, it is also considered relevant that a perception could arise that such restrictions are really an attempt to shut down communication which the government does not want heard. We know that modern governments have become increasingly concerned with managing the media cycle. Of course, this aim would not be considered reasonably appropriate and adapted to a legitimate objective. The difficulty is that the government would surely not openly admit that its purpose in introducing such provisions was to shut down certain communication. This leaves open the possibility that the Court might be willing to infer this illegitimate purpose, or at least accept that such laws create a perception that the government is seeking to shut down communication on political matters.

While rights and freedoms are not absolute, the law that burdens the political freedom of political communicate needs to be a proportionate response to an identified legitimate end. While governments do have a responsibility as custodians of public funds, it is not clear that conditions in funding agreements are a proportional response. Attempts to gag an essential voice in debate over contentious political issues, and the voice of people who might not otherwise be heard, is not a proportional response to that legitimate end, given the fundamental nature of freedom of speech. Most blatant are the bans on a funded organisation containing links on its website to other organisations that carry out the relevant advocacy. These cannot be justified on the 'custodian of public funds' argument.

More contentious is the ban on the use of funds for political advocacy. Community legal centres have traditionally played the role of speaking for members of society that would otherwise be marginalised and unheard. If there were evidence that an organisation formed primarily to provide practical community services was instead spending all of its grant money on political advocacy, that might arguably be a situation where some restrictions on the use of the money for advocacy could be justified, because the advocacy might be carried out at the expense of the practical community services envisaged by the grant. This is quite different from a general prohibition from engaging in political discussion.

Conclusion

Recent state government attempts to try to ban publicly-funded organisations from engaging in lobbying activity raises serious concerns about freedom of political communication. The US Supreme Court has been wary of government attempts to curb speech through the indirect means of withdrawing funding to the speaking organisation. Political communication warrants very strong protection in a democracy. Elsewhere, the High Court has been wary of parties waiving constitutional rights, particularly where the right is part of a broader concept of representative democracy. It is not just the right of community legal centres to speak that is at stake, but the right of individuals in society to hear their contribution, and those of the people they represent, and to consider arguments in favour of law reform. Such voices should not be silenced.

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