Your Freedom Ends Where my Nose Begins – But what if the Nose Moves?

The Hon Robert French AC[1]

INTRODUCTION

There is an old saying attributed to an anonymous author in the United States:

> *Your freedom ends where my nose begins*

Freedom of movement does not mean freedom to swing our fists at somebody else's nose. But what if the nose moves into my personal space? Is my freedom to be further constrained? The saying makes a bigger point than the proposition that we are not free to punch other people. The bigger point is about freedom in general and alerts us to shifting legal and social constraints.

There is no such thing as an absolute freedom. The Founding Fathers of our *Constitution* perhaps incautiously used the term 'absolutely free' in the notoriously litigated s 92 of the *Constitution* which provides:

> *On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

The intercourse limb of the guarantee covers freedom of movement but as Mr Clive Palmer found in November 2020 his freedom of movement was not absolute. He had sought and was refused permission to enter Western Australia which had closed its borders in April 2020 by a Border Direction made under the *Emergency Management Act 2005* (WA). He commenced proceedings in the High Court of Australia alleging that

[1] This the transcript of a speech the Hon Robert French AC delivered in Perth, Western Australia on 29 September 2023 to the Australasian Study of Parliament Group's Annual Conference. The Conference theme was 'Freedom of Speech, Debate and Information'.

the border closure was invalid for infringing s 92. On 6 November 2020, the High Court pronounced orders to the effect that the *Emergency Act* was valid and that the validity of the Border Direction did not raise a constitutional issue. Reasons for decision were published on 24 February 2021.

International Conventions declaring civil and political rights and freedoms have also recognised that there must be limits. Article 19 of *the International Covenant on Civil and Political Rights*, provides in para 2:

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.*

That is followed immediately by para 3 which provides:

> *The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
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> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Those are general limitations. They use words of broad meaning. Such words can be elastic in their application. And their application may differ from one society to another and according to changing political and social perspectives within our own society.

The purpose of my presentation is to emphasise the centrality of freedom of speech to our society and its institutions. It is also to draw attention to the tendency of laws, administrative practices, social conventions and cause advocates to try to limit that freedom by declaring expanded no-go areas. In so doing I acknowledge the threats to civil discourse posed by the dissemination of disinformation through social media and in other ways.

A mechanism by which the no-go areas are expanded is to broaden the application of words which describe speech which is to be disapproved or prohibited. The word 'hate' in the context of hate speech may be one such example. The American Bar Association has defined 'hate speech' as 'speech that offends, threatens or insults groups based on race, color, religion, national origin, sexual orientation, disability or other traits.' That

definition attaches the strong, negative connotation of 'hate' to conduct which, while it should be deprecated or condemned, may be underpinned by something less than hatred according to the ordinary meaning of the word. The apparently expanding scope of the word 'bullying' may be another example. The appropriation of narrowly focussed negative terms in order to advocate broadly defined behavioural norms can risk undercutting the norms that it seeks to promote. It can detract from the moral clarity of law, practice or conventions which seek to moderate expressive behaviour. My own interest in this phenomenon was enhanced by a consideration of institutional codes of conduct in the higher education sector.

In 2019, I was asked by the Commonwealth Government to conduct a review of freedom of speech and academic freedom in Australia's universities. That Review led to the formulation of a Model Code for Freedom of Speech and Academic Freedom in universities. It reflected a concern that there were in Australia's universities many codes of conduct governing staff and students which defined misconduct in broad terms which could impose unreasonable restrictions on freedom of speech — verbal noses moving into what should be personal spaces.

In the Report arising from that Review, I included a chapter with general observations about freedom of speech from which I draw in part in this presentation.

FREEDOM OF SPEECH – SOME GENERAL OBSERVATIONS

Australia has no equivalent to the First Amendment guarantee of freedom of speech under the Constitution of the United States. Its people enjoy common law freedoms. By that I mean freedoms recognised and developed by the Courts in Australia which, in doing so have drawn upon the legal heritage of the common law of England. A list of those freedoms was set out in a Report published by the Australian Law Reform Commission (ALRC) in 2015 in connection with its Inquiry into Encroachments by Commonwealth Laws on Traditional Rights and Freedoms. They include freedom of speech, religion, association and movement.[2] They can be defined tritely by the absence of legal constraints. A distinguished English Judge put it well:

[2] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report 129, December 2015.

> *For private persons, the rule is [that] you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions.*[3]

In similar vein, in relation to freedom of speech, the High Court said in *Lange v Australian Broadcasting Corporation*:

> *Under a legal system based on the common law, 'everybody is free to do anything subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.*[4]

Freedom of speech has been described, however, as more than a mere freedom, being characterised, even in the common law courts, as a 'right'. Lord Coleridge spoke in 1891 of the 'right of free speech' as 'one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment so long as no wrongful act is done'.[5] That nomenclature, combining right and freedom, has found its way into international law. Article 19 of the *International Covenant on Civil and Political Rights* provides that 'everyone shall have the right to freedom of expression'.[6]

As Professor Trevor Allan put it, in relation to civil and political liberties generally:

> *The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.*[7]

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[3] *R v Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513, 524 (Sir John Laws).

[4] (1997) 189 CLR 520, 564.

[5] *Bonnard v Perryman* [1891] 2 Ch 269, 284. See also *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150, 155; *Wheeler v Lester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2) [*1990] 1 AC 109, 220.

[6] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

[7] T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in C Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, 1996, p. 148.

The weighty value accorded to freedom of speech at common law has been reflected in observations from the High Court over the years, including reference to 'the paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest'[8]and the statement that '[f]reedom of communication, which of course includes freedom of speech, is properly regarded in our society as a fundamental right.'[9]

Two leading Australian legal academics, Professors Enid Campbell and Harry Whitmore, once described freedom of speech as 'the freedom par excellence; for without it, no other freedom could survive'.[10] In the words of Eric Barendt it is 'closely linked to other fundamental freedoms which reflect … what it is to be human; freedoms of religion, thought and conscience'.[11] The ALRC in the Report it published in 2015 accepted that freedom of speech and freedom of expression are integral aspects of a person's right of self-development and fulfilment.

A similar approach is taken in international human rights law. In 1946 at the first meeting of the General Assembly of the United Nations it was called 'the touchstone of all human rights'. That approach was reflected in the courts of the United Kingdom. Lord Steyn, in 2000, wrote:

> *Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stewart Mill), 'the best test of truth is the power of thought to get itself accepted in the competition of the market …' Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials.*

[8] *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 328.

[9] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 363.

[10] E Campbell and H Whitmore, *Freedom in Australia*, Sydney: Sydney University Press, 1966, p. 113 quoted in ALRC, *Traditional Rights and Freedoms*, [4.1].

[11] Eric Barendt, Freedom of Speech (Oxford University Press, 2nd ed, 2013) quoted in ALRC, *Traditional Rights and Freedoms*, [4.1].

> *It facilitates the exposure of errors in the governance and administration of justice of the country …*[12]

Freedom of speech at common law and international law serves two important purposes — respect for the dignity and autonomy of individuals and facilitating the flow of information and ideas essential to the functioning of democratic societies.

FREEDOM OF SPEECH NOT ABSOLUTE

Like all freedoms, freedom of speech is not and never has been absolute. Historically, its legal limits were found in common law offences such as sedition, blasphemy and scandalising the courts. The common law wrongs of defamation, passing off and deceit are other long-standing examples.

Ours is an age of statutes made by parliaments. There are many statutes which in one way or another constrain expressive conduct, a prime example of which, but is not limited to, speech. Thus a law may prohibit conduct which is 'offensive, insulting or humiliating' in certain circumstances. The question whether expressive conduct answers that description is not necessarily answered by asking its alleged victim. He or she may take offence or feel insulted or humiliated too easily. So the law tends to engage the services of the leading figure in the judge's small band of imaginary friends — the reasonable person. That is to say it makes the test objective rather than subjective. And the courts tend to interpret statutes so as to minimise their intrusion on the freedom.

THE REASONABLE PERSON COMES TO THE RESCUE

The reasonable person played a part in a leading Australian decision on offensive behaviour with some interesting historical resonances. It involved the former Governor-General of Australia, Sir John Kerr. Long before his appointment as Governor-General, when he was a judge of the Supreme Court of the Australian Capital Territory in 1966, Justice Kerr wrote a judgment on the subject of offensive behaviour.[13] A

[12] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 126 (citations omitted).

[13] *Ball v McIntyre* (1966) 9 FLR 237.

student at the Australian National University, Desmond Ball, protesting against Australia's involvement in the Vietnam war, climbed on to a statue of King George V outside Parliament House in Canberra. He wore on his head a placard which read 'I will not fight in Vietnam'. He refused to remove the placard or climb down from the statue. He was charged with the misdemeanour of behaving in an offensive manner in a public place contrary to s 17 of the *Police Offences Ordinance 1930–1961* (ACT).

There was no evidence that anybody had actually been offended by this behaviour. Justice Kerr called in aid 'the reasonable person' in its gendered manifestation as the 'reasonable man'. To be offensive, he concluded, the behaviour must be 'calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man.'[14] He defined the reasonable man as one 'reasonably tolerant and understanding, and reasonably contemporary in his [or her] reactions.'[15] Justice Kerr's decision in *Ball v McIntyre*, which allowed an appeal against Ball's summary conviction, set the threshold of the imputed emotional response required for conviction of offensive behaviour at a fairly high level. It defined a legal standard which acted as a warning to judges to proceed with caution before making a finding that a legal prohibition on offensive behaviour had been breached. That kind of interpretive approach has been reflected in many later decisions which have cited Justice Kerr's judgment.

The allegedly offensive student, Desmond Ball, became a renowned scholar in strategic studies both nationally and internationally, a Professor at the Australian National University and the recipient of many honours, including the award of Officer of the Order of Australia.

When Ball protested, he was speaking to the world at large about Australia's involvement in the Vietnam war. A passing Monarchist might have been offended by the fact that he was sitting on a statute of King George V, but there is nothing to suggest he was directing his remarks to passing Monarchists. Negative speech directed to particular classes of persons defined by their attributes, ancestry, or religious beliefs raises a different question. And in such case a tension can arise between freedom of speech and the rights and dignity of others. Such speech may contravene laws giving effect to human rights anti-discrimination rules. In judging where the balance should

[14] *Ball v McIntyre* (1966) 9 FLR 237, 243.

[15] *Ball v McIntyre* (1966) 9 FLR 237, 245.

be struck, it is perhaps important to remember that rights belong to people and dignity resides in people. Opinions and beliefs do not have rights. Indeed it can even be argued that neither opinions nor beliefs are entitled to respect. Of course when speaking to or about a person who holds opinions or beliefs with which one vehemently disagrees, it is better to express that disagreement civilly and with respect than with vehemence. It is also important to remember that there may be a very close connection between a person's beliefs and their sense of identity and personal dignity. Religious beliefs are a particular example. I may say that religious belief is delusional generally. In so saying I am less likely to offend people than if I say that a particular set of religious beliefs or a particular religion is a wishful fantasy or has been the vehicle of historical evils.

RESTRICTIVE APPROACHES TO STATUTORY INTERFERENCE

There has long been debate about the proper limits of societal interference with speech in general and offensive speech in particular. John Stuart Mill said that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'[16]

A wider approach was proposed by Professor Joel Feinberg, who suggested that the prevention of offensive conduct is properly the state's business.[17] His approach has been criticised on the basis that it may extend the heavy-handed reach of the criminal law and increase a potentially oppressive discretion allowed to law enforcement officers and sanction an illiberal lack of acceptance or toleration of other ways of life.[18]

The general approach of Australian courts to the interpretation of statutes affecting common law rights and freedoms was described in the ALRC Report, on Traditional Rights and Freedoms, published in 2015:

> *Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia 'common law constitutionalism' has not been*

[16] John Stuart Mill, *On Liberty*, John W Parker, 1859, pp. 14–15.

[17] Joel Feinberg, *Offense to Others: The Moral Basis of the Criminal Law*, Oxford: Oxford University Press, 1985, p. 1.

[18] R A Duff and S E Marshall, 'How Offensive Can You Get' in Andrew von Hirsch and A P Simester, *Incivilities: Regulating Offensive Behaviour*, Hart Publishing, 2006, p. 57.

> *applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the 'principle of legality', courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.*[19]

A restrictive approach to limits on freedom of speech in the context of an international convention was reflected in the leading judgment of the European Court of Human Rights in 1976 in *Handyside v United Kingdom*.[20] The case concerned the freedom of expression guaranteed by Art 10 of the *European Convention on Human Rights*. The Court held that protection of freedom of expression applies not only to information or ideas that are favourably received or regarded as inoffensive but also 'those that offend, shock or disturb the State or any sector of the population'.[21] Such it said are the demands of 'that pluralism, tolerance and broadmindedness without which there is no "democratic society".'[22] That broad statement was of course subject to the provisions of Art 10(2) allowing for restrictions to be imposed on the freedom for various societal purposes including the protection of the reputation or rights of others.[23] The Court also said in a later case:

> *The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.*[24]

THE ELUSIVE CONCEPT OF 'HARM'

John Stuart Mill said that 'the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to

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[19] ALRC, *Traditional Rights and Freedoms*, [1.7].

[20] (1976) 1 EHRR 737.

[21] (1976) 1 EHRR 737 [49].

[22] (1976) 1 EHRR 737 [49].

[23] See generally Luzius Wildhaber, 'The Right to Offend Shock or Disturb? – Aspects of Freedom of Expressions under the European Convention on Human Rights', 36 *Irish Juris,* 2001, pp. 17–31.

[24] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; Ect HR [65].

others.'[25] Mill's statement begs the large question — what is harm? It is a question which lies at the heart of some controversies about freedom of speech on university campuses and increasingly in other institutions and workplaces. Plainly enough, physical injury or death inflicted on another person is a harm. Incitement to violence involves the risk of such harm. Incitement to adverse discrimination based upon hatred or contempt or ridicule directed against a person or group of persons involves a risk of harm. Economic loss is a harm. Personal reputational damage is a harm. Beyond those core examples there is room for debate. Reputational damage to an institution may depend upon whose good opinion defines its reputation. There may be different constituencies with different views of relevant facts and circumstances. In such cases contestable value judgments come into play. There is real difficulty where harm is defined by reference to the subjective reactions or feelings of members of a class of persons said to be affected by some expressive conduct.

An example of a 'harm' which should not be subjectively defined arises in relation to offensive speech, a class of speech which sometimes appears in university codes. It is useful to recall the words of Justice Hayne in his judgment in *Monis v The Queen*:

> *The common law has never recognised any general right or interest not to be offended. The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. … The common law did not provide a cause of action for the person who was offended by the words or conduct of another that did not cause injury to person, property or reputation.*[26]

As his Honour went on to observe, however, legislatures in common law jurisdictions including Australia have created offences which hinge on words or conduct being 'offensive'.[27]

A leading example is s 18C of the *Racial Discrimination Act 1975* (Cth). The section renders unlawful acts done otherwise than in private, which are reasonably likely 'in all

[25] John Stuart Mill, *On Liberty,* John W Parker, 1859, pp. 14-15.

[26] (2013) 249 CLR 92, 175 [223].

[27] (2013) 249 CLR 92, 175 [224].

the circumstances to offend, insult, humiliate or intimidate another person or a group of people' where the acts are done because of the race, colour, national or ethnic origin of the other person or persons. Each of the States and the ACT have vilification provisions in their racial discrimination legislation.

As reported by the ALRC in 2015, there are numerous Commonwealth laws which interfere with freedom of speech and expression. Intellectual property, media, broadcasting and telecommunication laws limit the content of publications, broadcasts, advertising and other media products. Anti-discrimination laws apply in workplace relations to prohibit certain forms of speech and expression.[28] There are also a number of provisions of counter-terrorism laws and secrecy offences which impact on the freedom.[29]

INSTITUTIONAL LIMITATIONS

Freedom of speech is bounded by law but the law is generally interpreted in favour of the freedom to the extent that its words allow. The imposition of tighter limits on the freedom by institutions such as higher education providers, than the limits imposed by the general law, requires powerful justification having regard to the societal value attached to the freedom. As a general proposition, no higher education rule or policy should make it more difficult to exercise the freedom on campus than off it. To the extent that higher education rules seek to deal with offensive or insulting or humiliating or intimidating speech, the question whether speech answers those categories in any case should be defined objectively rather than by reference to the subjective reactions of individuals which may be highly variable. Formulae such as 'speech which a reasonable person in the circumstances would regard as insulting or humiliating or intimidating' are to be preferred as limiting the scope of any restrictions. A further safeguard would require that the speaker intend the speech to have one or other of those effects. The word 'offensive' may be too broad to be used even when subject to an objective test.

[28] *Fair Work Act 2009* (Cth) s 676.

[29] ALRC, *Traditional Rights and Freedoms*, [4.5]–[4.6].

VULNERABILITY AND SENSITIVITY

Returning to the nose principle, freedom of speech is limited in the sense that it cannot be exercised in a way that is inconsistent with the rights and freedoms of others. An extension of that concept, which is an area of current debate, would treat the freedom as qualified by diversity and inclusion policies. The qualification would allow for the protection of the sensitivities or vulnerabilities of particular groups of students whom it is thought may be unfairly disadvantaged by exposure to certain kinds of lawful speech.

Sigal Ben-Porath in her book *Free Speech on Campus* observed in this connection:

> *The focus should not be on civility as a main norm but rather on the conditions for dignitary safety, whose absence limits the substantive access of some members of the community. Even within a civil classroom, without dignitary safety, students fear humiliation, ridicule, and rejection and are therefore partially or wholly barred from taking full advantage of their learning opportunities.*[30]

As she points out, deciding if harm or risk of harm is significant enough to justify putting a limitation on the free exchange of ideas, can be difficult. This is especially so when the harmed party is a person whose identity and skills are evolving and whose wellbeing is entrusted to the university along with the role of intellectual growth. She writes:

> *Protecting a student's intellectual comfort by avoiding serious challenge to her views may create a sense of well-being and safety, but the price paid in development and in the opportunity to participate in the university's mission would be too high to pay. On the other hand, when the challenges presented to a student are based not on shaking her beliefs or views but rather on undermining her dignity and questioning whether she belongs in the institution altogether — especially as a member of an identity group — this can damage not only her sense of well-being but also the ability of others to hear her and evaluate her views. The guiding principles for*

[30] Sigal Ben-Porath, *Free Speech on Campus,* University of Pennsylvania Press, 2017, p. 42.

> *drawing this line should be based on a democratic commitment to inclusive freedom rather than on principles of civility.*[31]

That kind of consideration may be relevant to the implementation, in speech codes, of a higher education provider's duty, under the Higher Education Standards, to foster the wellbeing of students.

THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

In addition to the common law freedom of speech which has been discussed, there is in Australia an implied constitutional freedom of political communication. The implied freedom operates as a limit on Commonwealth, State and Territory law-making powers. It is subject to reasonably appropriate restrictions imposed for a legitimate purpose consistent with the constitutional scheme for a representative and responsible government.

There is no comprehensive guarantee under the *Australian Constitution* for individual rights and freedoms. In his judgment in *Australian Capital Television Pty Ltd v Commonwealth*[32] Sir Anthony Mason said:

> *The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.*[33]

Nevertheless in that case the High Court implied a freedom of political communication under the *Constitution* which operates as a limit on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law particularly in relation to defamation concerning public figures. The Court held invalid a new Pt IIID of the *Broadcasting Act 1942* (Cth) which sought to prohibit political advertising by means of radio and prohibition during an

[31] Ben-Porath, *Free Speech on Campus*, p. 42.

[32] (1992) 177 CLR 106.

[33] (1992) 177 CLR 106, 136.

election period in relation to a federal election or referendum, a Territory election or a State or local government election.

The implied freedom of political communication began its life with a law giving statutory protection against insults to the dignity of the Industrial Relations Commission of Australia. In or about 1992 the *Australian Newspaper* published an article highly critical of the Commission. It said, among other things:

> *The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.*[34]

The newspaper was prosecuted for a breach of s 299 of the *Industrial Relations Act 1988* (Cth), which provided that:

> *(1) A person shall not:*
>
> *...*
>
> *(d) by writing or speech use words calculated:*
>
> *...*
>
> *(ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.*

Counsel for the *Australian Newspaper* submitted that there was to be implied into the *Constitution* a guarantee in favour of the people of Australia that the Parliament has no power to make a law which impairs their capacity to perform the functions and responsibilities entrusted to them by the *Constitution*. The High Court held the section invalid. Three members held that it infringed an implied freedom of political communication derived from the text and structure of the *Constitution* relating to representative democracy and election of parliamentary representatives by the people.[35]

[34] *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 96.

[35] *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 52–53 (Brennan J), 95 (Gaudron J), 105 (McHugh J).

Unlike the First Amendment guarantee in the United States Constitution, the implied freedom is not an individual right. It is a limitation on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law of defamation in relation to public figures. It was elaborated in a number of defamation cases involving politicians[36] culminating in the decision of the High Court in *Lange v Australian Broadcasting Corporation*,[37] which concerned a defamation action brought by a former Prime Minister of New Zealand against the Australian Broadcasting Corporation. The test for validity adopted by the Court in *Lange* modified in a later case, *Coleman v Power*,[38] involved two questions:

> *1. Does the challenged law in its terms, operation or effect, effectively burden freedom of communication about government or political matters?*
>
> *2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*

As can be seen the application of those tests to laws affecting offensive speech and expressive conduct necessarily requires evaluative judgments.

Justice Brennan said in *Cunliffe v Commonwealth*[39] the implied freedom is negative: It invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control. That is to say it creates an area of freedom of action which cannot be unreasonably encroached upon by statute. There is a question whether it is applicable to the common law more widely than in the area of defamation.

The implied freedom also applies indirectly to delegated legislation. A statute, validly enacted, will not authorise the making of delegated legislation or indeed the creation of administrative powers or discretions which could be exercised in such a way as to

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[36] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

[37] (1997) 189 CLR 520.

[38] (2004) 220 CLR 1 That test has been recently elaborated by the Court in rejecting a challenge to the validity of laws of the State of New South Wales prohibiting the political donations from property developers: see *McCloy v New South Wales* (2015) 321 ALR 15.

[39] (1994) 182 CLR 272.

impermissibly burden the freedom.[40] It affects the scope of the powers which can be conferred on public authorities, including higher education authorities in relation to the making of delegated legislation, including by-laws, rules and regulations.

SOME REFLECTIONS ON THE UNIVERSITY SECTOR

In my Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers, I found that many higher education rules and policies which were mentioned in the Report, used broad language capable of impinging on freedom of expression. One example was a Discipline Rule which defined 'misconduct' to include conduct that 'demonstrates a lack of integrity or a lack of respect for the safety or wellbeing of other members of the university community.' It extended that definition to conduct that is otherwise:

> *(i) a contravention of the values set by the council for the university; or*
>
> *(ii) prejudicial to the good order and government of the university; or*
>
> *(iii) reprehensible conduct for a member of the university community to engage in.*

Particular examples of misconduct were set out in that Rule. They included behaving in a way to another member of the university community which created a hostile study, research or work environment. As I observed, the terms 'lack of respect', 'prejudicial' and 'reprehensible' are wide. It does not require much imagination to apply them to a considerable range of expressive conduct. When you use terminology of that kind in statutes or at common law, they fit into what Professor Julius Stone described as 'legal categories of indeterminate reference'. They allow, as he said 'a wide range for variable judgment in interpretation and application approaching compulsion only at the limits of the range.' I found that the kind of terminology and rules and policies which might affect expressive conduct was rife on university campuses in Australia. It made the sector an easy target for those who would argue that the potential exists for restrictive approaches to the expression of contentious or unwelcome opinions which some might find offensive or insulting. I considered that although the risk could never be

[40] *Wotton v State of Queensland* (2012) 246 CLR 1.

eliminated, it could be reduced by appropriately limiting language in higher education rules and policies. Of course, rules and policies can only go so far. A determining factor will be the culture of the institution. A culture powerfully predisposed to the exercise of freedom of speech and academic freedom is ultimately a more effective protection than the most tightly drawn rule. A culture which is not so predisposed will undermine the most emphatic statement of principles. Reciting a generally expressed commitment to freedom of speech and academic freedom does not of itself provide strong evidence of the existence of such a culture.

I recommended that higher education providers should adopt umbrella principles, operationalised in a code applicable to cases in which freedom of speech and academic freedom might be in issue. It could be applied to guide the exercise of powers and discretions, formal and informal, when their breadth would allow for its application. Its purpose was to restrain the exercise of over-broad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification.

THE DRAFT MISINFORMATION BILL

An expansive concept of harm appears in the Commonwealth Government's draft Bill, known as the 'Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023'. It seeks to provide the Australian Communications and Media Authority with powers to combat online misinformation and disinformation. The proposed Bill would be an amendment to the *Broadcasting Services Act 1992* (Cth). 'Misinformation' captures content which is false, misleading or deceptive and where provision of that content on a digital service is reasonably likely to cause or contribute to serious harm. 'Disinformation' is intended to capture misinformation that has been disseminated with the intention of deceiving another person. For misinformation to be covered by the powers it must be reasonably likely that it would cause or contribute to serious harm. The term 'harm' is defined as follows:

> *(a) hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;*
>
> *(b) disruption of public order or society in Australia;*
>
> *(c) harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;*

(d) harm to the health of Australians;

(e) harm to the Australian environment;

(f) economic or financial harm to Australians, the Australian economy or a sector of the Australian economy.

It is not necessary to delve further into the terms of the draft Bill which, on the strength of a range of submissions, appears to be the subject of considerable concern. It is sufficient to look at the open-textured content of the definition of harm which would enliven the regulator's powers. What constitutes disruption of '… society in Australia'? What is the threshold for an outcome of misinformation is able to be designated as 'hatred'? What does 'harm to the integrity of Australian democratic processes' mean? The scope of this terminology feeds directly into the scope of the regulator's power. The wider the potential application of the concept of serious harm, the wider the powers of the regulator to intervene in relation to such conduct.

CONCLUSION

The boundaries of freedom of speech are, from time to time, contested and moved by laws, institutional administrative policies and practices. Every new intrusion on freedom of speech — a movement of the nose — confers authority on some official or court to take adverse action against a person whose attempted exercise of the freedom infringes the new constraint. This is a matter in which, to some extent, we have become complacent. The codes of conduct and the broad concepts of misconduct which have infected the higher education sector are not confined to it. Freedom may be constrained by self-censorship where people fear contravening ill-defined concepts of misconduct or inappropriate behaviour. Ultimately, it is a matter of societal and institutional culture. Parliament has a leading role to play in supporting a culture of freedom of speech.