Free speech?

By Richard Ackland

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From out of nowhere free speech has become liberty's new frontier.

It has developed an urgent place in the political discourse and people, who for years expressed no interest in the topic, have overnight become free speech spear-carriers.

I'm thinking of Tony Abbott and George Brandis in particular.

Indeed, there has been a deal of cross-fertilisation between the two.

In his speech to the Institute of Public Affairs in April the opposition leader praised the shadow attorney-general for his 'magnificent work in opposing the current government's attacks on free speech'.

Presumably, he had in mind the government's decision to withdraw its legislation for a Public Interest Media Advocate.

The PIMA was to have had two main functions: to declare organisations such as the Australian Press Council as 'news media self-regulation' bodies; and to approve mergers and acquisitions in the highly concentrated media market.

Since the self-regulators would be enforcing standards that journalists themselves endorsed, it was difficult to see the threat to free speech.

Senator Brandis in May had his own moment in the sun or, more correctly, in the evening gloom of the Sydney Institute.

His oration was called 'The Freedom Wars', where he sought to stoke a cultural battle by identifying three areas where speech was restricted: by the PIMA legislation; the 'insult or offend' provisions of the anti-discrimination legislation; and amendments to the Australia Council legislation relating to artistic expression.

Professor Spencer Zifcak, the former president of Liberty Victoria, pointed out that with each of these nominated examples there was ultimately no threat to free speech at all.

The PIMA legislation vanished; the 'insult and offend' provisions in the consolidated anti-discrimination legislation were withdrawn; and the artistic expression requirement for the Australia Council for the Arts is still there – just in a different place in the legislation.

This suggests that some of the rhetoric around free speech might be entirely phoney and that those who have scampered to the top of the battlements either misunderstand it or distort its place among the liberties.

Of course, we know precisely what kick-started the 'freedom wars'. It sprang from the gutted sense of injustice experienced by celebrity provocateur, Andrew Bolt, over his loss in the Federal Court in the 2011 racial discrimination case *Eatock v Bolt*.

Justice Mordecai Bromberg found that the fair-skinned Aboriginal applicants would be reasonably likely to have been 'offended, insulted, humiliated or intimidated' by Bolt's erroneous claim that they unjustifiably chose to identify as Aborigines in order to gain assistance and benefits.

Neither Bolt nor his newspaper contested the factual claims put to the court by the applicants; nonetheless, the columnist equated the findings to 'book burning'.

Despite the indignation, the case did focus attention on 'offend and insult', which former NSW Chief Justice James Spigelman, in a speech to the Human Rights Commission, identified as constraints on free speech.

What is striking is that the free speech discussion has centred around anti-discrimination issues, which makes one curious just what it is these champions of the freedom really want to get off their chests about race, colour or creed.

Meanwhile, nuts and bolts issues that could make a real difference are neglected.

We still have a second-rate regime of protection of journalists' sources, and the Public Interest Disclosure legislation (whistleblower protection) goes nowhere near far enough.

Encouragingly, attorney-general Mark Dreyfus has just announced he'll pursue with the states and territories national uniform protection for journalists' sources, owing to 'recent court proceedings that have highlighted the inadequacy of protections'.

Unlike Britain, we have not developed a satisfactory defence in defamation for 'responsible journalism'; meanwhile, a privacy tort with injunctive relief and devoid of a public interest defence still hovers in the shadows, while suppression orders flourish.

A free media is supposed to be the handmaiden to free speech, but has not done much of a job – having bullied to death a proposed charter of rights and a gentle regime for journalists' standards.

At least we still have a relatively anarchic internet that, probably unwittingly, has taken Voltaire to heart. It goes about its business by mostly ignoring suppression orders, take-down orders, the law of contempt, defamation, discrimination and the dozen-and-one constraints that apply to the heritage media. ■

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