Explainer: how do Australia's laws on hate speech work in practice?

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Abstract
The Abbott government’s intention to amend national racist hate speech law has reignited a debate that has raged in Australia for decades: is there a place for laws that condemn public conduct that is likely to cause harm or generate ill-feeling towards racial minorities?

It’s an important question, and diverse views should be ventilated.

But the grand claims made from both corners – that hate speech laws have no place in a democracy, or that they are a valuable way of protecting minorities – are rarely backed up with evidence. This is unfortunate and unnecessary. Today, more than 20 years after the first hate speech laws were introduced, we can draw upon a wealth of experience.

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Explainer: how do Australia’s laws on hate speech work in practice?

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Simply knowing laws against hate speech exist makes people feel less vulnerable to the racial prejudice and hostility they encounter. Warren Hudson/Wikimedia Commons, CC BY-SA

The Abbott government’s intention to amend national racist hate speech law has reignited a debate that has raged in Australia for decades: is there a place for laws that condemn public conduct that is likely to cause harm or generate ill-feeling towards racial minorities?

It’s an important question, and diverse views should be ventilated.

But the grand claims made from both corners – that hate speech laws have no place in a democracy, or that they are a valuable way of protecting minorities – are rarely backed up with evidence. This is unfortunate and unnecessary. Today, more than 20 years after the first hate speech laws were introduced, we can draw upon a wealth of experience.

We recently completed a major study of Australian hate speech laws. Our research shows little evidence of an overzealous approach to taking legal action. Nor does our study find any “chilling effect” on free speech and debate in the media over a period of 20 years.

**Action depends on individuals, not ‘Big Brother’**
The first thing to note is that unlike many countries that have criminalised serious forms of hate speech (for example United Kingdom and Canada) Australia has taken a different path. The Australian model involves the creation of a civil wrong. This approach was adopted because criminal punishment is regarded as disproportionate to the nature of the harms and risk associated with hate speech, and incompatible with our commitment to freedom of expression.

This means that it falls to individuals from a targeted community to initiate complaints about allegations of hate speech. There is no equivalent of the police or DPP to enforce the law. Not even agencies like the Australian Human Rights Commission have the power to take carriage of a matter.

This is not a “Big Brother” situation. It is down to victims to “enforce” the law, and this is no easy task. Some complainants turn to hate speech laws in desperation because all other efforts have failed to stop a neighbour from subjecting them to appalling public racist abuse and no other legal redress is available.

Most hate speech complaints don’t proceed any further than lodgement. Some are resolved by conciliation. Most are either withdrawn or abandoned.

Many complainants just want to register their objection to the conduct. Even if they want to take it further, many do not have the time, resources, expertise, patience or confidence to do so. Frankly, many would like someone else to take responsibility for following through and are disappointed that no agency has the power to do so.

Complainants who do decide to proceed are not motivated by self-interest or greed. Jeremy Jones never received a cent in relation to any of the cases he pursued under the Racial Discrimination Act to confront and condemn serious anti-Semitism.

Keysar Trad’s case suggests the law isn’t as draconian as some claim. Damian Shaw/AAP
Where a complaint does make its way into the courts, the fight can be long. Keysar Trad’s attempt to invoke NSW racial vilification laws against Alan Jones in relation to comments by Jones on his radio program is still not resolved nine years later.

All up, Australia’s version of hate speech legislation places a heavy enforcement burden on the people it is meant to help. Perhaps this is the price to be paid for balancing free speech rights and the right not to be vilified, but it means that legal protection is unevenly distributed across the communities who experience racism and other forms of prejudice.

The most troubling consequence of this approach is that there is little correlation between the seriousness of the conduct in question and the likelihood that hate speech laws will be mobilised. Instead, it depends on the availability and willingness of a member of the targeted group to “step up” and invoke the legislation.

No evidence for chilling effect on debate

How often are hate speech laws invoked? Our research found that fewer than 4000 formal complaints were lodged across the country in the two decades from 1990 to 2010. That’s an average of only 200 complaints a year. Compare that with the 12,000 convictions secured by the police in NSW alone for the crime of using offensive language or conduct in a public place.

Less than 2% of complaints are the subject of a binding determination by a tribunal or court. Complainants succeed in about half of these cases and the most common remedy is a court-ordered apology or correction, or removal of the unlawful material (eg from a website). Damages orders are rare and, where made, the amount of compensation is modest. No-one ever goes to jail.

One of the biggest fears voiced by opponents of hate speech laws is that they have a chilling effect and stifle public debate on important issues. Our 20-year study of media content shows no evidence of such a chilling effect. While some of the crudest edges have been knocked off the language used in media commentary, Australians seem as willing as ever to express robust views about a broad range of issues from Indigenous land rights, to gay marriage, to immigration and refugees.

Most importantly, when we interviewed members of Australia’s diverse ethnic communities we heard one thing loud and clear: hate speech laws are important and shouldn’t be tampered with. Although many said they would never lodge a complaint or pursue litigation, they saw hate speech laws as a precious symbol: simply “knowing they’re there” makes them feel less vulnerable.

Hate speech laws were seen as setting a standard and making a statement about what’s “not acceptable”. And standards are worth proclaiming no matter how many times we fail to live up to them.