

# THE STATE OF FREE SPEECH IN AUSTRALIA

By the standards of a liberal democracy, the situation is dire.

Free speech is under serious pressure in Australia. The state of law is disappointing for a Western liberal democracy. The state of preparedness to defend the principle of free speech is poor. The threats are many, and growing, and often come from those we should expect to be among free speech's defenders.

Australia has limited legal protection for free speech. We have deference toward its preservation through the common law, and we have a limited constitutional protection for political speech, but the primary instrument we use to preserve more open and free expression is political culture. A lived culture of respect for free expression is as important as any constitutional or legislative protection.

It appears in contemporary debate that “free speech” is defined by what expressions are permitted. In a liberal democracy, it is the reverse. We should assume a blank canvas where all speech is legal unless specifically made illegal. Censorship needs to be justified based on the substantive harm it causes others.

Yet we are increasingly breaking with this important tradition. Australia is becoming a society adrift. Individuals are being betrayed by too many in positions of authority and power who are intellectualising censorship. It will take nimble and considered action to reclaim our political culture to preserve our freedoms.

Debates over free speech have always been the frontiers of the clash of civilisations. During the negotiations over the Universal Declaration of Human Rights, Stalin's Soviets fought to have restrictions against “hate speech” included, but these efforts were defeated by the will of countries like the United States, the United Kingdom, and Australia.

Eleanor Roosevelt described “hate speech” as “extremely dangerous” and “likely to be exploited by totalitarian States for the purpose of rendering the other articles null and void.” Australian delegates astutely observed that “morality” should not be “legislated.” Tragically, the Soviets won during the debates surrounding the International Covenant on Civil and Political Rights and we now have restrictions on “hatred.”

It seems now that, once again, free speech is a battle ground for civilisations. Extremists are claiming legitimacy to murder cartoonists for expressions they find offensive. Yet scarcely, this time, there are too many prepared to apologise than robustly defend the principle.

## An Unjustified and Unnecessary Low Bar

Last year's debate surrounding the need to reform the Racial Discrimination Act 1975 (Cth) was instructive. The need to reform a law that makes it unlawful to “offend,” “insult,” or “humiliate” a person is self-evident.

The prevalent, selective, and confected outrage culture that now dominates too much of Australia's mainstream discourse shows soft censorship is common on serious issues in need of discussion. Ineloquent and offensive expressions are no longer seen as simply being crude. Instead, outrage is used as the basis to silence dissenting opinions and delegitimise discussion itself. This culture is bad enough in its own



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right. It should not be backed up with the firm hand of law.

Section 18C creates two serious issues. The first is that it enforces hard censorship by using law to restrict what people can say and at an unacceptably low level that isn't sufficient to invoke the harm principle. Second is that it fosters soft censorship by having a vague and subjective free speech exemption through 18D, which allows 18C-violating expression if it is done "reasonably" and in "good faith."

The law has now been used for purposes that even advocates argued it would never be used for.

Section 18D isn't an exemption; it is permission. 18D permits expressions, reversing the very principle of a free society that all acts are legal unless they are explicitly made illegal.

Advocates for the maintenance of this law have wrongly asserted that it is justified because it was recommended by three significant federal inquiries before it was introduced. Such statements show that advocates have not done their research.

It is true that this law was preceded by three federal inquiries: The Royal Commission into Aboriginal Deaths in Custody; the Australian Law Reform Commission's report *Multiculturalism and the Law*; and the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence.

None of these inquiries recommended the current law. In fact, the Human Rights and Equal Opportunity Commission expressly recommended against such a low threshold as would allow complaints for "hurt feelings" and "injured sensibilities."

Law is good at regulating explicit acts, like market transactions. Law is a poor regulator of personal interactions between individuals, such as social interactions. Informal social norms are both more efficient in and capable of civilising conduct.

Speech sits on a scale. Nothing needs to be done to respond to civil and polite speech. Free speech only ever needs to be defended when it crosses the line of social acceptability, not when someone

is guilty of an excessive use of "please" and "thank you."

As the great Scottish economist Adam Smith argued in his *Theory of Moral Sentiments*, the success of people "almost always depends upon the favour and good opinion of their neighbours and equals; and without a tolerably regular conduct these can very seldom be obtained." In short, people regulate their conduct to be held in the good standing of others. There are countless contemporary examples where, in the face of unacceptable conduct (and increasingly aided by technology), Australians have chosen not to be passive bystanders in the face of unjust behaviour.

Importantly, the law has now been used for purposes that even advocates argued it would never be used for. In 1994 an article in *The Age* by two high-profile advocates for the law, argued that the operation of 18C and 18D would "apply to the skinhead on the street yelling racist names and other insults at an Asian man, or a woman in traditional Islamic dress, not newspaper articles or anti-immigration pamphlets." History shows they were wrong.

But rather than being a pariah, 18C has become a market leader in justifying censorship. Feedback from human rights consultations in 2014 found that while many Australians understood the importance of free speech, in practice many groups also wondered why 18C only applied to matters of race and why it didn't cover other identity groups such as gender, sexual orientation, and disability.

The calls from Australians were not for fewer restrictions on speech; they were for greater and more expansive ones. But if we applied the 18C standard to all identity groups, we would have a straitjacket society that would be unable to discuss anything controversial.

### Je Suis Woken Up

The horrific attacks on *Charlie Hebdo* perfectly demonstrate the need to defend and preserve free speech from principle, not the selective application based on the fads of the day. Those who proclaimed "*Je Suis Charlie*" were rightly horrified that people could be murdered for their expressions. Yet if the same people simultaneously support 18C in its current form, it means they are prepared to use the

law to punish and, at the extreme end, jail the same individuals if they refuse to self-censor.

Some people have asserted that *Charlie Hebdo* would not have been caught in 18C's net. They're wrong.

*Charlie Hebdo* would have been a perfectly legal publication in Australia. However, it would have been caught in 18C's hard and soft censorship net. *Charlie Hebdo* included cartoons that covered matters of race, religion, and other ethno-religious subjects, not just Muslims. And there is a strong overlap between race, culture, and religion.

From a social justice perspective, 18C makes sense if racial and ethnic groups are only ever the recipients of unsavoury conduct. But racial and ethnic groups are just as capable of denigrating other minorities, and do.

For almost all of human history, gay and lesbian people have sat at the bottom of most societies' social structures and have often been victims of more dominant cultures. Many have noted the horrific crimes committed by ISIS against gay men, who are being murdered by being thrown off buildings and the like. As shocking as these murders are, they are hardly new. Iran lawfully imposes the death penalty for sexually active gay men and pressures effeminate men suspected of being homosexual to undergo a sex change so their private lives can be within the law.

Yet when we create legal protections to stop an individual confronting an act that would "offend," "insult," or "humiliate" based on issues within the overlap between race, culture, and religion, we are also granting them a legal shield from necessary criticism. The problems become particularly acute when cultures sanction discrimination and violence against oppressed minorities.

Only the free and open contest of debate protects the vulnerable.

It remains a very serious disappointment that the federal government botched efforts to reform this law last year. In a political culture that values fairness and justice, as well as rights, the federal government inadequately prepared the case for change, the grounds for reform, and the tone of the debate, despite there being a broad consensus for reform. The divergence remains primarily about the reform that should be implemented.

## Can We Reclaim Liberties as Threats Continue?

Section 18C is not the sole test of advancing free speech. But it is an important test of whether we are prepared to reclaim forgone liberties. It is equally important that overly generous defamation laws are reformed to raise the standard from triviality toward whether there is a material loss to an individual from an earned reputation.

It seems unlikely that this will occur any time soon; there may even be regress instead of progress. We are hearing disturbing utterances that the federal government is considering criminalising "hate speech" in an attempt to silence Hizb ut-Tahrir.

There should be no ambiguity about my view about Hizb ut-Tahrir. They are a disgraceful group who are attempting to dress up extremist ideology as a legitimate political and social cause when it is nothing of the sort. But rather than being silenced, they are a group that we should keep a close eye on.

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Tackling them through censorship won't stop their cause. They are motivated by mad political ideas, and censorship doesn't stop their ideas. Instead it legitimises these ideas to their supporters and sympathisers. If they are prosecuted for expressing these views, they are also given a platform to express their madness. You can kill people; you can't kill ideas. You can only discredit them.

As Peter Grete argued in an address to the National Press Club: "Closing down debates exacerbates problems and doesn't make them go away." Worse, using an emotion—hate—as the basis of law only escalates attempts at censorship on other causes.

The concerning impact of using an emotional standard to justify censorship was on full display following SBS's refusal to run an advertisement by the group Australian Marriage Forum. The AMF is an entirely legitimate political group founded to preserve Australia's existing marriage laws. They sought to air an advertisement that expressed that

view. In response, SBS censored the advertisement and refused to air it during their broadcast of Sydney’s Gay and Lesbian Mardi Gras.

If SBS had a policy of not broadcasting any political advertisements, their action would have been reasonable. But we all know that they would have had no hesitation broadcasting a pro-reform advertisement on the same subject matter.

In response to the broadcasting of this advertisement on Channel 7 and Channel 9, my office received a number of complaints claiming this advertisement was a form of harassment against same-sex couples, and others decried it

as “hate speech.” Let’s remind ourselves of what this advertisement was advocating: that children, “wherever possible,” should have a mother and a father and hence marriage laws should remain unchanged.

Innovative, no. Insensitive, maybe. Hate speech? You’ve got to be kidding.

Once we establish the emotion of “hate” as the basis for censorship, we have to accept it will have disturbing unintended consequences and impose both hard and soft censorship of legitimate topics to the harm of society, intellectual progress and individual dignity.

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