FREEDOM OF SPEECH

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Freedom of speech, even under the protection of the First Amendment in the United States of America, has never been an absolute value but has always been subject to a range of qualifications. Everyone is aware of Oliver Wendell Holmes' dictum that no one is at liberty to shout 'Fire' in a crowded theatre. Another time-honoured example was the publication of details of war-time convoys so exposing them to enemy attack, although this is not really a contemporary example, given that convoys seem to have dropped out of modern warfare.

So I want to start by talking about some of the legislative and common law restrictions on freedom of speech in Australia before moving on to the cultural climate that can also have a significant impact on the kind of public debate that can take place in relation to social, economic and political issues.

In terms of legislation, s 18C of the *Racial Discrimination Act 1975* (Cth) is a useful place to begin, if only because it has been the subject of a long-standing debate and in many ways symbolises the recent discussion of free speech in Australia. It is also useful to look at s 18C because there are somewhat similar provisions in legislation at the State and Territory level.

Section 18C makes it unlawful to do an act that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people because of the race, colour or national or ethnic origin of the other person or some or all of the persons in the group. There is an exemption in s 18D for anything said or done reasonably and in good faith in a number of situations, including academic and

scientific discussions or for 'any other genuine purpose in the public interest.'

The real complaint in 2015 about s 18C by various persons, including myself, was that it is not always possible to have a robust public debate without offending or insulting persons or groups with a high level of sensitivity. There are some exemptions in s 18D but, amongst other problems, it is necessary to show that what was said was said reasonably and in good faith. This can be a highly subjective judgment on the part of a court or tribunal and, in any case, can only occur after the publisher has already been involved in lengthy and costly legal proceedings. It was Voltaire who said that he had only been ruined twice in his life — once when he lost a lawsuit and on the other occasion when he won a legal action.

As everyone knows, the proponents of freedom of speech lost the contest over s 18C. The Abbott government promised to substantially repeal this provision prior to their election but quickly reneged on this promise when it was opposed by a range of ethnic groups and legal professional bodies. There was a flood of submissions from these organisations but naturally very little from the other side because there are no community bodies established to defend freedom of speech. The Turnbull government tried to amend this legislation in 2017 but could not obtain enough votes in the Senate to achieve this object.

At the State and Territory level, I will use the example of s 17 of the *Anti-Discrimination Act 1998* (Tas) which prohibits conduct that offends, humiliates, intimidates, insults or ridicules another person on the basis of 14 kinds of status, including marital status, relationship status and family responsibilities. This provision had some publicity in late 2015 when a complaint was made to the Tasmanian Anti-Discrimination Commissioner about a booklet distributed by Church authorities to Catholic

school students on the subject of marriage. The complaint related to the publication's teaching on same sex marriage but presumably it would be open to anyone in Tasmania living in an unmarried heterosexual relationship to make such a complaint as well. Anyone who has read *Brideshead Revisited* will recall that it is Catholic teaching that unmarried heterosexual couples are 'living in sin' and doomed to the eternal fires of hell. That sounds like an insult to me!

It is true that, unlike s 18C, the Tasmanian provision has the requirement that a reasonable person would have anticipated that the other person would be offended or insulted. But, putting aside the fact that this is another value judgment for a court or tribunal, it may well be that a publisher does anticipate that some persons would be offended or insulted in the course of a vigorous public debate on moral questions. It is also true that, somewhat similar to s 18C, the Tasmanian legislation has an exception for a public act done in good faith for any purpose in the public interest. But again this can involve highly subjective judgments and requires this defence to be made out affirmatively by a publisher in the course of lengthy and expensive legal proceedings.

One irritating aspect of this debate is that proponents of provisions like s 18C and the Tasmanian legislation almost invariably say that they are in favour of freedom of speech but that this concept is not inhibited by these kinds of statutes. I don't know why they don't simply say that freedom of speech is not an absolute value and that on these occasions it is outweighed by a higher value, that is, the protection of some groups from offence or insult. I would, of course, not accept that proposition but it is at least an argument, unlike the contention that freedom of speech is simply not confined by s 18C and its counterparts.

None of this, of course, is to say that incitements to violence against particular groups in the community should not be unlawful. As it happens, they have always been unlawful under the criminal law. But this is very different from expressions of opinion that may be offensive or insulting. There is a very great difference between 'hate speech' and material that might be offensive to some persons in the context of serious public debate. But for some commentators 'hate speech' is simply anything with which they disagree.

It might be thought that the answer to this and other problems concerning freedom of speech is a bill of rights but there are three reasons why, in my view, that is not a solution. The first reason arises out of democratic political theory because what happens under a bill of rights is that political, social and economic questions as well are transferred from elected parliamentarians to unelected judges. It is important to realise that political, social and economic questions do not become legal questions when given to a court. They remain what they have always been but they are now decided by a court. This is simply the judicialisation of politics.

The second objection to a bill of rights is a more practical one but well-illustrated by the notion of freedom of speech under the First Amendment to the US Constitution. Courts in the United State have started with the general proposition that speech is to be absolutely free and then devised numerous qualifications to that principle. So really nothing has changed except that the qualifications are imposed by courts rather than parliament.

The third objection to a bill of rights provision concerning freedom of speech is that a provision like s 18C would very likely be held by Australian courts not to contravene this principle. This is because what John Kenneth Galbraith used to

call ‘the conventional wisdom’ in Australia is that these kinds of provisions are reasonable restraints on freedom of speech. I will have something more to say about ‘the conventional wisdom’ a bit later.

It is often said, especially by media organisations, that the law of defamation is one of the greatest inhibitions on freedom of speech in Australia. The law of libel had its origins in the common law but there is now in this country uniform legislation in all the States and Territories on this subject. It represents an attempt to strike a balance between freedom of speech and protection of individual reputation. It is easy to be critical of the length and cost of defamation litigation but this is hard to avoid when many defendants are large media organisations and have the resources to engage teams of expensive lawyers.

There has been established a Defamation Working Party — of which I am a member — that will make recommendations to the Council of Attorneys-General who will then decide what changes, if any, are to be made to the existing legislation. There will always be debate as to whether defamation law strikes the right balance between the competing values of freedom of speech and protection of reputation. There are, however, two changes that have been proposed by media organisations that might tilt the balance further towards freedom of speech.

The first is the requirement — introduced into the United Kingdom defamation legislation in 2014 — that a publication must have caused or be likely to cause serious harm to the reputation of the plaintiff before there can be any liability for its dissemination.[1] This would presumably have a chilling effect on trivial claims, although it might be noted that there are already some judgments of Australian courts that would allow these kinds of actions to be dismissed at the outset on the basis that the length and cost of the litigation would be completely

disproportionate to any harm suffered to the plaintiff's reputation.[2]

The other change proposed by media organisations is to the current defence of statutory qualified privilege which requires the conduct of the publisher to be reasonable.[3] This normally involves a consideration of the reliability of the sources relied upon by the journalist in question and the research carried out before publication. The media takes the view that the courts have interpreted this test too stringently and have argued for the test under the English legislation which requires a reasonable belief on the part of the publisher that the publication was in the public interest or for a test of 'responsible journalism'.

What about the problems created by publications on social media? It may be, of course, the first of the changes proposed — the requirement of serious harm to reputation before an action can be made out — might dispose of a sizable proportion of those claims based on items on social media, these claims having increased dramatically in recent years. But, depending on the number of persons with access to them, some publications on social media have the capacity to be extremely damaging to a person's reputation. There cannot be any real solution to this problem until there is a greater realisation in the community that making an allegation against a named person on social media is no different to making the allegation on the front page of a national newspaper. In each case the publisher is exposed to exactly the same risk of liability.

There is, of course, a separate problem about the legal liability of internet hosts like Facebook and Twitter and searches engines like Google for the publications of individuals that they facilitate. These are thorny legal questions with some inconsistency between various decisions of the English and Australian courts and one of the purposes of the defamation

reform process is to provide a legislative solution to these problems. It might be noted that in June 2019, the Supreme Court of New South Wales held that media organisations were responsible for the comments of readers that were added to the organisation's Facebook posts.[4]

One way in which the 2005 defamation legislation did reduce an area of litigation was by banning actions by corporations except for non-profit bodies and small companies with less than ten employees.[5] It might be thought that large corporations have staff whose sole function is to promote and publicise their activities and so are well-placed to respond to any allegations made against them. There was, however, considerable opposition to this provision at the time, although the submissions to the Defamation Working Party would suggest that it has now been generally accepted.

The law of contempt is designed to strike a different balance, between freedom of speech and the administration of justice. Usually this amounts to an inhibition on publications that might prejudice a pending criminal trial, although there can be contempt in relation to civil proceedings by, for example, intimidating litigants to abandon their rights. In relation to criminal trials, however, the explosion of information by way of the internet and social media in recent years raises the question of whether jurors can now be kept completely isolated from material that may be prejudicial to the accused person but will not be adduced in evidence. There is, of course, effectively no law of contempt in the United States because of the First Amendment. It is a criminal offence in New South Wales for a juror to access the internet and obtain information concerning the accused in a trial in which the juror is involved.[6]

It might be thought that in many ways the sheer volume of information now available on any particular subject lessens the impact of individual pieces of information on a prospective juror. There are still some clear contempts, such as publishing the prior criminal record of an accused during the currency of his or her trial but it is obvious that the law of contempt needs to take account of the technological changes of the last two decades. It should also be noted that there is a real public interest in the discussion of some prominent criminal cases and that this has always been a defence to a charge of contempt where the prejudice to the pending trial is incidental to that discussion.[7]

There is a form of contempt known as 'scandalising the court' that is designed to deal with allegations against judicial officers. This form of contempt has seldom been invoked in modern times but the Supreme Court of Victoria threatened to bring proceedings against three Commonwealth Ministers in 2017 when they criticised sentencing decisions of the court for being too lenient. The Ministers were forced to apologise to the court. Their comments were not particularly well-expressed but, in the absence of allegations of dishonest or corrupt conduct, it might be thought that courts should not be over-sensitive to criticism of their decisions at this time.

Another value that competes with freedom of speech is that of national security, a balance that was the subject of some public debate after search warrants were executed by the Australian Federal Police in June on journalists employed by the ABC and News Limited. Using the (out-dated) example of wartime convoy details, almost everyone would agree that this is a legitimate competing interest but historically the tendency of governments in all countries, including Australia, has been to classify as secret a great deal of innocuous information. One of the paradoxes of the Wikileaks saga was that the vast bulk of the

material disclosed presented no real threat to any country's national security, although Mr Assange appears indifferent to these questions in any event. It might be noted that, under the relevant provisions of the federal Criminal Code, every leak by a ministerial office in Parliament House in Canberra constitutes an offence by the person providing the information and possibly also by the journalist receiving it.[8] Needless to say there has never been a prosecution in these circumstances!

These official secrecy provisions were amended in 2018 but it remains an offence for a public servant to provide official material to a journalist and publication by the journalist may also be an offence depending on the security classification of the material and its damage to national security. There are heavier penalties for the disclosure of official material by public servants where the information in question is harmful or potentially harmful to national security. There is a defence for publication of such material by a journalist if he or she reasonably believed that publication was in the public interest, except in the case of the identification of security officers or persons in a witness protection program.

Questions of national security lead perhaps naturally to the issue of terrorism. Under the federal Criminal Code it is an offence for a person to advocate the doing of a terrorist act which is broadly defined to mean conduct that causes and is intended to cause serious harm to persons or property or a serious risk to public health or safety, when done with the intention of advancing a political, religious or ideological cause and with the intention of intimidating a government in or out of Australia or the public or a section of the public.[9]

I doubt that anyone would object to it being an offence to advocate the placing of a bomb in a suburban shopping mall in Sydney but it may be that these provisions are wide enough to

extend to the advocacy of violent acts in conflicts outside Australia. What about someone in Australia who calls publicly for the launching of rockets into Israeli suburbs from Palestinian territory or the killing of Palestinian militants by Israeli security services? If these laws had been in place, would they have extended to someone in Australia in the mid-1930s who proposed the assassination of Adolf Hitler? Those persons who recommend violence from the safety of their own armchairs may often not be the most attractive beneficiaries of freedom of speech but, to paraphrase Oliver Wendell Holmes again, the doctrine of freedom of speech is really only tested when the speech in question is hateful to most members of the community.[10]

How does the doctrine of freedom of political communication that has been implied in the *Constitution* by the High Court over the last three decades fit into this mosaic? The cases before the Court over this period can broadly be divided into those where there has been a challenge to what might be described as public order legislation and a challenge to legislation on the subject of electoral funding. Almost all the former challenges have failed, including those in 2018 to Victorian and Tasmanian statutes that effectively established zones in the vicinity of abortion clinics where persons attending the clinics could not be the subject of confrontation by those opposed to the operation of the clinics.[11]

A number of challenges, on the other hand, to electoral funding regulation have been successful, including those brought against New South Wales legislation in 2013 that prohibited donations to corporations and unions and in 2018 that limited electoral expenditure by third party campaigners to $500,000.[12] In many ways these cases might seem to be not about free speech but very expensive speech and to overlook

many of the problems caused by political donations. It might be remembered that the original decision of the High Court in 1992 that discovered the implied freedom of communication in the *Constitution* struck down federal legislation that was designed to remove the cost of political advertising on radio and television for political parties and so avoid much of their fund-raising activities.[13] There is, of course, now considerable public funding for political parties and their campaigns.

I mentioned earlier Galbraith's notion of the 'conventional wisdom' and there has developed in Australia in recent years a conventional wisdom on a whole range of subjects, for example, climate change, border security and freedom of speech, to name a few. This consensus is maintained by large sections of the media; all legal professional bodies; most teaching staff in universities; major sporting bodies; literary festivals; and quite a number of the boards of large corporations. Some of these views may be quite supportable. You yourselves may hold some or all of them. But that is not the point. The point is that no young person in our society could publicly espouse a contrary view if he or she wished to pursue a serious career in any of these areas.

You may think that all this is wildly exaggerated. But, as someone who was once very familiar with university common rooms, I would be prepared to wager a large sum that any young aspiring academic who consistently contradicted the conventional wisdom at morning tea in the staff common room in 2019 would find his or her career prospects severely affected. And most young academics would know this and would confine their public views accordingly. Much the same position would hold for young persons working in federal or state bureaucracies and in many large corporations. I don't suppose these bodies have a tearoom anymore but they no doubt have office lunches and other social events where contradiction of the conventional

wisdom will not be favourably received. This is not because everyone in such organisations subscribes to the conventional wisdom but those that do not know better than to expose their views.

When I was at law school in the late 1960s the conventional wisdom was rather different and would be considered in comparison with today's variety as quite conservative. There is a very interesting question as to how and why this turn-around occurred in a relatively short space of time, by which I mean between the 1970s and the 1990s, a relatively short period for any historical perspective. One difference, however, between the two periods seem to me to be the degree of intolerance on the part of current proponents of the conventional wisdom. As an example, until relatively late in the 1960s the war in Vietnam enjoyed quite strong support in the Australian community. It was not until it became clear that the war could not be won by the United States that public disenchantment set in in Australia. So being opposed to the war was not a fashionable or popular stance for most of that decade. But I doubt that opponents of the war were held in the same contempt for their views as opponents of any aspect of the conventional wisdom are subjected to now. Almost everyone I knew at Melbourne University was in favour of the war but it did not stop me being on good terms with them and having friendly debates on this and other subjects.

So it seems to me in many ways that the conventional wisdom is the greatest inhibition on freedom of speech in Australia at this time. There are, of course, strong strains of what is sometimes known as political correctness in England and the United States but, for reasons that are not entirely clear, this development seems to have been taken to extremes in this country. One factor may be that in a much smaller society there

is simply less scope for diversity of opinion than in England or the United States.

All of these may sound rather pessimistic when considering the position of freedom of speech in Australia in the immediate future. And it is certainly true, in my view, that public debate on important political and social questions has become more inhibited in this country over recent years. There are, however, still individuals and journals who are prepared to initiate robust public discussions. They often have a problem getting any response from the smug holders of the conventional wisdom but hopefully there will be a reaction against the current claustrophobic climate of opinion at some stage. In the meantime, proponents of freedom of speech will just have to get used to causing a stir at normally polite and otherwise peaceful dinner parties!

Endnotes

1 *Defamation Act 2013* (UK) s 1.

2 See, e.g., *Bleyer v Google Inc* (2014) 88 NSWLR 670; c.f., *Jameel v Dow Jones & Co Inc* [2005] QB 946.

3 *Defamation Act 2005* (NSW) s 30.

4 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766.

5 *Defamation Act 2005* (NSW) s 9.

6 *Jury Act 1977* (NSW) s 68C.

7 *Ex parte Bread Manufacturers Ltd; re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242.

8 *Criminal Code Act 1995* (Cth) Division 122 of Schedule 1.

9 *Criminal Code Act 1995* (Cth) ss 80.2C and 100.1 of Schedule 1.

10 *Abrams v United States* (1919) 250 US 616, 630-631.

11 *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1.

12 *Unions NSW (No 1) v New South Wales* (2013) 252 CLR 530; *Unions NSW (No 2) v New South Wales* (2019) 264 CLR 595.

13 *Australian Capital Television Pty Limited v Commonwealth of Australia* (1992) 177 CLR 106.