

Free speech vs Hate Speech

The 2018 Annual Marg Barry Lecture delivered by Tim Vines, Vice President of Civil Liberties Australia to Inner Sydney Voice Thursday 25 October 2018.

Good evening everyone. Can I begin by acknowledging the Gadigal people of the Eora Nation, the traditional custodians of the land on which we are meeting, and pay my respects to their elders past and present.

I would also like to thank Charmaine, the Board and *Inner Sydney Voice* for inviting me to deliver a lecture in honour of the social justice advocate and former Executive Officer of Inner Sydney Voice, Margaret Barry.

Marg was a remarkable woman who rose from living near pony racing tracks that later became the Uni of NSW and NIDA acting school, to live a life as a great communicator.

She understood the power of words and used radio and the *Inner Voice* Magazine to speak out on environmental and city-living issues, like public housing and social justice. In her honour, my talk tonight concentrates on the rights, responsibilities and difficulties around free speech.

Just to explain where I come from: [Civil Liberties Australia](#) is a non-party political NGO based in Canberra with members all over Australia.

CLA is similar in philosophy to the Civil Liberties' Councils that are established in NSW, Queensland and Victoria. That is to say – and here I am generalising – our positions tend to the socially-liberal, rather than the libertarian. We see Government and laws as having a legitimate role in helping to secure the positive rights of all Australians.

However, our view is that government action should always be scrutinised for its intended and unintended effects on the rights that Australians have by virtue of the common law and international law.

A number of seminal events occurred in 1974. Cyclone Tracey devastated Darwin, Nixon resigned as a result of Watergate and ABBA won Eurovision with the hit *Waterloo*.

That year also saw two events of relevance to tonight's talk. First, the [Inner Sydney Regional Council for Social Development](#) – now known as Inner Sydney Voice – was established. Second, the British National Union of Students enacted their '[No-Platforming](#)' policy: a policy that continues to provoke debate and – from some quarters – condemnation.

This policy prohibits Union office holders from sharing a stage (a 'platform') with individuals from a list of proscribed organisations and to not invite or provide student union support for appearances by representatives of those organisations on affiliated campuses.

No platforming and related activities such as counter-protests, boycotts and social media shaming of businesses have been used as tactics in recent years to stop certain individuals from speaking at university campuses or delivering lectures at public or private events.

Individuals targeted for such action include those associated with the Alt-Right, other right-wing groups and those accused of promoting misogynistic or hate speech.

And...whenever these tactics are deployed, some media outlets seek to frame these actions as an affront to free speech.

So where do civil liberties groups stand on this issue?

What I hope to do tonight is to outline some of the complexities often ignored in the Free Speech vs Hate Speech debate and give a sense of how an organisation like CLA approaches this topic.

Along the way, I will try to answer the question: are the alt-right being denied their liberty when their talks are cancelled?

What is hate speech?

Hate speech is a contested term. That is to say, there is no clear definition and any attempt to define it will likely reflect the values of the person doing the defining.

A number of [Australian States](#) have 'hate speech' laws which make it a criminal and/or civil offence to, for example, 'incite hatred' towards, or serious contempt for, or severe ridicule of a person or group on the grounds of race and – in some states – religion.

Speaking of [similar laws in his country](#), Chief Justice Dickson of the Canadian Supreme Court wrote that: 'Hatred is predicated on destruction' and hate speech involves an implication 'that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.'

But the term 'hate speech' isn't just used to refer to racial vilification of this kind.

It is also applied to public speech that is prohibited under [section 18C of Australia's Racial Discrimination Act](#) – which prohibits speech that 'is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people' and which is 'done because of the race, colour or national or ethnic origin of the other person....'

The term has also been applied generally to misogynistic, racist and homophobic speech acts, as well as online campaigns against minority and female actors.

However, the question of what *is* hate speech is perhaps less important than *who* we let determine the answer to that question.

[Why] should hate speech be limited?

Existing anti-hate speech laws, as well as actions such as no platforming do place legal and practical limits on what can be said in public and semi-private venues.

So are they an affront to free speech? And, if so, how are they justifiable?

Well, first, let's assume that free speech is an important right and is worthy of protecting. Hopefully, such a view is non-controversial.

Freedom of speech and expression are, after all, recognised and protected under [international law](#) and in the [constitutions](#) or [human rights charters](#) of all developed democracies – [except Australia](#) of course.

But freedom of speech is not absolute. Even the United States – which has the most robust free speech protections– recognises certain categories of unprotected speech such as '[fighting words](#)', '[obscenity](#)' and '[libel](#)'. We also accept other limitations on speech in Australia, such as copyright, laws prohibiting profanity in public and misleading business statements.

So limits may be acceptable, but they must be [justified and proportionate](#).

So why might society and groups within want to stop hate speech, and even punish it through criminal laws?

Simple: as Marg knew, words matter. Sticks and stone may break my bones, but words can create a climate where discrimination and violence are permitted and condoned. As discussed above, hate speech is not about hurting feelings, it's about dehumanising, silencing and negating a person's or group's right to exist.

Such acts have real consequences.

For example, exposure to racial vilification [has been shown to contribute to](#) the very real health disparities between Aboriginal and non-Aboriginal Australians. And, at the extreme, words inciting genocide and genocide denial can and have been seen as [constituent acts of genocide](#), punishable under [international](#) and [domestic law](#).

But sometimes we accept one harm in preference to a greater harm. Is the harm to individuals exposed to hate speech outweighed by the harm to society of censoring speech?

And how does a civil liberties group approach free speech in a consistent manner in this situation?

Principles of international human rights law provide some guidance for us. Central to my approach is the idea that [one right cannot be used to destroy another](#). Freedom of speech exists *alongside* freedom from discrimination and other freedoms; it does not trump it.

This reflects the affirmation in the [UN Declaration of Human Rights](#) of the 'inherent dignity of' all people. This inherent dignity is the source of our rights.

Hate speech, which seeks to deny or destroy the inherent dignity of individuals and groups is therefore inconsistent with our mission to promote the freedoms that are the birthright of all people.

This means we can place less weight on claims that hate speech deserves similar protection to other kinds of speech.

Nonetheless, accepting that limiting hate speech is compatible with a goal of promoting free speech generally, doesn't mean we shouldn't be interested or concerned about who determines what is hate speech, how that speech is controlled and the risk that controls are extended to other categories of speech.

Who

In my view, the biggest issue is not over *what* qualifies as hate speech (I doubt this will ever be settled), but *who* gets to decide what speech is objectionable, punishable and *what* sanctions are legitimate.

For example, no platforming is the result of a collective vote by the members of the National Union of Students, who regularly vote to maintain and amend their no-platforming policy. Members are bound by their policy, and the policy remains accountable to those members.

However, laws against hate speech introduce the government as a key decision maker, leading to new challenges of accountability and control.

Now, I am not suggesting that we should abolish anti-discrimination laws or agencies such as the Human Rights Commission. These laws and agencies play a valuable role in enshrining community values and they can help ensure that one right cannot be used to destroy another.

Moreover they help address the power imbalance between individuals and groups.

If a rich man feels aggrieved by what someone said to them, they have the resources and knowledge to use the courts or media to address any harm.

But when South Sudanese youth are attacked in the press, they lack the same financial or social capital to respond. (They may also have other things they need to deal with in their lives). Human Rights agencies can help level the field and make a paper right a substantive right.

However, these laws and agencies require us to recognise and acknowledge that governments, police and bureaucratic agencies have a legitimate role in policing speech.

And how far and in what circumstances should we turn to the government to help address our disputes?

In combination with no platforming and protests, an [increasingly common tactic](#) in recent years has been to seek Ministerial intervention to deny or revoke a travel visa to foreign individuals seeking to conduct speaking tours in Australia.

We have a number of concerns with this tactic:

- First, it usually draws more attention to the speaker (the [Streisand effect](#)).
- Second, given that these individuals often have a YouTube or social media presence, a visa ban is unlikely to be effective in preventing their message being transmitted and heard.
- Third, many of the individuals denied a visa, be they racists, fascists, arch pro-lifers, holocaust deniers [or anti-vaxers](#) – this action only feeds their sense of victimhood and is used as ‘evidence’ of a conspiracy to silence the ‘truth’.

But, fundamentally, we believe that using this tactic legitimise the idea that one individual in Australia should wield such a power – [a power](#) that is not subject to the rules of natural justice and is effectively un-appealable.

It is also a power used capriciously and arbitrarily. Chelsea Manning was recently denied a visa based on her conviction for leaking classified documents, [but fellow convicted leaker](#) of state secrets (when he was the director of the CIA), General David Petraeus, was not only granted a visa by the current government but headlined a 2017 Liberal Party fundraiser during his visit.

We are also concerned that appeals to the Immigration Minister legitimises a conception of him or her as the chief guardian of the moral fabric of Australia.

It also sets a precedent for further government intrusion into the area of free speech and assembly, and we see early signs that governments wants to crack down on counter-protests by charging for police time or [facility hire](#); [boycotts](#) of businesses, and [on universities](#) restricting who can give lectures on their campuses.

Concentrations of unchecked power in the executive or politicians are a real threat to everyone’s liberty. Not just the alt-right.

A similar concern exists when it comes to free speech on the internet, the primordial swamp for many alt-right groups and figureheads.

In August 2017 the content delivery network provider [Cloudflare terminated the services](#) it provided to the white supremacist website *The Daily Stormer*, which was soon forced off the net.

Cloudflare had a policy of total content neutrality – i.e. free speech trumps all and it provided its services to anyone. Cloudflare is also an integral part of net’s infrastructure.

What's interesting about Cloudflare's action is not that they back-tracked on their policy but what their CEO, Matthew Prince, [said about the decision](#) he made personally.

He called his decision 'dangerous', saying: 'Literally, I woke up in a bad mood and decided someone shouldn't be allowed on the internet. No one should have that power.'

Prince is not alone in having that power, though. The individuals who run Google, Facebook and the major hosting companies all have this power. What they also have in common is that they report to shareholders, not the public, and their decisions are not subject to appeal or democratic oversight.

If Facebook were a country, it would be the most populous in the world: yet one man, Mark Zuckerberg can decide who can enter it and what content is acceptable or should be removed. No elections, term limits or democratic control.

Our freedoms are all at risk when power is concentrated in this manner and I am not sure it is enough to argue 'their sandpit, their rules'. Because of their size and ubiquity, hosting services, Facebook and Google are different to the Australian hotels that cancelled the bookings made by alt-right individuals.

Whereas other venues could offer to host events, the options are much more limited when the leaders of the internet's key infrastructure take you offline.

Again, my concern here is not that one horrid website was taken offline but the risks we all take when we concentrate power in the hand of a small number of unaccountable individuals.

Even if we accept that certain speech should be policed or restricted, it is important that civil society have a role and that the rule of law applies.

Conclusion

Having said all this. I want to conclude by suggesting that the death of free speech as claimed by the Alt-Right is exaggerated.

Introducing section 18C of the Racial Discrimination Act in 1995, the then Attorney General [reflected on NSW's experience with similar laws](#):

In relation to free speech, I do not know whether anyone could seriously advance that ... the citizens of New South Wales have been somehow stifled in the expression of their views or ideas.

I am not aware of any talkback radio host having been taken off the air ... in the last five years. I am not aware of any newspapers having been shut down, or articles having been edited, or anything of that sort having occurred.

I do not believe that.... what could be regarded as very unpopular or extreme— views ... have in any ways been stifled

This reflection applies equally now.

Since it was enacted, section 18C and our laws against hate speech do not appear to have disrupted the liberty of Australians to – in the words of a more recent Attorney-General – be bigots.

Alan Jones' wallet might be a bit lighter after some hefty defamation rulings, but he is still on air and able to wield immense power over Premiers and political parties. Andrew Bolt and right wing commentators continue to be published and syndicated by our largest media players.

If anything, extreme views have gained new prominence.

It is also worth reflecting that if it seems that more speech is being caught up by these laws then this might be that some media commentators are attempting to shift mainstream discourse into areas of extremism and are upset when these efforts are rebuffed by groups and the public at large.

The case of the *Daily Stormer* aside, can the alt-right *really* claim a loss of liberty when their leaders build and sustain large online audiences through outlets like Breitbart, or when individuals sympathetic to their world view have occupied some of the highest offices in the world's most powerful country?

And actions speak louder than words- when individuals such as Milo Yiannopoulos are [invited by a federal Senator to lecture at Parliament House](#) and an [Australian neo-Nazi is given a national audience](#) on Sky, we would suggest that their liberty is just fine thank you.

In my role as media spokesperson for CLA I often point out that the complaints by the alt-right distract from the real issues confronting free speech in Australia.

We still have some of the most restrictive defamation and [repressive anti-terrorism](#) laws in the developed world; [we prosecute the lawyers](#) who represent individuals who blow the whistle on the illegal activities of our intelligence agencies and have increased criminal penalties for whistleblowing. Our government [bans books on euthanasia](#) and, increasingly, has sought to [control how our public servants use social media](#) in their free time.

And, finally, we [still have no national Bill of rights](#) that would protect the free speech of ordinary Australians – whether that is a nine-year-old schoolgirl [not standing for the anthem](#) in protest, an aboriginal activist burning the Australian flag or environmental and social campaigners such as [Bob Brown](#) and Marg Barry.

Free speech is meant to promote debate and – hopefully – reflection. Perhaps the alt-right need to reflect on why their voice is being shouted down by communities and the public.

And, when they do so, they could consider that, in this 'marketplace of ideas' (as American judges like to call it), the problem might not be with their rights; but with the product they're trying to sell.

Marg Barry's community campaigns took place in a different time and relied on communication tools now largely disrupted by the internet. No doubt, however, today she would be constantly on social media, using photos and videos and YouTube to communicate and rally the community to action.

Whatever the tools, the message would probably be the same: communities need to look after themselves, and people must watch out for each other. That only as a community can we safeguard what we hold dear from the ['excesses of the powers that be'](#), whether that is our public spaces or our rights to free speech and assembly which are – at least for now – fundamental principles of our Australian society.

Thank you.

Delivered by Tim Vines, Vice President of Civil Liberties Australia at the 42nd Annual General Meeting of Inner Sydney Voice. Thursday 25 October 2018.