

Free Speech and the Law on Campus — Do we need a Charter of Rights for Universities?

8th Austin Asche Oration in Law and Commerce

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Introduction

Austin Asche has served Australia and the Northern Territory with great distinction as a lawyer of high repute and as a Judge of the Family Court, as a Judge of the Supreme Court of the Northern Territory and as its Chief Justice and later as the Administrator. He has had a commitment to higher education, serving as a member of the Council of the Royal Melbourne Institute of Technology and as Chancellor of Deakin University and later as Chancellor of Charles Darwin University. It is an honour to be invited to deliver this Oration named after him and to do so in his presence and that of his wife, Valerie.

The traditional theme of the Oration is law and governance. My presentation this evening concerns the ideas of freedom of speech and academic freedom in universities and their interaction with the general law and university governance. Its focus is on that aspect of free speech and academic freedom which involve the expression of highly contentious and controversial views. There are other important aspects of both freedoms affected by the increasing commercialisation of research and also by the application of anti-terrorism or sedition laws.

Free speech — the debate

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.

The debate has often centred on notions of harm inflicted on vulnerable groups within the university or on society generally, often by what is called ‘hate speech’. The vulnerable groups may include racial, ethnic or national groups, and LGBTQI people. They may be victims of abuse or violence.

In his essay ‘On Liberty’ John Stuart Mill said that ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.’¹ That statement begs the question – what is ‘harm’? It begs that question acutely when it is applied to restrictions on freedom of expression. Harm is a concept in which contestable value judgments are intimately involved. What one person regards as harmful another may legitimately view as bearing no adverse consequence.

A global issue

Freedom of expression in universities is a live question in a number of representative democracies. In November 2016, the College of St George in partnership with the Centre of Islamic Studies at the School of Oriental and African Studies at the University of London produced a report entitled ‘Freedom of Speech in Universities’. The Report reflected the proceedings of a private consultation over two days with 33 experts from the higher education sector. The Report acknowledged that in the United Kingdom freedom of speech on university campuses had been a topic of major controversy. The Report stated in its Introduction:

In much of this public discourse, there is a growing sense that freedom of speech and academic freedom in universities is under threat. There is also a sense that the rules of engagement regarding freedom of speech are becoming increasingly uncertain, and that clarity of definitions and protocols is much needed.²

¹ John Stuart Mill, *On Liberty* (John W Parker, 1859) 14-15.

² College of St George and the Centre of Islamic Studies SOAS, *Report on ‘Freedom of Speech in Universities 31 October – 1 November 2016’* 3.

Two main factors were identified in the Report as constraining freedom of speech. One was internal student-driven activity such as no-platforming and safe space policies. The other was externally imposed counter-terrorism policies under the rubric of the ‘Prevent duty’. That is a duty imposed on universities in England and Wales by s 26 of the *Counter-Terrorism and Security Act 2015*. Universities and colleges are required to have ‘due regard to the need to prevent people from being drawn into terrorism.’³

The debate is live in Canada. In a book published in 2018 entitled *University Commons Divided*,⁴ Peter Mackinnon, President Emeritus of the University of Saskatchewan, quoted Chief Justice Beverly McLachlan’s description of freedom of expression as ‘the indispensable condition of nearly every other freedom’.⁵ For Mackinnon it is an indispensable condition of the university ‘commons’. ‘Commons’ here means the ‘space for the debate, discussion, and collaboration that are both inherent in and essential to the idea of the university.’⁶ He describes the commons, tested often in recent years, as ‘a contemporary battleground over its boundaries.’⁷

The debate has been carried on in New Zealand. In 2017, 27 prominent New Zealanders signed an open letter expressing concern about freedom of speech in New Zealand universities. The letter said:

Governments and particular groups will from time to time seek to restrict freedom of speech in the name of safety or special interest. However, debate or deliberation must not be suppressed because the ideas put forth are thought by some or even by most people to be offensive, unwise, immoral, or wrong-headed.

In the United States there has been a torrent of books and articles on this topic, including a number by some very substantial academic writers.

There is no doubt that the issue of freedom of expression on campus and the related issue of academic freedom raise difficult questions for university governance today. No

³ *Counter-Terrorism and Security Act 2015* (UK) s 26(1) and see generally J Gilmour, ‘Teaching Terrorism: the impact of the Counter-Terrorism and Security Act 2015 on academic freedom’ (2017) 51 *The Law Teacher* 515.

⁴ Peter Mackinnon, *University Commons Divided* (University of Toronto Press, 2018).

⁵ Ibid 37.

⁶ Ibid ix.

⁷ Ibid 37.

matter how aspirational and well-framed the principles or codes that universities adopt to assist their decision-making in this area, practical decision-making can be difficult and hotly contested — not least if it involves the application of broadly stated norms to the exercise of administrative discretions about which reasonable minds might differ — and, of course, the unreasonable as well.

Should there be a statutory charter?

Should there be a statutory charter for the protection of expressive conduct specifically directed to universities? Whatever the answer to that question, it is doubtful that even a detailed and prescriptive charter would enable a university to avoid difficult decisions in border-line cases.

In the United Kingdom, s 43 of the *Education (No 2) Act 1986* (UK) imposes a duty on all concerned in the governance of the universities to:

take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.

That duty extends to a duty to ensure, so far as is reasonably practicable, that the use of any premises of the university is not denied to any individual or body of persons on any ground in connection with their beliefs or views, policies or objectives.⁸ The Act also requires governing bodies to have in place codes of practice setting out procedures in connection with the organisation of meetings held at the university and the conduct of persons in connection with such meetings.⁹

In addition, s 6 of the *Human Rights Act 1998* (UK) makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. One of the Convention rights is freedom of expression. The concept of a public authority extends to universities which are themselves created by Acts of Parliament and which exercise public functions. A similar provision is found in s 40B of the *Human Rights Act 2004* (ACT) and appears to be applicable to Canberra's public universities, The Canberra University and the

⁸ *Education (No 2) Act 1986* (UK) s 43(2).

⁹ *Education (No 2) Act 1986* (UK) s 43(3).

Australian National University. So too, s 38 of the *Charter of Human Rights and Responsibilities 2006 Act* (Vic) appears to apply to public universities in that State. Paradoxically, invocation of these provisions in the service of freedom is likely to cause difficulty for some who champion the freedom but do not believe it should be protected by law — a position which reflects a conservative view that such protections generally transfer too much power to judges.

Section 161 of the *Education Act 1989* (NZ) provides that:

It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and autonomy of institutions are to be preserved and enhanced.

The term ‘academic freedom’ is defined in that section as including:

the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions

In exercising their academic freedom and autonomy, institutions are required to act in a manner that is consistent with the need to maintain the highest ethical standard and the need for accountability and the proper use by institutions of resources allocated to them.¹⁰

There are a number of countries in which there is constitutional protection of academic freedom. They include Germany, in its Basic Law and Spain, Portugal, Japan and South Africa in their Constitutions.¹¹ There is also specific protection under Art 13 of the European Charter of Fundamental Rights. Academic freedom is also referred to in some industrial agreements between universities and their staff.

In 2005, the Senate Standing Committee on Education, Employment and Workplace Relations heard submissions and reported on the desirability of a Charter of Academic Freedom. That idea had evidently emanated from the United States. In 2001, an academic,

¹⁰ *Education Act 1989* (NZ) s 161(3).

¹¹ Eric Barendt, *Academic Freedom and the Law* (Bloomsbury Publishing, 2010) 2.

David Horowitz, founded Students for Academic Freedom and proposed an Academic Bill of Rights. Legislation giving effect to his proposal was introduced into a number of State legislatures. The Australian Liberal Student Federation picked up on the idea and argued for a Charter of Academic Rights which would protect diversity of thought and students' entitlement to freedom of inquiry.

Two academics, Professor George Williams and Edwina MacDonald in testimony before the Committee favoured statutory protection of academic freedom. They contended that:

Experience elsewhere shows that a Charter could give real protection to human rights by freedom of speech and could have a powerful impact on shaping public debate. While no such law provides the whole answer and is not a substitute for ongoing political or industrial action, it would be a valuable tool in preventing the further erosion of academic freedom in Australia.¹²

The National Tertiary Education Union also argued for statutory protection. It cited threats to academic freedom arising from the enactment of anti-terrorism laws and new sedition provisions which would restrict the rights of researchers and lay them open to criminal offences. It argued that the traditional protections afforded to academics through collective agreements and university codes of practice were no longer sufficient.

The Committee came to an inconclusive conclusion. At par 4.30 of its Report it said:

The committee has reached no considered view on whether there should be statutory protection of academic freedom. It has had limited opportunity to consider the evidence in detail. The issue would require its own inquiry, rather than as a subsidiary part of an inquiry about quite a different matter. The committee was without the benefit of specific advice from vice-chancellors, and could not even begin to consider which jurisdiction would be vested with legislative responsibility.

¹² Senate, Standing Committee on Education, Employment and Workplace Relations, *Allegations of academic bias in universities and schools*, Ch 4, A Charter of Academic Freedom, December 2008, 37 citing Edwina Macdonald and George Williams, 'Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom', *Australian and New Zealand Journal of Law and Education*, vol 12, no 1, 46.

The Committee went on to say the issue would have to be looked at as part of the governance framework for universities and would require the attention of university councils and vice-chancellors, as well as academic specialists.

Presently, at the Commonwealth level in Australia, the *Higher Education Support Act 2003* (Cth) requires that higher education providers, which include universities, ‘must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research.’¹³ That provision, in its term, is concerned with the concept of the academic freedom of inquiry, rather than the wider idea of freedom of expression covered by the United Kingdom legislation.

These references outline a part of the landscape of contemporary debate about freedom of expression at our universities. But the concepts of freedom of expression and academic freedom need further consideration.

Freedom of speech

Freedom does not require a positive law to explain or justify its existence. Freedom of expression can be described as the condition of a person who has the capacity to express himself or herself in writing, speech or artistic works and who is not prevented by law from doing so. He or she can be said to be ‘free’ to express himself or herself within the limits prescribed by the law. The point was made well in 1995 by the eminent English jurist, Sir John Laws, who said:

For private persons, the rule is 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.¹⁴

A freedom may be protected by law and thereby acquire the character of a right. But when ‘freedoms’ are confused with positive ‘rights’ false controversies can arise. In the course of a debate in the Senate concerning s 18C of the *Racial Discrimination Act 1975* (Cth), the Attorney-General, Senator Brandis, is said to have observed that ‘people do have a

¹³ *Higher Education Support Act 2003* (Cth) s 19-115.

¹⁴ *R v Somerset County Council; ex parte Fewings* [1995] 1 All ER 513, 523.

right to be bigots you know'. There was a strong reaction to that statement. There were two words in it which might have been poorly selected. The first was 'right'. Had the Attorney-General said that 'people are free to be bigots' he might have been seen as saying something less controversial. And if instead of using the word 'bigot' he had said that people are free to be prejudiced against anyone, the statement would have been quite uncontroversial as a matter of principle. The law generally does not try to regulate peoples' prejudices however ridiculous or offensive others may find those prejudices to be. When bigotry is so understood, everybody is free to be a bigot. However, when bigotry is manifested in speech or action directed against others, there may be a debate about whether the law should regulate that speech or action.

The regulation of speech by the general law

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. Racist and other kinds of negative speech today can contravene laws reflecting and sometimes extending beyond international human rights norms. That kind of communication is often designated under the general label of 'hate speech'. That is a very widely used term which seems to have a much wider meaning than its dictionary definition. The American Bar Association defines 'hate speech' as 'speech that offends, threatens or insults groups based on race, colour, religion, national origin, sexual orientation, disability or other traits.'¹⁵ The dictionary definition of 'hate' is a good deal narrower. It involves concepts of loathing or despising people. The broad use of the word 'hate' in the term 'hate speech' appropriates the strongly negative connotation of 'hate' and uses it to condemn a range of conduct including conduct which, while it should be strongly deprecated, may be informed by something less than 'hatred' in its ordinary sense. This misappropriation of a narrow but intense terminology to market broadly defined prohibitions on speech, may undercut what it risks to promote. It may detract from the moral clarity of the law.

There are a number of statutory provisions around Australia which prohibit 'offensive' or 'insulting' conduct, including offensive or insulting speech. The ordinary

¹⁵ Students in Action '*Debating the Mighty Constitutional Opposites: Debating Hate Speech*', American Bar Association, www.americanba.org/groups/public_education/initiatives_awards/students_in_action/debate_hate

meaning of the word ‘offend’ includes vexing, annoying, displeasing, angering, exciting resentment or disgust.¹⁶ That ordinary meaning defines the term ‘offend’ by reference to the reaction of one person to the conduct of another rather than the conduct itself. In law, however, whether speech is offensive is not necessarily to be determined by asking its target. The target may take offence or feel insulted or humiliated too easily. So there is therefore a tendency to invoke an imaginary ‘reasonable person’.

In the well-known Australian case, *Ball v McIntyre*¹⁷ Justice John Kerr, sitting as a Judge of the Supreme Court of the Australian Capital Territory, set a high objective threshold which had to be met before conduct could be described as offensive for the purposes of the *Police Offences Ordinance 1930* (ACT). To be offensive, he said, behaviour must be ‘calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man.’¹⁸ He defined the ‘reasonable person’ as one ‘reasonably tolerant and understanding, and reasonably contemporary in his [or her] reactions.’¹⁹ His decision established the threshold of the imputed emotional response required for conviction at a fairly high level and with it the requirement that the allegedly offensive conduct must elicit that response from someone not readily moved to anger. It was a legal standard which really acted as a warning to judges to proceed with caution before making a finding that a legal prohibition of offensive behaviour had been breached. The House of Lords took a similar approach to the concept of insulting behaviour in 1972 in a case called *Brutus v Cozens*.²⁰ Properly interpreted, that statutory provision would not touch vigorous, distasteful or unmannerly speech or behaviour as long as it was not threatening, abusive or insulting.²¹ It might show disrespect, or contempt for people’s rights, but it did not follow that it must always be characterised as insulting behaviour.

The European Court of Human Rights in 1976 seemed to set an even higher standard in a case called *Handyside v United Kingdom*.²² There the court said that the protection of freedom of expression in Art 19 of the International Covenant on Civil and Political Rights 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

¹⁶ Concise Oxford English Dictionary (Oxford University Press, 11th ed, 2004).

¹⁷ (1966) 9 FLR 237.

¹⁸ Ibid 243.

¹⁹ Ibid 245.

²⁰ [1973] AC 854..

²¹ Ibid 862 (Lord Reid).

²² (1976) 1 EHRR 737.

population.’²³ Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.

There have been many debates about what limits society should place, through law, on free speech in general and offensive speech in particular. If the limits are defined too broadly then the threshold for State interference with expressive conduct is set too low.

The courts take a very cautious approach to restrictions on expressive conduct. They tend to interpret statutes criminalising expressive conduct in a way that narrows rather than broadens their application. The question that then arises is whether or not universities, which are part of the general community, should through their by-laws or administrative policies and codes make special provision in relation to expressive conduct on campus that imposes more extensive restrictions than those which exist off campus.

Freedom of speech and universities

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?

Debates about freedom of speech at universities tend to erupt when views expressed by academic teachers or researchers or by students or persons invited to speak at the university attract student and/or academic objection. That objection may be directed at the content of a speaker’s views and against the propriety or appropriateness of the university being used as a platform. The grounds for such objections typically include:

1. That the speaker’s views are hurtful to or denigrate particular classes of persons within the university or, indeed, in the wider community including persons who are regarded as vulnerable in one way or the other. Vilification of people on the grounds

²³ Ibid [49].

of their race, ethnicity, national origin, or opinions or beliefs, or membership of a particular social group are examples which may attract this kind of objection.

2. The content of the proposed speech is seen as propagating theories or opinions about scientific issues which are not supported by evidence and whose propagation may be harmful to the community or particular groups within it. Anti-vaccination advocates linking vaccination to health risks would fall into this category of objection.
3. The content of the proposed speech propounds a view of history, society or science which, if expressed on a university campus with the official permission of the university, will bring the university into disrepute as inconsistent with minimum standards of higher education and learning. Advocates against the theory of evolution arguing for a special creation of the world in six days might attract this category of objection.
4. There may be objections by different groups of students to speakers who support particular foreign policy positions, for example, who support the State of Israel and, on the other hand, those who support the Palestinian cause.

There may be a particular objection against certain speakers because of who they are regardless of what they may want to say.

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.

Universities' power to regulate the use of their land and buildings

In Australia we have no equivalent of the *Education (No 2) Act 1986* of the United Kingdom. We have no constitutional equivalent of the First Amendment guarantee of freedom of expression under the United States Constitution. There is an implied constitutional freedom of political communication, first enunciated by the High Court of Australia in 1992 in two decisions: *Nationwide News Pty Ltd v Willis*²⁴ and *Australian Capital Television v Commonwealth*.²⁵ It does not confer an individual right to engage in

²⁴ (1992) 177 CLR 1.

²⁵ (1992) 177 CLR 106.

political communications. Rather, it limits the powers of Commonwealth and State and Territory parliaments to prohibit or restrict such communication. 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?²⁶

To the extent that universities, operating under the authority of Acts of Parliament which create them, make legal rules affecting freedom of speech, those rules would have to comply with the implied freedom. There is a question whether administrative policies would be subject to the same constraints. Given that university executives act under the authority of the law setting up the university and defining its powers, the answer is probably yes.

There are many circumstances in which freedom of expression is limited by valid laws applicable in particular places for a variety of legitimate social purposes. One example is found in the judgment of the High Court in 2013 in *Attorney-General (SA) v Adelaide City Corporation*.²⁷ A by-law made by the Adelaide City Corporation prohibited persons from preaching, canvassing, haranguing or distributing printed material on any road vested in the Council without the permission of the Council. This included vehicular or pedestrian thoroughfare and pedestrian malls. The by-law was not concerned with the content of the preaching or haranguing that it restricted. Two members of an unincorporated association known as ‘The Street Church’ wanted to preach and distribute printed material in Rundle Mall and other public places in the City of Adelaide promulgating their religious beliefs. Some of their preaching was, to put it mildly, confronting. One of them was convicted and fined \$250 for contravening the by-law. The Council also sought injunctions to restrain them from their preaching, and distribution of pamphlets without a permit. A legal challenge being mounted, the South Australian courts held that the relevant regulation was invalid as infringing the implied freedom of political communication.

²⁶ *Langey v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also *McCloy v New South Wales* (2015) 257 CLR 178.

²⁷ (2013) 249 CLR 1.

The case was appealed to the High Court which held by a 5-1 majority, that the by-law was a valid exercise of the City of Adelaide's by-law making power and that it did not infringe the implied freedom of communication on political or governmental matters guaranteed by the *Constitution*. It served a legitimate purpose of the Council.

The City of Adelaide in that case was a statutory body, lawfully exercising its power to restrict certain forms of expression on land under its legal control. Absent its by-law there would have been nothing to stop the members of The Street Church from preaching their doctrines in Rundle Mall at any time they chose. Absent the by-law their freedom of expression would have extended into Rundle Mall without qualification because there was no other relevant law to prevent them from exercising that freedom in that place. Once Rundle Mall was denied to them, their freedom of expression was limited geographically by a body with the power and responsibility to regulate conduct in that place. A starker and perhaps simpler example is that of the private property owner. The owner of a hotel would ordinarily have the right to prevent somebody from coming into the hotel uninvited for the purpose of making a speech or distributing materials to guests of the hotel in its lobby.

Like the case of the local authority and in the absence of a law like the United Kingdom *Education (No 2) Act*, a university with regulatory powers over its land and buildings can restrict access to them even if the basis of the restriction is objection to the content of a proposed presentation by a visitor to the campus or perhaps even by an academic or a student member of the university unless there is some higher law, such as the implied freedom of political communication, which is engaged.

By way of example, s 14 of the *University of Western Australia Act 1911 (WA)* provides:

The Senate shall have the control and management of all real and personal property at any time vested in or acquired by the University.

The University may make by-laws for the purpose of regulating the terms and conditions on which its lands may be visited and used by any person whomsoever and the conduct of such persons when on such lands. The University may:

- prohibit any nuisance, or any offensive, indecent or improper act, conduct, or behaviour on such land; and
- prohibit the use of abusive or insulting language on such lands.²⁸

There is a by-law called ‘The University of Western Australian Lands By-Laws: Part 2 — Entry on Lands’ which restricts entry to the University’s property to members of the Senate or of Convocation, the latter being a reference to all of the University’s alumni, teaching staff, employees, persons attending lectures or undertaking courses at the University and holders of permits authorising persons to enter or remain present on the lands in accordance with their terms.

Subject to the implied freedom of political communication, the University can control access to and conduct on its lands in ways that may amount to the restriction or regulation of expressive conduct. Given that power, should the University have rules which regulate access by reference to the apprehended content of expressive conduct?

Legitimate restrictions by universities

Universities as already mentioned, are landholders. They hold the land and buildings for public purposes. A principal purpose is to provide a place in which academics and students together can teach, learn, research and publish. As part of the learning process there may be presentations, lectures and speeches made by parts of the university community or by persons invited on to campus by members of the university community which are contentious.

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 a 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.

²⁸ *University of Western Australia Act 1911* (WA) s 16A(2)(f) and (g),

Where disruption is threatened it becomes a matter not only for the university but also for the organisers of the event and the State or Territory police force. Universities, in deciding whether to allow access to land and facilities by strangers are not in the same position as a general legislature determining rules to govern freedom of speech.

The university and its staff

So far as its staff are concerned, the university is their employer, albeit they may have different kinds of employment according to their contracts. The students are their clients who have come to the university to study, to gain knowledge and skills and a formal qualification which recognises what they have achieved.

The Full Court of the Federal Court of Australia in *University of Western Australia v Gray*²⁹ observed that in many universities the academic staff are part of a membership that constitutes the corporation and, as such, are bound by the statutes and regulations of the university. Their membership is integral to their status and place in the university:

To define the relationship of an academic staff member with a university simply in terms of a contract of employment is to ignore a distinctive dimension of that relationship.³⁰

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 inquiry.

In his book *Speak Freely*,³¹ Keith Whittington, a Professor of Politics at Princeton University, put the production and dissemination of knowledge at the heart of the mission of a university. The scholar of the university expects vigorous debate about his or her ideas and that colleagues and students can be pushed to re-examine their own. The creation of better citizens is a by-product of educating students. That is to say, people who can take their place in public civic discourse, help to form public values and public policy and to choose the

²⁹ (2009) 259 ALR 224.

³⁰ Ibid [185].

³¹ K E Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton University Press, 2018).

officials who manage public affairs. This is not just about creating future leaders, but responsible contributors to civic life.

The mission of the university according to Whittington, requires a robust commitment to free speech on campus. It is not an optional extra.

The controversial visitor

The speaker invited on to campus by students or academic staff has historically given rise to difficult free speech questions for universities. These are not strangers coming uninvited on to 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 the 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.

In the 1970s, again at Yale, a student group invited William Shockley, a Nobel Prize winning physicist, to participate in a debate. Shockley believed that black people were generically inferior to white people. He often debated with a psychiatrist, Frances Welsing, who contended, on the other hand, that white racism was a product of white genetic inferiority. Again, the students who invited Shockley to come onto campus were not thereby endorsing his views. It might be said that they were exposing the existence of those views to their peers and better equipping them to understanding those views and to debate about them. Shockley was shouted down by student protestors.

In the result, a committee chaired by the historian, Comer Vann Woodward, published a defence of free speech. In the report the committee said:

The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.

Universities had a particular responsibility to provide ‘a forum for the new, the provocative, the disturbing and the unorthodox’, to serve as a bulwark against ‘authoritarianism’ including

that of prevailing public opinion.³² A dissenting report filed by a student member of the committee argued that free speech should be suppressed if doing so might advance ‘the liberation of all oppressed people and equal opportunities for minority groups.’ No doubt that could be characterised as an outlier position but the potential for the exercise of heavy-handed authority over expressive conduct on campus is plain.

In 2014, the University of Chicago established a Committee on Freedom of Expression headed by a Law Professor, Geoffrey Stone. The Committee issued a report in which it proposed a substantial commitment to free inquiry within universities. The Report said ‘it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.’³³ Debate should not be suppressed because the ideas propounded were regarded by many, if not most, members of the university community to be offensive, unwise, immoral or wrong-headed.³⁴ Princeton University adopted the Chicago statement as its own. There was a complaint from some students in an editorial at the University of Chicago that the report did not preclude ‘hate speech’ from the protection of the free speech principle. The editorial also argued that ‘students’ mental well-being or safety’ should be protected before free speech.³⁵

Professor Whittington in his book said that each generation will have its own debates about free speech on campus and that universities must constantly renew their commitment to that ideal:

If universities are to remain valuable institutions in the 21st century, however, members of the campus community will need to preserve the college campus as a sanctuary for serious debate of unorthodox ideas and avoid succumbing to the temptation to make them echo chambers of orthodox creeds.

Free speech issues on campus may also arise for academic staff who express opinions in the course of their research or teaching or in intra-mural criticism of the university

³² Report of the Committee on Freedom of Expression at Yale, 23 December 1974 cited in Whittington op cit.

³³ University of Chicago, *Report of the Committee on Freedom of Expression* (January 2015) cited in Whittington, op cit.

³⁴ Ibid.

³⁵ Maroon Editorial Board, ‘Land of the Free? *Chicago Maroon*, 9 January 2015 cited in Whittington, op cit.

administration or in extra-mural statements not necessarily confined to their areas of academic work.

Here, general principles governing freedom of expression, interact with the contested and uncertain term 'academic freedom'. It is a term which has been applied to the institutional autonomy of universities and the individual freedom of the staff to pursue particular lines of inquiry, conduct particular research, publish their findings and speak about them. It has also been invoked in support of the freedom of intra-mural speech by staff critical of the university administration and more contentiously, extra-mural speech expressing views off campus.

Academic freedom

There is a long history of public statements about the nature and necessity of academic freedom in higher education. One of the earliest in the 20th century was a statement by the American Association of University Professors (AAUP) in 1915. A further statement of principle was published by the AAUP in 1940.

In 1997, UNESCO published a report and a recommendation that academic freedom be defined as:

the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.³⁶

This has been summarised as freedom of teaching, freedom of research, freedom of intra-mural expression and freedom of extra-mural expression.³⁷

There is necessarily a tension between the institutional autonomy of the university and the academic freedom of its staff. Staff are not free to teach a course which is not on the

³⁶ UNESCO, *Recommendation Concerning the Status of Higher-education Teaching Personnel* (November 1997) 3.

³⁷ James Turk, Director Centre for Free Expression at the Faculty of Communication and Design, Ryerson University, Canada.

curriculum, nor to do research for which there is no funding and which falls outside the research topics to which the university gives priority.

Academic freedom to teach and research is also constricted by professional standards defined for the relevant research and teaching areas.

That academic freedom may encompass freedom of speech does not mean that it encompasses a greater freedom than that applicable to the public at large. It is perhaps, however, a greater freedom than is available to persons in an employer/employee relationship. That greater latitude emanates from the nature of the relationship between academic staff and the university, which was discussed in *University of Western Australia v Gray* mentioned earlier and the nature of academic work generally.

General conclusion

There are different perspectives about freedom of speech on campus and about the scope of academic freedom. There should be a very high threshold to be overcome before universities, academics or student bodies or groups seek to prevent speech on campus by reference to its content. The same proposal is true for any rule providing for disciplinary action against staff or students by reference to the content of what they say. That threshold would be met when the apprehended or actual expressive conduct would constitute a breach of the general law. In setting the threshold it is also relevant to have regard to priorities in allocation of university resources both physical and human in terms of event management and the provision of security staff.

If the threshold is set too low in the interests of the feelings of the university community and applies an extended concept of 'safety' in support of restrictions, the reputation of universities in the wider community which they serve might be at risk. Legislative intervention imposing protective rules is a possibility.

In my opinion the better approach is to encourage and maintain a robust culture of open speech and discussion even though it may involve people hearing views that they find offensive or hurtful. That is one of the prices we pay for a core freedom in this liberal democracy. It is not lightly to be eroded.