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A victory only until the next time

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The Federal Court has shown how our freedom of speech rests upon a convoluted legal fiction. There is little doubt the NSW Parliament meant to allow the Lemma Government to make the World Youth Day anti-annoyance regulation. Despite this, the court found that the regulation could not stand because Parliament had not authorised this in explicit enough terms. In such a case, the court presumed that Parliament had not in fact permitted the making of a regulation that infringed freedom of speech.

The court challenge was brought by two student activists from the No To Pope Coalition. They want to use World Youth Day to protest against the Catholic Church and Commonwealth Government on issues such as same-sex marriage, contraception and abortion. This includes dressing up in a giant condom costume and handing out condoms and leaflets to pilgrims.

The Federal Court's decision to overturn the anti-annoyance regulation might seem to be a clear victory for the activists. This is an incorrect reading of the case. The court did not strike down the law because it infringed basic rights. It fell over on a technicality that can easily be repaired.

The activists' victory was further limited because they failed in their attack on the offence of "inconveniencing" participants at a World Youth Day event. This failure was reflected in the costs order made by the court. Normally, a victory entitles a person to claim legal costs from the other side. In this case the court held that the activists were entitled to receive only one-third of their costs.

The Federal Court decision means that regulations outlawing annoying conduct can be made in the future. As the NSW Government argued in court: "The State Parliament has the power to make these kinds of laws if they wanted to." There is little doubt that this is correct. The only restriction is that Parliament must make the law clear and wide enough to show it really did intend to restrict freedom of speech.

The decision means that a future, properly made anti-annoyance law may have no legal remedy. This is a significant threat to freedom of speech. Such a law prohibits conduct that, according to the Macquarie Dictionary definition of "annoy" as quoted by the Federal Court, "disturbs in a way that is displeasing, troubling or slightly irritating". This is a very low threshold at which to stop a person having their say.

Annoying someone is also by its nature subjective. Words that annoy some people do not annoy others. This offends against the fundamental principle of criminal justice that a person must know what the law is. There is no clear standard against which a person can judge whether they will breach the law.

This inevitably means some people will err on the side of caution and censor their own speech to avoid prosecution. Others will deliberately undertake even greater acts of annoyance to flout the law and to attract public attention and sympathy. Either way, the outcome is unsatisfactory.

World Youth Day is about unity and tolerance. Unfortunately, a regulation like this serves to highlight disagreement and division. One reason is because the regulation is, as the activists' barrister suggested, "a one-way street". It criminalises only causing annoyance to pilgrims. There is no like prohibition on causing annoyance by pilgrims to other members of the community. By contrast, similar provisions for the Sydney Cricket Ground prohibit the causing of annoyance to anyone in that location.

These are strong objections to any anti-annoyance regulation. They should not be capable of being overcome merely by a new authorisation of the NSW Parliament. Fortunately, it is now too late for this to occur for World Youth Day. It would require the immediate recall of the State Parliament. This would both be an expensive overreaction and a logistical nightmare.

The protesters have won this round. Next time they are not likely to be so fortunate. The Federal Court decision illuminates the fragile nature of freedom of speech in Australia. The right deserves better protection than the legal presumption that Parliament does not intend to breach the right unless it sets this out in clear terms. It is long past time that such an important freedom was safeguarded in a national charter of human rights.