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Freedom of speech

Freedom of speech is a fundamental human right. It is because of freedom of speech that we are able to access and communicate information. It is because of freedom of speech that we have what we need to decide our political views and values. It is because of freedom of speech that Australian society has been able to accept the values that now make it such a great place to live in. Through a long process of persuasion through speech by advocates of freedom, the ultraconservative values that used to constrain all now-developed nations to barbarism have been rejected, and free societies exist as a result.

1 Supposed justifications for hate speech laws

Many arguments are offered as to why hate speech laws are necessary by their proponents. I will respond to some of these arguments.

1.1 Argument that hate speech laws protect minorities from mental harm

Supporters of hate speech laws argue that they are necessary to protect minority groups from suffering the mental harm that may come with being exposed to speech about their group that they find offensive.

This argument fails to recognise that minorities have the power to avoid this exposure if they so wish. They can avoid watching television, reading newspapers or listening to radio broadcasts that may include opinions they find offensive.

This argument also fails to recognise that hate speech laws do not in fact prevent minorities from suffering mental harm, but rather exacerbate their mental harm. This is discussed in section 1.2.3 of this submission - "Third consequence: decreased resilience among groups ostensibly protected by hate speech laws". It is unnecessary to further discuss it here.

1.2 Argument that hate speech laws prevent hate-motivated violence

Supporters of hate speech laws argue that they are necessary to prevent hate-motivated violence and crimes against minority groups. The logic goes that the more hate and hostility there is towards a minority group in society, the more violence and crimes will be committed against that group. Therefore, it is necessary to prevent the speech that incites this hostility in order to reduce hate crimes and violence.

I fully acknowledge that the more hateful a society is, the more hate crimes will be committed against a minority group in that society. However, this does not mean that hate speech laws will prevent these crimes. There are many problems with this argument. First of all, it is impossible to trace a hate crime back to any individual comment (unless the crime was committed in immediate response to the advocacy of violence). Accordingly, hate speech laws punish people for consequences for which there is no evidence that they had a role in creating. But even if a crime could be traced back to an individual comment, it would still be a bad idea to punish the commenter for it (unless the commenter deliberately advocated violence). This would deny or diminish the personal responsibility of the perpetrator of the crime.

Secondly, it is illogical to think that laws against speech will be effective to stop hate crimes. Hate speech and hate crimes are engaged in by hateful people. There are already laws against hate crimes, as there should be, and they punish hate crimes much more seriously and punitively than hate speech laws punish hate speech. If a hateful person is not going to be deterred from committing a hate crime, by either the radical nature of the activity or the serious criminal penalties they will face, why would they be deterred from expressing hate speech, which is much less radical than hate crimes, and punished much less harshly?

Thirdly, it's far from clear that if hate speech laws have an effect on the propensity of hateful people to commit violence and hate crimes, that this effect would be to reduce such acts. Hateful people are often very fearful of a perceived impending negative change to their societies at the hands of the group that they hate, and feel compelled to fight against this perceived change. Hate speech laws remove from them the means by which they may make their concerns known. Vile as these concerns may be, should they not be able to make them known, their hopes of a peaceful resolution to their concerns will be lost, and they may feel as if they have no other option but to use violence.

History is littered with examples of censorship of grievances leading to further violence by the group censored. During the 1960s, Catholics in Northern Ireland protested to end the systematic discrimination against them in the country. In 1969, Protestants responded with violent attacks on their demonstrations that culminated in pogrom-like riots by Protestants against Catholics. Far from ending the Catholic civil rights campaign, the riots were the beginning of the thirty-year conflict known as the Troubles, in which over 3,500 people were killed.

In the 1980s, Israel had stepped up a campaign of censorship and violence against Palestinians, known as the Iron Fist policy. It registered 2,663 "disturbances of public order" in 1984, well up from 1,556 in 1981. Other measures included "administrative detention, censorship, school closures, and deportation." Predictably, "without institutions to channel grievance, protest became more violent." In 1985, a "new trend" of "sporadic assaults on Israelis that were not attributable to any political faction began".¹ Then, the First Intifada began in 1987.

Most notably, in July 2011, Norwegian right-wing extremist Anders Breivik killed 77 people in two separate terrorist attacks targeted at the Norwegian Labor Party over its perceived pro-Muslim policies. In his manifesto *2083: A European Declaration Of Independence*, he wrote extensively about the actual or perceived silencing of his opinions. A passage on page 5 of the book reads:

"Needless to say; the growing numbers of nationalists in W. Europe are systematically being ridiculed, silenced and persecuted by the current cultural Marxist/multiculturalist political establishments."²

A passage on page 5 of chapter 2 of the manifesto reads:

"This Eurabian policy, expressed in obscure wording, is conducted at the highest political levels and coordinated over the whole of the European Union. It spreads an anti- American and anti-Semitic Euro-Arab sub-culture into the fiber of every social, media and cultural sector. Dissidents are silenced or boycotted. Sometimes they are fired from their jobs, victims of a totalitarian "correctness" imposed mainly by the academic, media and political sectors."³

Adding to Breivik's perception of being silenced is his use of the word "silenced" in the manifesto 14 times, his use of the word "censored" 9 times, and most importantly, his use of the term "hate speech" 17 times, as revealed by using the "Find" tool on a computer.⁴

¹ Wendy Pearlman, *Violence, Nonviolence, and the Palestinian National Movement* (Cambridge University Press: Cambridge), 2003, p. 101.

² Andrew Berwick (pseudonym), *2083: A European Declaration of Independence*, https://fas.org/programs/tap/_docs/2083_-_A_European_Declaration_of_Independence.pdf

³ *Ibid.*

⁴ *Ibid.*

The Breivik case is especially instructive for Western debates about hate speech laws. Far-right violence, such as his attacks, is generally the type of violence people worry about when defending hate speech laws. And Norway has hate speech laws based on the attribute that caused him to commit his attacks - religion.⁵ The attack happened anyway, with Breivik making clear that the law played a part in driving him to act.

But proponents of hate speech laws should not be so naive as to think that those examples of censorship by violence have nothing to teach us about censorship by laws. Hateful extremists have a severe victim mentality. Even without violence done to them, they will feel extremely persecuted by laws that censor them.

Finally, the available evidence bears out that hate speech laws are simply unable to reduce hate crimes. In 1987, the University of Michigan imposed a speech code on its campus in response to serious racist incidents. But as reported by *The Atlantic*: “Thereafter, racist incidents kept occurring on campus at the same rate as before.”⁶ The same reality is found in Australia. Section 18C of the Racial Discrimination Act, which bans public acts done because of someone’s race that are likely to offend that person or people, was enacted in 1995. But Australia’s most serious instance of modern racial violence, the Cronulla riots, occurred in 2005. Section 18C was a law and in force at the time - it was clearly unsuccessful in preventing the riots. As previously stated, Norway’s hate speech laws failed to prevent, and even contributed to, the 2011 attacks there. And finally, between September 14, 2017 and November 15, 2017, Australia had its first ever in-force law against hate speech on the basis of sexual orientation at the federal level. This law was intended to prevent the vilification of and hate crimes against LGBTI Australians during the execution of the Australian Marriage Law Postal Survey. It failed miserably: anti-LGBTI verbal and physical assaults more than doubled during the survey.⁷ (To prevent this regrettable outcome, the survey should not have taken place.)

1.3 Argument that hate speech laws preserve social cohesion

Proponents of hate speech laws argue that they are necessary to preserve the cohesion, peace and order of free societies. They argue that as societies are made up of different people with different beliefs and interests, criticism of the beliefs and interests of a group of people by another will lead to tension and animosity between the two groups, and therefore, hate speech laws are necessary to prevent the criticism that leads to this tension and animosity. These arguments are more commonly made in multicultural societies, which are more diverse, and therefore have more points of difference and of potential conflict between its members.

The first thing that must be said about this is that even granting the truth and validity this argument does not mean that hate speech laws are justified. Even if censoring freedom of speech leads to greater harmony, there is no reason to think that this censorship is worth the harmony. Personally, given a choice, I would choose freedom of speech over social harmony. I am willing to tolerate social disharmony before I am willing to tolerate censorship. If the argument is correct, then I believe the response is not to censor freedom of speech, but rather to shift to a different model of social integration, one that encourages solidarity with fellow citizens despite disagreements, and that encourages disagreements to be thought of not as a personal attack (unless it actually is), but as the simple result of different opinions inevitably existing together, and irrelevant to our relationships and solidarity with each other.

But the available evidence bears out that the argument that hate speech laws preserve social cohesion is not correct. Instead, by censoring a person from being able to speak if their speech is thought to be hateful

⁵ Almindelig borgerlig Straffelov (Straffeloven), Anden Del. Forbrydelser, § 135 a, https://lovdata.no/dokument/NLO/lov/1902-05-22-10/KAPITTEL_2-6

⁶ Conor Friedersdorf, *Free Speech Is No Diversion*, November 12, 2015, <https://www.theatlantic.com/politics/archive/2015/11/race-and-the-anti-free-speech-diversion/415254/>

⁷ Paul Karp, *Marriage equality survey marred by doubling in reported assaults*, December 5, 2017, <https://www.theguardian.com/australia-news/2017/dec/05/marriage-equality-survey-marred-by-doubling-in-reported-assaults>

against a group of people, a person censored may very well blame the group that the law was ostensibly trying to protect as responsible for their censorship. This may in turn lead to the person coming to bear the hostility to the group that the law was trying to prevent.

1.3.1 Case study - Julian Porteous same-sex marriage case

As is discussed in section 1.2.1 - justification of the censorship of other speech, in September 2015, a supporter of same-sex marriage complained to the Tasmanian Anti-Discrimination commission about a booklet distributed by Catholic Archbishop of Hobart Julian Porteous that argued against same-sex marriage.

The negative reaction to the complaint is indicative of the hostility that hate speech laws ostensibly try to protect.

An article in Quadrant referred to “Tasmania's Anti-Discrimination Commissioner, who hounded Catholic bishops on behalf of a transsexual Green”.⁸

An article in The Australian that included discussion of the complaint was headlined “Beware the barge of bullies trumpeting diversity” and said that “the campaign for same-sex marriage is not sailing on a raft of rainbows but on a barge of bullies.”⁹

An article in the Daily Telegraph that included discussion of the complaint was headlined “Gender big brothers control our thoughts” and said that “IT’S a sad truth that those who so recently claimed to be the bullied are now among the world’s greatest bullies. None more so than the alphabetical jumble of the gender confused in their pursuit of the destruction of the ancient and revered traditional form of marriage.”¹⁰

One must wonder whether this case increased or decreased tolerance and acceptance of LGBTI people, and social cohesion along with it. I hazard a guess that the case decreased both.

1.3.2 Case study - Bill Leak cartoon case

In October 2016, cartoonist Bill Leak was the subject of a formal complaint under Section 18C of the Racial Discrimination Act over a cartoon he drew in August that year, that depicted a responsible Aboriginal policeman disciplining an Aboriginal youth and talking to the youth’s Aboriginal father about discipline, and the father failing to remember his son’s name.¹¹

When the cartoon was drawn, Race Discrimination Commissioner Tim Soutphommasane wrote on his Facebook page: “If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can consider lodging a complaint under the Racial Discrimination Act with the

⁸ Roger Franklin, *Religious Faith vs ‘Community Standards’*, June 28, 2017, <https://quadrant.org.au/opinion/qed/2017/06/ssm-community-standards/>

⁹ Glenn Davies, “Beware the barge of bullies trumpeting diversity”, March 31, 2017, <http://www.theaustralian.com.au/opinion/beware-the-berge-of-bullies-trumpeting-diversity/news-story/ab37e4c742c24b3506b1287e93e4303d&memtype=registered>

¹⁰ Piers Akerman, *Gender big brothers control our thoughts*, April 1, 2017, <https://www.dailytelegraph.com.au/news/opinion/piers-akerman-gender-big-brothers-control-our-thoughts/news-story/4fead8a3fdf3a53b331b88cb220f1fa9>

¹¹ ABC News, *Bill Leak 'singled out' for racial discrimination investigation after cartoon prompts complaints*, October 20, 2016, <http://www.abc.net.au/news/2016-10-20/bill-leak-singled-out-for-racial-discrimination-investigation/7952590>

Commission.”¹² Fairly or unfairly (I think fairly), this post has been interpreted as “soliciting for complaints”. Although the complaint was withdrawn the following month, the case still attracted a hostile backlash of the sort that hate speech laws are supposed to deter.

An article in the Daily Telegraph on October 17, 2016 mocked Soutphommasane’s name, saying that “The Human Rights Commission’s Tim Soutphommasane, who’d be a 23-point certainty for the board game hall of fame if only Scrabble allowed proper nouns, made certain of maximum outrage by encouraging submissions to the HRC.”¹³

An article in the Daily Telegraph on November 5, 2016 also mocked Soutphommasane’s name, saying that then-Human Rights Commission president Gillian Triggs and “Tim ‘Soup Spoon’ Soutphommasane were actively pursuing Bill Leak, without doubt Australia’s foremost political and social commentary cartoonist.”¹⁴

On March 10, 2017, Leak died of a heart attack at age 61. Leak’s death exacerbated the backlash against the complaint: some commentators argued that the complaint against him contributed to his death.

An article in Quadrant the day Leak died called Soutphommasane a “race pimp and sinecured Labor hack”.¹⁵

At a memorial service for Leak, posters featured a caricature of then-Human Rights Commission president Gillian Triggs and Soutphommasane and said the duo was “wanted for the untimely death of Bill Leak and other crimes against Western Civilisation”.¹⁶

One must wonder, with such palpable anger at the complaint, if it increased or decreased tolerance and acceptance of various ethnic minorities, and social cohesion along with it. I hazard a guess that the case decreased both.

1.3.3 Case study - Memorial to Korean war victims case

In December 2016, a group called the Australia-Japan Community Network filed a formal complaint under Section 18C of the Racial Discrimination Act against a memorial to victims of Japanese war crimes in the Second World War that was erected in a Sydney Uniting Church.¹⁷

The negative reaction to the complaint is indicative of the hostility that hate speech laws ostensibly try to protect.

¹² Tim Soutphommasane - Race Discrimination Commissioner, August 4, 2016, <https://www.facebook.com/rdc.tim.soutphommasane/posts/1219825684746926>

¹³ Tim Blair, *Just wild about Bill Leak’s cartoon: Time to muzzle the Human Rights Commission*, October 17, 2016, <https://www.dailytelegraph.com.au/news/opinion/just-wild-about-bill-leaks-cartoon-time-to-muzzle-the-human-rights-commission/news-story/85a270266b2adb55c8281f3bc6e4be2d>

¹⁴ Piers Akerman, *We’ve hit a Triggs-er point on mind control*, November 5, 2016, <https://www.dailytelegraph.com.au/news/opinion/piers-akerman-weve-hit-a-triggser-point-on-mind-control/news-story/04f0a57bbf8fd016e3be18bcf0d17d6e>

¹⁵ Roger Franklin, *Bill Leak and His Persecutors*, March 10, 2017, <https://quadrant.org.au/opinion/qed/2017/03/bill-leak-persecutors/>

¹⁶ Lyle Shelton, March 16, 2017, <https://twitter.com/LyleShelton/status/842572686630912001>

¹⁷ Hayden Cooper, *Japanese group launches 18C racial discrimination case over ‘comfort women’ memorial*, December 14, 2016, updated January 3, 2017, <http://www.abc.net.au/news/2016-12-14/japanese-group-launches-18c-case-against-uniting-church/8117234>

A blog post on the Herald Sun was headlined “Now Japanese use our race law against a war memorial”.¹⁸

A Facebook post by MP George Christensen read “There are no longer any excuses. When a Japanese ethnic group can lodge a complaint against a WW2 memorial then Section 18C of the Racial Discrimination Act must be repealed in its entirety.”¹⁹

An article in The Spectator Australia asked “Will it become illegal, for fear of hurting Japanese feelings, to mention that out of about 22,000 Australian Prisoners of War, more than 8,000 –well over one in three – died in captivity, apart from other Allied POWs with comparable death-rates and literally countless natives? Given the latest case, this hardly seems far-fetched.”²⁰

One must wonder whether this case increased or decreased tolerance and acceptance of Japanese people, and social cohesion along with it. I hazard a guess that the case decreased both.

1.3.4 Case study - Catch The Fire Ministries case

But the clearest case of hate speech laws negatively affecting social cohesion is the multi-year legal battle between the Islamic Council of Victoria and Christian organisation Catch The Fire Ministries. This case was filed not under the Racial Discrimination Act, but under section 8 of Victoria’s Racial and Religious Tolerance Act. Unlike the Racial Discrimination Act, this Act covers racial and religious vilification. However, it sets a higher bar than Section 18C by requiring that “hatred of, serious contempt for, or revulsion or severe ridicule” be incited against a person.²¹ Nonetheless, this higher bar failed to protect free speech and still caused a deterioration in social cohesion.

In 2002, three Muslim Victorians attended a seminar held by Danny Nalliah of Catch The Fire Ministries that discussed Islam. Finding the seminar offensive, they filed a complaint with the then-Victorian Equal Opportunity Commission. The complaint progressed to the Victorian Civil and Administrative Tribunal. In December 2004, CTFM was found to have breached the Act. In June 2005, orders for remedies were made by the judge.²² It is here that the deleterious effect on social cohesion is revealed.

According to Herald Sun columnist Andrew Bolt, “[t]ensions were so high during the Catch the Fire case that scuffles broke out on the courtroom steps and the pastors took along guards.”²³ An ABC report of the hearing for the ordering of remedies seems to confirm Bolt’s column. According to a transcript of the report:

¹⁸ Andrew Bolt, *Now Japanese use our race law against a war memorial*, December 15, 2016, <http://www.heraldsun.com.au/blogs/andrew-bolt/now-japanese-use-our-race-law-against-a-war-memorial/news-story/aa72967bca77db1deec121be2d026cdc>

¹⁹ George Christensen, December 14, 2016, <https://www.facebook.com/gchristensenmp/posts/1148752868512973>

²⁰ Hal G. P. Colebatch, *The metastasising of 18C*, December 16, 2016, <https://www.spectator.com.au/2016/12/metastasising-18c/>

²¹ Victorian Current Acts, *RACIAL AND RELIGIOUS TOLERANCE ACT 2001 - SECT 8*, http://classic.austlii.edu.au/au/legis/vic/consol_act/rarta2001265/s8.html

²² Jenny Stokes, *Christianity on trial – Catch the Fire Ministries and the Islamic Council*, February 2009, http://www.saltshakers.org.au/images/stories/attachments/Christianity_on_trial_-_Catch_the_Fire_and_the_Islamic_Council_Feb_2009.pdf

²³ Andrew Bolt, *Pastors’ toil and trouble*, December 20, 2006, <http://www.heraldsun.com.au/archive/opinion/pastors-toil-and-trouble/news-story/141ee6c23c44d5f603f0de91fc1358d1>

NATASHA SIMPSON (reporter): Today's decision in the human rights division of the Victorian Civil and Administrative Tribunal did little to engender religious harmony.

(Sound of exchange outside the court)

WOMAN: You come here and you want your way, we want to be able to have...

MAN: This is my country, this is my country too...

WOMAN: ...our way in your country too.

MAN: Please understand this. We are fellow Australians. You're treating us as something hostile, something different, but we're not.

WOMAN: You are different. You make the women go around all covered up, that's not right.²⁴

It is clear and obvious that this case damaged social cohesion in Victoria. This case likely demonstrates that in the other case studies discussed, although there may have been no overt confrontations, the feelings that drive those confrontations had likely been stirred up. (The VCAT verdict was eventually reversed and the case settled by mediation, but the damage of the process was well and truly done.)

2 Consequences of hate speech laws

Censoring speech has serious and multiple negative consequences.

2.1 First consequence: justification of the censorship of other speech

The first such consequence, which is tied to the principle and theory of why freedom of speech is so important, is that it sets a precedent by which any speech can be censored if it is deemed worthy of censorship by an authority with the power to censor.

In the aftermath of the August 2017 white nationalist violence in Charlottesville in the United States, there have been calls to censor the free speech of white nationalists. This instinct is understandable but misguided. The danger of these calls is explained in Reason Magazine:

“And if you believe, as many of the Charlottesville counter-protesters do, that white nationalists and their brethren are emboldened by the presence of a man in the White House who sees them as part of his coalition, then why on God's good green Earth would you want to hand that man the right to censor those *he* believes are unworthy?”²⁵

Proponents of hate speech laws fail to understand that they are not the only ones likely to be doing the censoring. Conservatives have learned this lesson the hard way. The criminalisation of homosexuality in Australia was also accompanied by severe restrictions on the freedom of speech of LGBTI advocates. In 1978, the first Sydney Gay and Lesbian Mardi Gras was violently attacked by police, who bashed and

²⁴ The World Today, *Christian group ordered to apologise for vilifying Muslims*, June 22, 2005, <http://www.abc.net.au/worldtoday/content/2005/s1398137.htm>

²⁵ Katherine Mangu-Ward, *The End of Free Speech*, December 11, 2017, <https://reason.com/archives/2017/12/11/the-end-of-free-speech/print>

arrested participants.²⁶ Then in 1988, the Hobart City Council banned an LGBTI stall from the Salamanca markets, and had 130 people who protested against the ban arrested.²⁷

But proving that those who have the power to censor at one point in time may lose that power, Australia has now thankfully moved on from this era. The New South Wales government and Hobart City Council now recognise that their actions were gravely immoral and have both apologised for them.^{26 27} In fact, they have gone even further. Australian attitudes towards LGBTI people have shifted so much that governments now operate with the belief that their rights are important and should be protected. Consequently, the authority with the power to censor speech, and the speech that is censored, has been reversed. While in the past, right-wing governments censored the speech of LGBTI advocates, now left-wing governments censor the speech of anti-LGBTI advocates.

This was most famously seen following a September 2015 complaint to the Tasmanian Anti-Discrimination Commission over a booklet produced by the Catholic Archdiocese of Hobart that argued against same-sex marriage.²⁸ In November 2015, the Anti-Discrimination Commission decided that the Archdiocese had a case to answer under Tasmania's Anti-Discrimination Act.²⁹ This decision confirms that speech against same-sex marriage may very well be illegal under Tasmanian law (although a final decision was never made, as the complaint was withdrawn in May 2016³⁰). The result is an obvious chilling effect on freedom of speech. How could opponents of same-sex marriage in Tasmania freely express their beliefs knowing that their speech may very well be illegal? Even without a formal finding of breach of the law, as is often repeated, the process is the punishment. This type of censorship of freedom of speech is not remotely comparable to the type that preceded it: LGBTI advocates faced police violence, criminal sanctions including imprisonment, loss of employment and widespread social ostracism. Nonetheless, the prospect of having to face government-enforced anti-discrimination hearings, the possible stigma of being found a law-breaker, and the possible onerous remedies that could be imposed, not to mention all the stress that accompanies this process, is likely to deter free speech in Tasmania.

However, the response to the controversy from many same-sex marriage advocates has been very dismissive of the seriousness of the situation. For example, Rodney Croome (whose outstanding work over decades for LGBTI equality must be acknowledged, even though he is incorrect on this occasion) dismissed the situation of Archbishop Julian Porteous as “umbrage at being asked to attend a mediation” that “is hardly the basis for good law making.”³¹ But while I wish more people were receptive to complaints by conservatives of their freedom of speech being violated, it's impossible to deny that conservatives' abhorrent and violent censorship of LGBTI advocates in the past has caused many to believe that denying them freedom is impossible. Indeed, opponents of expanding freedom of religion are already pointing to conservatives'

²⁶ Lindy Kerin and Bill Code, *Sydney Mardi Gras: NSW Government apologises to first generation of protesters*, February 26, 2016, <http://www.abc.net.au/news/2016-02-25/sydney-mardi-gras-bashing-victims-get-government-apology/7198184>

²⁷ Felicity Ogilvie, *Hobart Council apologises to '80s gay activists*, December 11, 2008, <http://www.abc.net.au/worldtoday/content/2008/s2443749.htm>

²⁸ ABC News, *Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says*, September 28, 2015, <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>

²⁹ Fiona Blackwood, *Catholic Church has discrimination case to answer over anti same-sex marriage booklet*, November 13, 2017, <http://www.abc.net.au/news/2015-11-13/catholic-church-has-discrimination-case-to-answer/6939942>

³⁰ Andrew Drummond, *Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet*, May 5, 2016, <http://www.themercury.com.au/news/tasmania/transgender-rights-activist-martine-delaney-drops-complaint-over-catholic-churchs-marriage-booklet/news-story/d8d9079bf932526b27e5f094e57dbe84>

³¹ Rodney Croome, May 9, 2017, <https://www.facebook.com/rodney.croome/posts/10154400778601811>

terrible behaviour regarding LGBTI issues to argue that their freedom should not be expanded. For example, a December 13, 2017 article in *The Guardian* asks “Why extend the church's ‘freedom’ when it's abused what it already has?”³²

The history of oppression of LGBTI people by conservatives has created, in many people's minds, an intractable perception of conservatives as oppressors such that it is impossible for them to be victims. Advocates for censoring freedom of speech should be wary of creating the same impression of themselves, and therefore putting their own freedom of speech at risk later on.

2.2 Second consequence: use of hate speech laws against minorities

The second consequence of censoring freedom of speech is the harm this has on the people for whose protection it is often done. The most contentious issues around freedom of speech in Western societies concern hate speech laws, that are generally enacted to ostensibly protect minorities. The use of the word “ostensibly” is necessary because in fact, in many cases, hate speech laws have been used against minorities.

The history of hate speech laws hurting minorities can be traced back decades. In 1987, the University of Michigan implemented hate speech codes on its campus in response to serious racist incidents on the campus. In the 18 months between the implementation of the code and its judicial invalidation as a violation of the First Amendment to the United States Constitution, white students accused black students of violating the code in no less than 20 cases. As the American Civil Liberties Union said at the time, “speech codes don't really serve the interests of persecuted groups. The First Amendment does.”³³

In April 2010, a British atheist was given a six-month suspended jail sentence and a five-year anti-social behaviour order for leaving flyers critical of Christianity and Islam in the religious room of Liverpool airport. Adding to the perverse nature of the case is the apparent discrimination against atheists, whose beliefs about religion were not welcome in the room when other beliefs about religion were. He was convicted of “causing religiously aggravated intentional harassment, alarm or distress”³⁴

In March 2012, a British Muslim teenager was arrested, and later fined and ordered to do community service, for writing on Facebook “All soldiers should DIE & go to HELL! THE LOWLIFE FOKKIN SCUM! gotta problem go cry at your soldiers grave & wish him hell because that where he is going.” While obviously offensive, it neither threatened nor advocated violence. He was deemed to have committed a “racially aggravated public order offence”³⁵

In July 2015, a Croatian court ordered LGBTI organisation Zagreb Pride to pay approximately 5414 euros for putting Karolina Vidović Krišto, a Croatian TV commentator who has made numerous homophobic

³² Richard Ackland, *Why extend the church's ‘freedom’ when it's abused what it already has?*, December 13, 2017, <https://www.theguardian.com/australia-news/2017/dec/14/dont-extend-churches-freedom-when-theyve-abused-those-they-already-have>

³³ Conor Friedersdorf, *Free Speech Is No Diversion*, November 12, 2015, <https://www.theatlantic.com/politics/archive/2015/11/race-and-the-anti-free-speech-diversion/415254/>

³⁴ BBC News, *John Lennon Airport sexual image atheist gets Asbo*, April 23, 2010, http://news.bbc.co.uk/2/hi/uk_news/england/merseyside/8640048.stm

³⁵ Richard Seymour, *Azhar Ahmed – charged with treason over Facebook comments?*, March 16, 2012, <https://www.theguardian.com/commentisfree/libertycentral/2012/mar/15/azhar-ahmed-treason-army-facebook-comments>

public comments, on their “annual list of candidates for the most homophobic person of the year in 2013”. The court ruled that the organisation violated her “personal honour and dignity”.³⁶

In a highly relevant domestic case from September 2015, three members of Sydney’s Community Action Against Homophobia were fined or issued with court attendance notices for chanting “fuck [Christian Democratic Party NSW MP] Fred Nile” during a counter-protest against a rally led by Nile against same-sex marriage. The CAAH trio were accused of “offensive language”. As The Conversation points out, “the “Fuck Fred Nile” case highlights the absurdity of responding to “fleeting expletives” with criminal sanction. This is particularly so when contrasted to language which depicts homosexuality as abnormal, unnatural and sinful.” Fortunately, the charges were dismissed in October 2016.³⁷

In October 2015, France’s highest court of appeals upheld convictions against pro-Palestinian activists for wearing T-shirts that read “Long live Palestine, boycott Israel.” The conviction was based on a law that criminalises “provok[ing] discrimination, hatred or violence toward a person or group of people on grounds of their origin, their belonging or their not belonging to an ethnic group, a nation, a race or a certain religion.”³⁸

In November 2016, a French court fined Laure Pora, a French LGBTI activist, 2300 euros for describing Ludovine de La Rochère, leader of the anti-same-sex marriage organisation La Manif Pour Tous (The Rally For All) as a “homophobe”.³⁹

In February 2017, prosecutors in Poland charged the Center for Monitoring Racist and Xenophobic Behavior with various crimes at the urging of far-right Catholic priest Jacek Międlar. According to a Google translation of Międlar’s blog:

“In February this year, at the request of the prosecutor's office in Białystok, the police searched the center, and the following month, prosecutors from Warsaw responded positively to our request and two proceedings were instituted: the center's deletion and **hate speech** (Article 257 k.k.).”⁴⁰ (emphasis added)

In November 2017, teachers in the Spanish autonomous region of Catalonia were ordered to be investigated by a Spanish court for criticising police violence during the operation to stop the October 1 referendum on

³⁶ Zagreb Pride, *Backlash against Freedom of Speech: Attack on Zagreb Pride*, July 13, 2015, <http://www.zagreb-pride.net/en/backlash-on-the-freedom-of-speech-attack-on-zagreb-pride/>

³⁷ Elyse Methven, *Is it OK to use the f-word in political protest?*, November 3, 2016, <https://theconversation.com/is-it-ok-to-use-the-f-word-in-political-protest-67705>

³⁸ Jewish Telegraphic Agency, *French high court confirms BDS activists’ discrimination convictions*, October 23, 2015, <https://www.jta.org/2015/10/23/news-opinion/world/frances-highest-court-confirms-bds-activists-discrimination-convictions>

³⁹ Nico Lang, *French hate crime ruling sets a dangerous precedent for LGBT people: It’s now illegal to call someone a “homophobe” in France*, November 8, 2016, <https://www.salon.com/2016/11/07/french-hate-crime-ruling-sets-a-dangerous-precedent-for-lgbt-people-it-is-now-illegal-to-call-someone-a-homophobe-in-france/>

⁴⁰ Jacek Międlar, *NASZ SUKCES! Trwa delegalizacja OMZRiK. Sprawami zajmują się prokuratury! Kto prowadzi postępowanie?*, May 5, 2017, <http://jacekmiedlar.pl/2017/05/05/sukces-trwa-delegalizacja-omzrik-sprawami-zajmujecie-prokuratury-kto-prowadzi-postepowanie/> The original Polish is: “W lutym bieżącego roku, na wniosek białostockiej prokuratury policja przeszukała ośrodek, zaś w następnym miesiącu, prokuratury z Warszawy pozytywnie odpowiedziały na nasz wniosek i wszczęto dwa postępowania: o delegalizację ośrodka i mowę nienawiści (art. 257 k.k.).”

Catalonian independence, violence which injured over 700 Catalonians. Officially, they were investigated for “hate speech”.⁴¹

In January 2018, Jewish students in Vienna were charged by police there for unfurling an Israeli flag at an anti-Israel rally, despite the unfurling being in response to chants of the anti-semitic Islamic battle cry of “Jews, remember Khaybar, the army of Muhammed is returning.” Police alleged that the flag was “extremely provocative” and “produced considerable offense”.⁴² (No action was taken about the genocidal battle cry.)

When considered this way, hate speech laws look like the swords of oppressors, not the shields of victims.

2.3 Third consequence: decreased resilience among groups ostensibly protected by hate speech laws

Hate speech laws have consistently reduced the ability of minorities to be unaffected or to ignore speech that they find offensive. Minorities - and indeed all people - have more power to be unaffected than they realise. How someone reacts to offensive speech depends on how seriously they perceive it. Hate speech laws may affect one’s perception of offensive speech by making them perceive it as more serious than it actually is.

In a liberal democracy, certain freedoms are fundamental, and one of them is freedom of speech. Governments are only justified in restricting fundamental freedoms when to not do so would cause serious and unacceptable harm. Accordingly, when governments outlaw offensive speech, they are sending a message that such speech is seriously harmful, and therefore, if the speech has been outlawed ostensibly to protect a minority group, that that group has been seriously harmed. It is obvious that if the government tells a group of people that they have been seriously harmed, some of them will come to believe that they have been. The belief that one has been seriously harmed will obviously be psychologically damaging to them.

As an example, take section 17(1) of the Tasmanian Anti-Discrimination Act. The section makes it unlawful to “engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16” of the Act.⁴³ The attributes in section 16 include race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal record, irrelevant medical record, and association with a person who has, or is believed to have, any of these attributes.⁴⁴ A person who merely feels offended - not vilified, not abused, but *offended* - by speech because of any attribute that they have in this list is being told by the Tasmanian government that they have been seriously harmed. As such, something that should be very minor, benign and insignificant is now causing people to lack resilience in the face of merely being offended.

Indeed, there is already strong evidence that this decrease in resilience is already happening. In the notorious QUT case, complainant Cindy Prior claimed that she suffered “offence, embarrassment, humiliation and psychiatric injury” over reading Facebook posts written by students that she ejected from an indigenous-only computer lab that were critical of their ejection. One read “Just got kicked out of the unsigned indigenous

⁴¹ Catalan News, *Teachers charged with hate speech remain under investigation*, November 7, 2017, <http://www.catalannews.com/society-science/item/teachers-charged-with-hate-speech-remain-under-investigation>

⁴² Benjamin Weinthal, *Vienna Police Charge Three Men For Waving Israeli Flag At Rally* January 10, 2018, <http://www.jpost.com/International/Vienna-police-charge-3-men-for-waving-Israeli-flag-at-rally-533313>

⁴³ Tasmanian Consolidated Acts, *Anti-Discrimination Act 1998 - Sect 17*, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/tas/consol_act/aa1998204/s17.html

⁴⁴ Tasmanian Consolidated Acts, *Anti-Discrimination Act 1998 - Sect 17*, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/tas/consol_act/aa1998204/s16.html

computer room. QUT stopping segregation with segregation.” Another read “I wonder where the white supremacist computer lab is.”⁴⁵ The idea that such benign, if sarcastic, criticism of a very questionable policy could make a reasonable person suffer what Prior said she has suffered is absurd. Such suffering can only occur once a person has been hypersensitized to speech they find offensive.

The evidence that this decrease in resilience is occurring is not just anecdotal. A book by social psychologist Jean Twenge released in August 2017 “analyzes four large national datasets that track the mental health of teenagers and college students.”⁴⁶ It finds that “as soon as the data [on mental health] includes iGen (short for internet generation)—those born after roughly 1994—the rates of anxiety, depression, loneliness, and suicide spike upward.”⁴⁷

What could be at least a reason for this? As explained by Jonathan Haidt and Greg Lukianoff:

“If students are repeatedly told that *numerical disparities are proof of systemic discrimination*, and a *clumsy or insensitive question is an act of aggression* (a “microaggression”), and *words are sometimes acts of violence that will shorten your life*, then it begins to make sense that they would worry about their safety, chronically, even within some of America’s most welcoming and protective institutions.”⁴⁸ (emphasis original)

Furthermore, there is evidence that may suggest that the absence of hate speech laws focused on a protected attribute may increase the resilience of the people with that attribute. With the exception of two months in 2017, Australia has never had federal hate speech laws based on sexual orientation at the federal level. As observed by Ebony Bennett of the Australia Institute following a study conducted on the effect of the Australian Marriage Law Postal Survey on the mental health of LGBTI people, the survey showed “the resilience of a community that has faced discrimination for decades.”⁴⁹ Of course, this may be sheer coincidence, but given the established negative effects of hate speech laws on resilience, it is highly possible that there is a causal link.

2.4 Fourth consequence: increased hostility towards minority groups and decreased social cohesion

As was already stated in section 1.3 - Argument that hate speech laws preserve social cohesion, hate speech laws increase hostility towards minority groups and decrease social cohesion, as they generate resentment towards minority groups who are perceived as censoring freedom of speech. This resentment decreases social cohesion. It is unnecessary to further repeat what is discussed in section 1.3.

3 Distortions of the meaning of freedom of speech

Unfortunately, a tendency has recently developed where proponents of hate speech laws have distorted the meaning of freedom of speech to try and defend hate speech laws as not inconsistent with freedom of speech.

⁴⁵ Frank Chung, *QUT embroiled in ‘segregation’ furore*, February 6, 2016, <http://www.news.com.au/finance/work/careers/qut-embroiled-in-segregation-furore/news-story/dcdf3b57557aaf98576207f0ea7944e>

⁴⁶ Jonathan Haidt and Greg Lukianoff, *Why It's a Bad Idea to Tell Students Words Are Violence*, July 18, 2017, https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/?utm_source=atfb

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Paul Karp, *Marriage equality survey marred by doubling in reported assaults*, December 5, 2017, <https://www.theguardian.com/australia-news/2017/dec/05/marriage-equality-survey-marred-by-doubling-in-reported-assaults>

One such argument is to define freedom of speech as excluding speech that someone doesn't like, and then finding a reason to justify this after the fact, rather than a pre-existing principle on freedom of speech deciding this exemption. One often says "I believe in freedom of speech, but freedom of speech doesn't mean freedom to [insert whatever it is that that person doesn't like]." To make such an argument is not to reach a reasoned conclusion about the meaning of freedom of speech. Rather, it is to identify whatever speech the person doesn't like, carving out an arbitrary exception to freedom of speech for this speech, and then call that exception a different principle. It's not.

Another talking point used to defend censorship is that "rights comes with responsibilities". That's true, but it doesn't mean what those who point it out to defend hate speech laws argue it means. "Rights come with responsibilities" means that while you have your rights, you also have the responsibility to not violate other people's rights, as they have rights too. Instead, proponents of hate speech laws have distorted the responsibility as a requirement to exercise the right responsibly. This is inconsistent. A right is something that you're entitled to, and is therefore not contingent on any other conditions being fulfilled. Imposing the requirement to exercise it "responsibly" renders it not a right. In fact, the proper understanding of rights coming with responsibilities works against hate speech laws. One has the responsibility not to violate other people's rights, including their right to freedom of speech, and hate speech laws violate this right.

These tendencies must stop.

4 Behaviour that does not constitute freedom of speech

Although it is wrong to redefine freedom of speech to exclude disliked speech, this does not mean that all behaviours are protected in the name of freedom of speech.

4.1 Making threats of unlawful violence

One behaviour that is not protected by freedom of speech is making threats of unlawful violence. A threat of unlawful violence is intended to impose a well-founded fear of violence on the subject of the threat. Although these threats are often made with words, they may also be made without words, such as by gesturing menacingly to the subject of the threat, leaving malicious or dangerous objects at the place of residence of the subject, or by brandishing a deadly tool in the direction of the subject.

It is due to the well-founded fear of violence imposed on the subject that threats are illegal: they are not something that people should have to tolerate, and were they tolerated, they would threaten the security of society by making its members much more paranoid and fearful of violence, and therefore more willing to use violence when it may be unnecessary and unjustified. A threat is not made illegal because words are used to make it. However, the use of words cannot make an otherwise unlawful activity lawful. The fact that threats are outlawed due to the well-founded fear they impose on their subjects - whether that's imposed by words or not - and not due to the fact that some threats are made by words, demonstrates that outlawing threats of unlawful violence does not attack freedom of speech.

Threats of unlawful violence made with words can be easily distinguished from other forms of speech. No other form of speech intentionally imposes a well-founded fear of violence on its subject. While other forms of speech may nonetheless cause some people to fear violence, this is not the intention of the speaker. One cannot be held legally responsible for how another person feels when there is no intention to make them feel that way. This concern does not exist with threats of unlawful violence, because there is the intention to cause the fear, and therefore the person making the threat can be held responsible for the fear. Therefore, the outlawing of threats of unlawful violence does not set a precedent according to which other speech can be outlawed.

4.2 Advocating, encouraging or instructing the commission of unlawful violence

Another behaviour that is not protected by freedom of speech is advocating, encouraging or instructing the commission of unlawful violence. This is intended to incite others to commit that violence. It is for this reason that such behaviour is prohibited: society cannot tolerate violence being committed against its citizens. Such behaviour is not prohibited because it is often done through speech. But once again, the fact that it is done through speech doesn't render it lawful when it would otherwise be unlawful. No one would question the prosecution of a person who, while carrying a pitchfork and a torch, led an angry mob on a march to a minority group's community center, which the mob proceeded to burn down. Even if the leader of the march did not participate in the arson himself, he would still be prosecuted for inciting the arson. If he said no words and held no placard during the march, then he would have incited the arson without making any speech. It makes no sense to think that a person who intends to achieve the exact same result, especially if successful in achieving it, through words should avoid prosecution. The plan and intention to cause violence - similar to a conspiracy plot to commit violence - is the reason that advocating, encouraging or instructing the commission of unlawful violence is illegal, not because of any speech. This demonstrates that outlawing this behaviour does not attack freedom of speech.

There is also no risk of setting a precedent of censoring other speech by prohibiting the advocating, encouraging or instructing the commission of unlawful violence. No other speech is intended to incite violence. Should a hypothetical situation arise in which speech that does not advocate violence nonetheless inspires a person to commit violence, this is not the intention of the speaker. One cannot be held legally responsible for how another person acts when there is no intention to inspire them to act that way. This concern does not exist with advocating unlawful violence, because there is the intention to incite the violence, and therefore the person making the threat can be held responsible for the incitement. Therefore, the outlawing of advocating unlawful violence does not set a precedent according to which other speech can be outlawed.

4.3 Physical intimidation by abusive language when face-to-face with the target

Another behaviour that is not protected by freedom of speech is physically intimidating another person when face-to-face with them. Society can't tolerate its citizens physically intimidate each other. This would make society a considerably more violent and fearful place.

For example, a person who directs a tirade of obscene language towards another person when face-to-face with that person is (in a manner similar to threats of violence) creating a well-founded fear of violence in the person. This doesn't have to be done by speech. A person who stalks another person - a clear act of physical intimidation - would unquestionably be breaking the law. There's no reason why the same behaviour should be legal just because it is accompanied by speech.

There is no risk of violating freedom of speech with such a prohibition. A person would be free to make the exact same comments that accompanied the physical presence in the person's vicinity in other contexts. While illegal in the context of physical intimidation, it is not made illegal because of the words themselves. The fact that it is only legal in the context of physical intimidation means there is no threat to freedom of speech, as speech in any other context is not threatened by such a prohibition.

5 Recommendations

Recommendation 1: Sections 18B, 18C, 18D, 18E and 18F of the Racial Discrimination Act are repealed in their entirety.

Recommendation 2: Section 42 of the Border Force Act is repealed in its entirety.

Recommendation 3: The Defamation Act is amended so only objective falsehoods constitute defamation.

Recommendation 4: The federal parliament passes the following provision into law. Due to the limitations on federal legislative power, it is possible that not all of the provision would be upheld should it be challenged in court. This is no reason to not try. Indeed, the lessons learnt from the case law of any court decision striking it down would be useful for devising laws to the extent possible that protect free speech.

“(1) Every person has the right to freedom of speech and expression; on any subject, topic, issue or other matter; whether orally, in writing, by electronic means or by other means.

(2) Where subsection (1) is inconsistent with the Defamation Act 2003, the latter shall prevail.

(3) Subsection (1) shall oblige neither any government, nor any department, agency, commission or other bureaucracy of any government to offer or provide any money, property or other resources for the speech and expression to any person.

(4) Subsection (1) shall be overridden by any law that makes it an offence to do any of the following, to the extent that it makes it an offence:

(a) advocate, encourage, or instruct the commission of unlawful violence;

(b) make threats of unlawful violence;

(c) act in an abusive and intimidating manner to another person in public, when face-to-face with that person.”