

This debate is about social conflict – conflict between at least two groups: let's call them the Speakers and the Spoken-about. Our opponents in this debate would have you believe that the Spoken-about are an oversensitive, humourless bunch looking to gag the Speakers at every turn. The Speakers, on the other hand, represent the vanguard of a free society. So important is their work that they are not prepared to try their luck in the world of speech, armed only with a right to freedom of expression. No, no; they require additional, special protection – a free pass, as it were, through the free market of ideas. They require the licence to offend.

Well my team-mates and I are here this evening to convince you that, in Australian society, Speakers do not require the special protection of a licence to offend. Freedom of expression is important, without doubt, but it is not an absolute value. Conflicts that surround hurtful speech are thorny. They require a careful assessment of the impact of speech on other freedoms: freedom from fear and intimidation, for instance. A licence to offend would not contribute to the just resolution of these conflicts. Indeed, a blanket licence to offend would make our society less free and less fair.

To convince you of that fact, I'm going to talk about some conflicts between Speakers and the Spoken-about. I'm also going to show that corrective or critical speech is not a satisfactory counter to harmful speech. Finally, I'm going to explain why it is not necessary to create special protections for producers of offensive speech in order to ensure society's freedom.

Let's first establish what you've been asked to decide tonight. The "licence" that we're talking about here is not like a driving licence: the licence to offend is not a permit to express oneself within agreed parameters. No, the "licence" with which we're concerned here is an *unfettered liberty* – the liberty to offend others without preventative restraint; the liberty to offend others without being called to account for harm caused. And it *is* harm that we're talking about as well – let's be clear about that. One can, of course, offend someone by annoying or slighting them. But what is really at issue here is another, more serious sense of the word "offend": to attack a person; to harm a person. What our opponents are asking you to support is an unfettered liberty for Speakers to be able to attack or harm others in speech. Our opponents invoke the cause of freedom, but the licence that they advocate would silence and oppress.

Let's turn to a concrete example. In 1997, the West Australian Newspaper published a cartoon strip featuring aboriginal people. The cartoon focused on efforts of members of the Nyoongar community to have the head of Yagan, a prominent aboriginal leader of the 19th century, recovered from England where it had been shipped for museum display. The return of his head to Australia for customary burial was compared, by the indigenous people concerned, to the return of the body of the unknown soldier from Gallipoli. It was also the subject of dispute within the Nyoongar community and the cartoon satirised that dispute. It depicted aboriginal people as preoccupied with little more than their next government handout and their next drink.

Indigenous people reacted with shock and distress to this cartoon. They read it as an act of racial discrimination and they complained to the

Human Rights and Equal Opportunity Commission on that basis. The Commission and later the courts did not grant the newspaper a general licence to offend. They did something much more measured. They agreed that the cartoon was offensive to indigenous persons. They recognised that offensive cartoons such as this can do great social harm. Nevertheless, they concluded that the cartoon's publication was lawful, because the editor had acted reasonably and in good faith in commenting on issues of importance for the West Australian people. The same issue of the newspaper had, after all, published a balanced report of what had happened to Yagan and the Nyoongar people. We can see from this example that rejecting the licence to offend is not necessarily about closing Speakers down – it's about holding them to account.

This approach is consistent with international human rights norms. Every human rights treaty in the world concerned with free speech provides that freedom of expression may be constrained to the extent necessary to ensure respect for the rights of others, including the right to be free from discrimination.

What if we approached the conflict over the Yagan cartoon in the way that our opponents invite you to do so? Armed with the licence to offend, the newspaper would have had no encouragement to think through the social consequences of publishing something that targets a particular group in an offensive way. What's more, the harm felt in this case could never have been placed on the table. The aboriginal people in question were offended (rather than being physically or financially harmed), so in the face of a licence to offend they would have had no way to register publicly the harm that they felt. Sweeping this hurt under the rug of a licence to offend would have favoured the viewpoint of the Speakers and

chilled the free expression of the Spoken-about. This is how the licence to offend undermines freedom of expression.

Now it might be argued that one can safely distinguish speech that hurts people's feelings from speech that causes harm and that no-one wants to licence harm. The difficulty is that one cannot reliably separate these things in the abstract. What seems merely critical to one person may strike another person to the core. And racial hatred has often masqueraded as reasoned argument – think of the “scientific” theories used to justify colonialism and slavery. Drawing a protective circle around all speech that offends would inevitably leave genuinely felt social harm unaddressed.

Against these arguments, it is often said that unfettered speech permits the truth to out. Let a thousand flowers bloom, we are told, and the poisonous ones will invariably be smothered by the sweet-smelling. But a licence to offend would not level the ground. It would fence off a patch of turf – still more turf – for the Speakers and leave the Spoken-about to suffer the consequences. Let me show you how by reference to another example.

In 1992, Jack Trawick kidnapped 21 year old Stephanie Gach, beat her with a hammer, stabbed her, strangled her and threw her down a highway embankment. Trawick was imprisoned in Alabama where he remains today. Yet with the help of an amateur web designer in New Jersey, Trawick has been able to share in excruciating detail gloating accounts of his crimes on the Web, alongside his fantasies about committing other crimes of rape, torture and murder against women. Trawick has spoken of Gach's murder as “delicious”, taunting her mother by name. And his

writings came with hand-drawn illustrations. Naturally, Stephanie's family avoided the materials as best they could. But it pained them no less to know that Stephanie's name featured in Trawick's twisted display. Their efforts to prevent Trawick from parading his violence were, however, to no avail. Even after the web designer lost interest and took down the dedicated site, the material circulated elsewhere, as it does today.

And what, exactly, are the words that will console Stephanie Gach's family? What good will open public discussion of their experience do, except perhaps to magnify their pain and extend the degradation of the women concerned? Once again it needs to be stressed: offensive speech can cause serious harm. And, in some instances, no amount of later speech can undo that harm or address it in a meaningful way.

A generic licence to offend would discourage Speakers from taking responsibility for the harm that they cause. But aside from all this, such a licence is not necessary. There are safeguards already in place in Australian law and policy that prevent the Spoken-about from simply shutting down whatever they don't like. Consider the example I gave you: publication of the Yagan cartoon was lawful not because of any licence to offend, but because the newspaper had complied with standards governing speech that offends on racial grounds. I'm not saying that Australian law and policy is perfect by any means. There is room for discussion about how freedom of expression might be better promoted in Australia. But starting with a generic licence to offend wouldn't be conducive to that discussion: it would be more likely to close it down than open it up.

Freedom of expression exerts a talismanic force over our imaginations. It's time to clear our minds and think carefully about the sort of society we wish to foster. If you, like me, think that we could all do with a little less noise and a little more empathy, then vote against the proposition before you this evening.

Two minute summary/rejoinder

Saying and publishing things that offend can diminish others' freedom and cause serious harm. We need to be encouraged to consider those possible consequences before we make a public statement that is likely to offend. A generic licence to offend would discourage that sort of reflection. It would place Speakers on a pedestal and exempt them from responsibility in a way that is neither necessary nor wise.

We accept that there should be constraints upon our freedom when our actions cause physical harm, even when the harm could be considered quite minimal by some. We don't say to someone who has been the victim of domestic violence: I know you feel hurt, but that bruise really looks quite small to me. Your attacker is really just a boorish fool. Why don't you just give it back to him? We don't talk about a thousand flowers blooming in that context.

No, it's freedom of expression that we get all giddy about. But giddiness aside, the choice that you face tonight is quite clear.

If you believe that Speakers should be able to harm others without answering for that harm, then vote in favour of the proposition.

If you believe that the Spoken-about should be able to voice the hurt that offensive speech causes them and, in some cases, to prevent that harm, then vote against the proposition.

If you would happily place your trust in the judgment of media executives and editors about the tone and content of public discourse, then vote in favour of the proposition.

If you believe that public agencies and elected representatives should play some role in ensuring fairness, freedom and safety in this context, then vote against the proposition.

If you believe that freedom of expression stands above all other rights and freedoms, then vote in favour of the proposition.

If you believe that other freedoms are as important – freedom from discrimination, intimidation and fear, for instance – then vote against the proposition.