The Fight for Free Speech

What it means for universities

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What are universities' obligations and restrictions for free speech?

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Introduction

There is at least one matter which will not be in dispute today. Since the time at which this conference was first convened, the issue of free speech in universities has been the subject of much attention and has become even more controversial.

In an interview reported on 22 October last, the NSW Education Minister, Rob Stokes, "[blasted] *our Universities for encouraging a 'far-left group think mentality*'". The report continued:

> "*Mr. Stokes* [said] *'robust debate' has become almost non-existent in Universities thanks to a rise in identity politics.*
>
> *The Education Minister says 'great speakers' from around the world are being banned from giving university talks because academics have labelled their views as 'unacceptable'.*
>
> ...
>
> *'Universities are places where people should be free to speak their mind, that's at the heart of academic freedom'*".

In a similar vein and earlier in that month, the NSW Treasurer, Dominic Perrottet, in a speech to the Sydney Institute, said:

> "*In recent weeks, our universities have banned controversial speakers, passed on excessive security costs to organisers and allowed protests to escalate to the point where riot police had to be called in.*
>
> *In none of these cases did the universities act as they are meant to – as facilitators of debate.*"

Even more recently, the issue has been the subject of attention in the course of a Senate Estimates Committee Hearing. During that hearing, Senator Stoker (Queensland) said:

> "*I could keep going but there are lots of universities policies that are quite problematic in terms of their restriction on the ability of students and staff to freely speak about many things.*"

Additionally to these contributions to the discussion, the Honourable Robert French, in September last, delivered the Eighth Austin Asche Oration in Law and Commerce at Charles Darwin University. Mr. French is a former Chief Justice of Australia and is currently Chancellor of the University of Western Australia. He was also Chancellor of Edith Cowan University, from 1991 to 1997. On any view that has to be a quintessential example of gluttony for punishment.

It is interesting to note that last week the Commonwealth Government announced the appointment of Mr French to conduct an enquiry into the issue of free speech on university campuses

The subject of the Judge's paper was; "*Free Speech and the Law on Campus – do we need a Charter of Rights for Universities?*".

The paper, from my perspective, could not have been more timely. That is not to say that I have been relieved of any obligation to think for myself. However, the paper does explore numerous themes that are pertinent to the issue which I have been asked to address. It will be useful, therefore, to follow the lines of thinking which Mr French develops. That is even more so the case given his recent appointment to conduct this important review of freedom of speech in Australian universities.

What is "*free speech*"?

Let me begin by posing the question which invokes the lawyers' mantra; what do we mean, in this case, by "*free speech*"?

In the long distant past, when I was a student, or thereabouts, the focus of the discussion concerning free speech related to the law proscribing obscene and indecent publications. One case which commanded our attention was the prosecution in England of the Australian editors of OZ, a satirical magazine, for what was called its "*School Kids Issue*". I suspect that there are other reasons why, in this day and age, that publication might have attracted adverse attention.

More recently, there has been the "section 18C debate". Section 18C, of course, is a reference to that provision in the Commonwealth Racial Discrimination legislation which renders it unlawful to do some act "*which is reasonably likely… , to offend, insult, humiliate or intimidate…*".

These are but two examples of the way in which the law has intruded upon or limited free speech. These intrusions were summarised more generally by Mr. French in this way:

> "*The general law regulates expressive conduct in the community at large. Historically, the law has created offences involving speech and other forms of expressive conduct which have included insulting the dignity of the sovereign, seditious libel, blasphemy, scandalising the courts, defamation, obscenity and offensive language and communications generally.*"

I might add a more recently legislated example being the restrictions imposed by the *Defence Trade Controls Act*, which is a statute with particular implications for members of university communities undertaking research in the many areas covered by the Defence and Strategic Goods List of military and dual-use technologies.

Be that as it may, all of these restrictions on "free speech" apply to the community generally in the sense that none of them apply to universities selectively. Moreover, other than, possibly, in the case of the *Defence Trade Controls Act,* I have not heard it suggested that universities should be in some privileged position when it comes to exemptions from the laws regulating free speech.

That is an important consideration when addressing the question; "*what do we mean by free speech?*".

I would contend that, in the context of the current controversy about free speech in universities, what is really in issue is not free speech but rather what I might characterise as the freedom to speak and its natural concomitant, the freedom to hear.

I am reinforced in that view by Mr French, who defined the debate about free speech in these terms:

> "*There has been public debate in Australia and elsewhere about protest action by academics and student groups which are said to demonstrate a worrying intolerance for the expression at universities of views which are considered harmful in various ways.*
>
> *Contributors to the debate straddle the spectrum from the censorious, through the thoughtful and concerned, to the chronically angry libertarians. Both ends of the spectrum are capable of over-the-top language in strikingly similar terms when complaining that a contentious view has been allowed, or not allowed, a platform on campus.*"

I hasten to say that I do not intend by raising this contention to define my topic out of existence. Rather, I hope to give it greater focus on what, as I survey the landscape in my own and other universities, appears to be the issue which is at the centre of the current debate. Indeed, as it seems to me, the term "free speech" obscures the issue.

I should add, for completeness, that I do not suggest that issues of free speech are unimportant in this context. However, relevantly, they are concerned with the manner in which we contribute to public debate and discourse rather than the content of that contribution. So, for example, my own University's Code of Conduct for Academic Staff requires them in the course of at least their professional behaviour to "*act fairly and reasonably and treat students, staff, affiliates, visitors to the University and members of the public with respect, impartiality, courtesy and sensitivity*".

Freedom to Speak and Freedom to Hear

When defining the current focus of the debate by reference to "freedoms" rather than "rights", I do so deliberately having been asked to address the obligations and restrictions of universities in relation to the protection of freedom of speech as well as the restrictions which they might properly impose upon its exercise. Beyond that, discussions about rights and their content can involve highways and byways beyond the reasonable scope of this talk.

The first matter to be noted is that these freedoms are being considered in the context of a university. The extent to which they must be protected and may be circumscribed, therefore, can be distinguished with the same freedoms when exercised, for example, on the work floor of a factory or, if they exist at all, in a Trappist monastery.

That consideration requires close attention to the nature of a university. If I may, I shall refer, where relevant, to the regime in which my own University operates, although I sense, without having researched the matter in detail, that it is not dissimilar in any significant respect from that applicable in universities generally in Australia.

The *University of Sydney Act* provides by section 6(1) that:

> "*The object of the University is promotion, within the limits of the University's resources, of scholarship, research, free enquiry, the interaction of research and teaching, and academic excellence.*"

and by section 6(2):

> (b) "*the participation in public discourse*".

The requirement for the promotion of those objects is reinforced by section 19.115 of the *Higher Education Support Act* which requires that universities; "*must have a policy that upholds free intellectual enquiry in relation to learning, teaching and research*".

By way of satisfying the requirements of that provision, the University has a Charter of Academic Freedom, which was endorsed by both its Senate and its Academic Board and which provides:

> "*the University of Sydney, consistent with the principles enunciated in its mission and policies, undertakes to promote and support:*
>
> ...
>
> - *principled and informed discussion of all aspects of knowledge and culture.*"

The Charter is supported by the University's Policy on Public Comment, the scope of which is described as follows:

> "*Academic Staff are encouraged to contribute to public comment in their area of expertise. The University encourages the ideal of the 'public academic' willing and able to comment on matters.*
>
> *All staff have a professional responsibility to uphold the outstanding reputation of the University in the community and to exercise good and ethical judgment in any public comment*".

In addition, there are provisions in the University's Enterprise Agreement which are concerned with the protection of "*intellectual freedom*" as it is described. By that agreement, the University and its academic staff are committed "*to the protection and promotion of intellectual freedom, including the rights of academic staff to engage in the free and responsible pursuit of all aspects of knowledge and culture through independent research, and to the dissemination of the outcomes of research in discussion, in teaching, as publications and creative works and in public debate*".

That commitment is subject to them upholding "*the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards*".

A further consideration which impacts upon this debate is the membership of a university.

Section 4 of the *University of Sydney Act* provides for the establishment of the University. Significantly, for our purposes, it provides that the University's membership shall be:

> "*(a) A Senate,*
>
> *(b) Convocation,*
>
> *(c) the professors and full-time members of the academic staff of the University and such other members or classes of members of the staff of the University as the by-laws may prescribe; and*
>
> *(d) the graduates and students of the University.*"

That significance is reflected in the decision of Mr. Justice French (as the Mr French then was) in *University of Western Australia v Gray* [2008] FCA 498. Albeit that that case was concerned with the relationship between a university and a member of its academic staff, some of the observations made in the course of the judgment have more general application. In that regard, His Honour said:

> "[1361] *It is also not without significance, that Dr. Gray was employed by a university, a statutory body established for public purposes. He was not merely an employee. He was, by virtue of the definition of the "*university*" in the UWA Act, a member of it and linked historically by that definition to the idea of the university as a community of teachers and scholars. That statutory definition which incorporated that idea can be traced back at least to the 16th century statute by which Oxford University was incorporated.*"

Whilst the Full Court of the Federal Court, in the course of the appeal from that judgment, did not explore that issue in detail, I think that it is fair to conclude that, in the joint judgement of that Court, its members accepted that there was at least a distinctive and distinguishing character in the relationship between the university and an academic on the one part and, say, the relationship between a private company employer and one of its employees; *University of Western Australia v Gray* (2009) 179 FCR 346 at 387 et seq.

Mr. French also considered the character of a university in the course of the Austin Asche Oration. There he said:

> "*Beyond particular aspects of academic freedom which attach to academic staff in a variety of ways as aspects of membership of the university and beyond the larger view of students not just as clients but as participants in the transmission of knowledge, we can look to the historical tradition of universities as places of free enquiry.*"

It seems to me that it would be incompatible with the character of a place of free enquiry if there was not either a freedom to speak or a freedom to hear.

Before exploring the extent either to which those freedoms may be limited or the extent to which they must be protected, I note that Mr French referred to students as "*clients*", albeit allowing that they are also "*participants in the transmission of knowledge*". Given that students are, by the terms of the statutes constituting universities, members of those institutions, I think that that is too narrow a view of their status. Rather, I would contend that they are members of a "community of teachers and scholars" to adopt the phrase used by Mr French in *University of Western Australia v Gray*.

Consistently with the decision in that case, it has to be accepted that the rights and obligations of students, as is the case with the university's academic staff, can be regulated by the terms of their contract with the university for so long as the ambit of that contract is within the university's powers. Equally, subject to the powers of the University, the exercise of those rights and compliance with those obligations, whether by staff or students, can be the subject of the university's by-laws, rules and policies.

Accepting those limitations, it is still the case that students are members of a community. It is a community dedicated to "*scholarship, research, free enquiry, the interaction of research and teaching, and academic excellence*" as it is put in the *University of Sydney Act*. Whilst the issue has not been the subject of authoritative determination, it must at least be arguable that membership of such a community permits staff and students not only to engage with other members of that community for the purpose of pursuing that objective but also to invite visitors onto the campus who can make legitimate contributions to its advancement.

Restricting the Freedom to Speak

Mr. French introduces his consideration of the issue of restricting the freedom to speak in this way:

> "*Rules about expressive conduct on campus may govern the use of university land and facilities and they may inform conduct codes and standards enforceable by*

disciplinary measures. What then is the normative basis for more restrictive rules beyond application of the general law? Would a university's rules have to be subdivided into one set relating to expressions of opinion by staff and students and another set applicable to people invited to speak on campus? If persons who are not members of the university community want to use university facilities to express their views, whether by invitation or otherwise, is their freedom of speech compromised if access to those facilities is refused by reference to the apprehended content of their speech?"

Having considered various of the bases on which objection might be taken either to views expressed on a campus or to inviting a visitor to speak to a meeting on university grounds, Mr French concludes:

> "*Generally speaking, no one has a positive right, in the legal sense, to use University land or buildings as a platform for their views. There may be distinctions to be drawn between invited speakers and academics and students expressing views on university land and in university buildings.*"

As a statement of principle, that is not objectionable. However, the use of the term "*right*" avoids or circumvents what I have suggested is the real issue; namely, what freedoms should the members of a university community and their visitors enjoy? In particular, should they have the freedom to speak and the freedom to hear?

As I have already mentioned, a discussion about rights in this or, indeed, any context, raises broader issues. It has a particular impact on this debate to the extent that there is a great deal of American literature touching this topic. However, it is written in the United States constitutional environment of the First Amendment, which protects freedom of speech. There is no corresponding provision in Australian law, although, the High Court has developed a body of law around implied constitutional freedoms, including, importantly for our current purposes, the freedom of political communication. That is a freedom to which I shall give some greater attention later.

Be that as it may, those considerations do not affect the view that it would be incompatible with the character of a university as a place of free enquiry if there was not either a freedom to speak or a freedom to hear.

Regulation of the Use of University Lands

Notwithstanding that consideration, may a university limit access to its land or buildings for the purpose of prohibiting either a member of the university community or a visitor from exercising the freedom to speak?

I doubt, in the case of my own University, that it has a power to, say, preclude a visitor coming onto the campus at the invitation of a member of the University community merely because a majority of the Fellows of Senate did not agree with the views of the visitor.

Moreover, I would read the University's *Campus Access Rule*, which regulates both the rights of third parties to come onto University grounds and the rights of all persons, be they members of the University community or not, to remain on University lands, consistently with that view.

The relevant provisions of that Rule are:

> "***Unlawful Entry on University Lands***
>
> *Any person who, without lawful excuse (proof of which lies on the person), enters into University lands without the consent of the University, or who remains on those lands*

after being requested by a University representative to leave those lands will have their licence to access those lands terminated by way of a Termination of License Notice.

I would argue that for the purposes of that provision of the Rule, a lawful excuse would include an invitation from a member of the University community to come and speak or engage in a discussion about a topic legitimately explored in the course of pursuing the University's objects.

Offensive Conduct While on University Lands

Any person, who remains upon the University lands after being requested by a University representative to leave those lands and while remaining upon those lands conducts himself or herself in such a manner as would be regarded by reasonable persons as being, in all the circumstances, offensive will have their licence to access those lands terminated by way of a Termination of License Notice."

When considering that Rule, it is appropriate, as Mr. French does, to consider what has been described as the implied constitutional freedom of political communications. That refers to a limitation on the powers of Australian Parliaments and the instrumentalities (including universities) which they establish. That limitation precludes them from prohibiting political communication. He explains the implied freedom in this way;

"*It does not confer an individual right to engage in political communications. Rather, it limits the powers of Commonwealth and State and Territory Parliaments to prohibit or restrict such communications. The question to be asked in every case when the validity of a law is challenged because it impinges on that freedom is:*

1. *does the law effectively burden the freedom either in its terms, operation or effect?*

2. *If the law effectively burdens that freedom, is it reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*"

Irrespective of one's views as to the ambit of the power of the University to regulate access to its land, the implied constitutional freedom of political communication operates as a limitation on that power.

The High Court in *Lange v Australian Broadcasting Corporation* [1997] HCA 25, described the freedom of political communication in these terms:

"*Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections….. Furthermore, because [there]…. must be a true choice with "an opportunity to gain an appreciation of the available alternatives",…… legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.*"

In the Oration, Mr. French refers to another decision of the High Court involving a by-law adopted by the City of Adelaide which limited the right to speak on public streets without a permit; *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3. The constitutional validity of that by-law was challenged on the ground that it involved an impermissible limitation on the freedom of political communication. That challenge was unsuccessful. The reasoning in that case suggests that any similar challenge to the *Campus Access Rule* would not succeed.

The Controversial Visitor

A particular circumstance with which Mr. French deals is the controversial visitor. This circumstance has relevance for the application of the *Campus Access Rule*. He introduces the issue in this way:

> "*The speaker invited onto campus by students or academic staff has historically given rise to difficult free speech questions for Universities. These are not strangers coming uninvited onto campus to express their views. They are invitees of members of the University. Examples abound. In 1963, student members of the Yale Political Union invited George Wallace, the segregationist Governor of Alabama to speak. It was not that students agreed with those views. However, the President of Yale who was concerned about violent protests persuaded the students that they should withdraw the invitation.*"

At an earlier point in the paper, Mr French said:

> "*The University has a legitimate interest in ensuring that the use of its facilities is consistent with its public purposes. It also has a legitimate interest in ensuring that the use of its facilities, which are a limited resource, does not involve displacement of other higher-priority users and that events on campus are properly managed so as to avoid or minimise damage to University property. The threats of disruptive and potentially violent action against speakers from within or outside the University may be relevant to its decision-making. Generally speaking, there should be zero tolerance approach to such threats. However, universities cannot be expected to run private police forces of the kind that might be necessary to respond to threats of violent action.*"

Beyond the considerations to which Mr French refers concerning the proper use of university facilities, the scenario he describes which involved the invitation to Governor Wallace would also raise, in the Australian context, possible issues under the *Work, Health and Safety Act*.

Section 19(1) of that Act provides:

> "*A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:*
>
> *(a) Workers engaged, or caused to be engaged by the person, and*
>
> *(b) Workers whose activities in carrying out work are influenced or directed by the person,*
>
> *whilst the workers are at work in the business or undertaking.*"

In addition, section 20(2) reads:

> "*The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the*

workplace and anything arising from the workplace are without risks to the health and safety of any person."

In that scenario, having regard to the University's obligations in respect of the safety and wellbeing of staff and students as well as visitors to the campus, it needs to balance those obligations with the promotion of its objects, including the encouragement of the dissemination, advancement, development and application of knowledge informed by free enquiry as well as the participation in public discourse. I accept that that balancing act may result in the University refusing its consent to or precluding an invited visitor coming onto a campus. That decision might be made having regard to the possibility that the presence of the visitor may cause such controversy and disruption that it puts safety and wellbeing of others on the campus at unacceptable risk.

Bullying or Harassment

Against the circumstance of the controversial visitor, it is my contention that, particularly in the context of a university, given its necessary commitment to public discourse and debate as well as the airing and testing of contentious views, that the university's obligations on account of health and safety have particular pertinence. This is especially the case where the health and safety of staff, students and visitors to the university might be put at risk as a result of bullying or harassment. Conduct of both types, in my view, can improperly intrude upon the exercise of both the freedom to speak and the freedom to hear. As such, the obligations of a university can be enlivened where such behaviour interferes with the legitimate expectations of staff and students that they will be able to debate, discuss and listen to others on issues either of immediate relevance to some course of study or a more general matter of extra-mural interest which might reasonably command their attention as members of a scholarly community.

In the case of my own University, it has adopted a Bullying, Harassment and Discrimination Prevention Policy.

That Policy defines "*bullying*" as follows:

> "*Bullying is repeated and unreasonable behaviour directed towards a person or group of people that creates a risk to health and safety.*
>
> and says that:
>
> *(b) Unreasonable behaviour is behaviour that a reasonable person, having regard to the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening.*"

Particular examples of bullying include:

> "...
>
> *(a) Verbal abuse or threats, including yelling, insulting or offensive language;*
>
> ...
>
> *(b) Deliberately excluding someone from activities;*
>
> ...
>
> *(g) denying access to information, supervision, consultation or resources to the detriment of a person;*

(h) physical abuse."

It also specifies what does not constitute bullying, and, in that regard, provides that:

> *"(1) The following behaviours do not constitute bullying.*
>
> *(a) A single incident of unreasonable behaviour. However, single or one-off incidents of unreasonable conduct can also cause a risk to health and safety."*

And as to harassment, it says:

> *"Unlawful harassment occurs when a person, or a group of people, is intimidated, insulted or humiliated because of one or more characteristics."*

By referencing this Policy in this context, I do not suggest that the freedom to protest may not be exercised. I do argue, however, that the exercise of that freedom must be undertaken conformably with the requirements of that Policy. In the event of a breach of the Policy it will be open to the University to take appropriate disciplinary action.

Equally, so far as concerns any requirement on the part of the University to protect the freedom to speak and the freedom to hear, it has obligations under the *Work Health and Safety Act* where the exercise of those freedoms is inhibited by conduct which amounts to bullying, harassment or which otherwise puts the safety and wellbeing of staff, students and visitors to the University at risk.

Conclusion

In conclusion and to reiterate, it is my view that the proper focus of the current debate is the freedom to speak and its natural concomitant, the freedom to hear. Given the character of universities as places of free enquiry, the discharge by them of their obligations to protect those freedoms as well as their entitlement, from time to time, to restrict their exercise can involve, as I have observed, a difficult balancing act. Beyond being responsive to the need both to promote its objects and to secure the proper use of its facilities, though, it is both legitimate and necessary for a university to have regard to its duties under the *Work Health and Safety Act* when undertaking that balancing act.

Whilst I have been asked to consider the issue of free speech on university campuses from a legal perspective, I do not suggest that the matter can be addressed exclusively from the perspective of a university's obligations and powers.

In my own University and as part of its current strategy significant effort is being made to promote a culture which encourages what we have called "disagreeing well". A recent report on the project observes as follows:

> *"Disagreement and critique are a core and essential aspect of both academic and wider community culture. The University's* Charter of Academic Freedom *(2008) states, "The University declares its commitment to free enquiry as necessary to the conduct of a democratic society and to the quest of intellectual, moral and material advance in the human condition." This involves the pursuit of "knowledge for its own sake wherever that pursuit might lead" and "principled and informed discussion of all aspects of knowledge and culture."*
>
> *What is not covered in the Charter, however, is the fact that such free enquiry, pursuit of knowledge, and informed discussion requires the courage, creativity, openness and self-reflexivity to disagree well. The Charter is due for review to*

recognise that academic freedom is only possible in a culture where people can have the integrity to disagree while maintaining respect for each other."

Wherever the debate about free speech or the freedom to speak finishes, if it ever does, it is to be hoped that the outcome does not produce the result forecast for Harvard if a current campaign succeeds; "*they want a campus where everyone looks different but thinks alike – that is their definition of diversity*".