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FREEDOM OF EXPRESSION - SOME RECENT AUSTRALIA DEVELOPMENTS

Hon. Justice Michael Kirby *

Australia

A VITAL ATTRIBUTE OF FREEDOM

The value of freedom of expression rests primarily on the ability of every individual to express his or her beliefs. A free society seeks to support individual self expression as a vital attribute of freedom not far less important than the protection of life itself. Life without freedom to express ideas and beliefs is less than human. Freedom of speech provides the ideological underpinning of individualism. It is a vital protection against tyranny. In a free society, citizens and others are able to criticise the government, to protest peacefully against its policies and practices, and to lobby for a change of public opinion as a means of securing political, social, economic, legal and administrative changes.

CONSTITUTIONAL PROTECTIONS - A NEW DEVELOPMENT

Despite its importance, freedom of speech is offered limited express protection by Australian law. There is no legal guarantee of free speech as such in any jurisdiction. The laws dealing with speech are more concerned with its control than its facilitation and protection.

The Australian Constitution does not contain a Bill of Rights. An attempt in 1988 to introduce some fundamental rights was overwhelmingly defeated at referendum. The regulation of expression is substantially left to State legislation and common law. Some Federal laws govern the electronic media. In Australia freedom of expression is what is left when the various Federal, State and local legislation and the common law dealing with expression has been applied and exhausted. Such laws deal such matters as defamation, obscenity, sedition, offensive language, intellectual property and so on.

Nonetheless, courts in Australia have lately discovered that there are implied rights and freedoms in the Constitution of Australia relevant to freedom of expression. These rights are those which are consistent with the democratic principles which underlie the Australian Constitution as a whole. In this respect, two recent decisions of the High Court deserve special mention.

The first is *Australian Capital Television Pty Ltd v. The Commonwealth [No 2]* (1992) 66 ALJR 695; 108 ALR 577, or the *Freedom of Political Expression case*, as it has come to be known. That case concerned a challenge by a commercial television broadcaster to the constitutional validity of amendments made by the Federal Parliament to broadcasting legislation. The amendments imposed a general prohibition on the transmission of paid political broadcasts and advertisements during an election period. The

prohibition was modelled upon legislation enacted in several European democracies. It was negotiated in a hotly contested public debate in the Australian Parliament. Its given object was to prevent the trivialisation of political debate by slogans and jingles, typical of superficial political advertising. It was said to be a measure designed to prevent wealthy interests manipulating the media presentation of issues in the pre electoral period and to enhance serious and factual discussion of political issues. The legislation breached no express prohibition of the Australian Constitution. However, it was struck down by the High Court of Australia as unconstitutional on the basis of implied guarantees of free expression said to be derived from the very nature of the Australian Federal polity.

The second decision, in *Nationwide News Pty Ltd v. Wills* (1992) 66 ALJR 658, 108 ALR 681 also known as the *Industrial Relations Commission case*, concerned provisions in the Federal *Industrial Relations Act* which prohibited public criticism of the Commonwealth Industrial Relations Commission (IRC). This prohibition was effected by provisions creating an offence, in the nature of contempt, akin to scandalising a court. In each of the above cases, it was claimed that these provisions were unconstitutional. In each case this argument succeeded.

In both cases, the majority of the High Court of Australia began with the proposition that the Australian Constitution makes it clear that the Commonwealth is to be a representative democracy. The Court held, in both cases, that there was an implied right to enjoy and participate in freedom of communication about governmental and political affairs in a representative democracy. Without such free discussion, one of the implied features, fundamental to the system of government envisaged by the Constitution, would be frustrated or

prevented. Such free expression was therefore integral to, and necessary for, the very operation of the Constitution.

In the *Freedom of Political Expression case*, the High Court held that a right to be governed democratically was meaningless unless there was a freedom to communicate about matters relevant to the performance and election of governments, so that the people could exercise an informed choice. In a representative democracy, the Government should be under constant scrutiny from public debate of those issues. The Federal Parliament's powers to legislate was therefore subject to this implied right. Only in that way could legislative powers be exercised in accordance with the assumptions of the Constitution.

In the *Industrial Relations Commission case*, the majority concluded that the statutory provisions prohibiting, in effect, all criticisms of the IRC went further than was necessary to protect the integrity of that body. The restrictions on free expression were not a justified derogation from the freedom to communicate. They were declared unconstitutional.

THE LEGAL INHIBITIONS UPON FREE EXPRESSION

The right of the individual to freedom of expression in Australia is constrained by much legislation and common law. Freedom of expression sometimes affects the interests of state security, public order, public morality, and the protection of privacy. Laws relevant to these interests necessarily impinge upon, and to that effect diminish, the individual's right to free expression. In Australia there is no First Amendment to protect such freedom from legislative diminution.

A free society may punish advocacy of its own destruction. However, experience suggests that it is dangerous to allow the law to

interfere with speech which does not incite actual violence or overthrowal of society. Yet in all Australian jurisdictions it is an offence to write, print or utter seditious words. Seditious words are those which bring the sovereign into hatred or contempt or which undermine loyalty. The emptiness of these provisions has been brought into sharp relief in the current debate in Australia on republicanism. The prosecution of the Prime Minister and others of the mind for sedition, because of their expressed republican views, is of course unthinkable. In earlier times it was not so.

It can be dangerous for individuals to express their opinions about the workings of Parliament, the courts, or even of the police drug squad. The offence of scandalising the courts been the occasion of arbitary use. Lately, however, there have been few prosecutions in Australia for such conduct. Judges, and politicans seem content to endure a high level of calumny as an attribute of freedom and a feature of holding office in a democratic society at the end of the twentieth century.

In the past in Australia it has frequently been the militant trade unionists whose opinions about the courts resulted in punishment for contempt. Academics, journalists and those who publicise views espoused by others critical of courts or of Parliament, were rarely charged with contempt. The expression of opinions detracting from the respect of Parliament can lead to imprisonment without court trial, as a journalist and publisher discovered in Australia in 1954.

Like the offence of sedition, these laws are unconcerned with the actual effect of the speech in undermining confidence in the institutions of the State. They are simply aimed at prohibiting the expression of the opinion in the first place. While it is true that laws of sedition and contempt are now used reletively infrequently to

diminish the right of free expression in Australia, they still pose a limitation upon free expression. They are frequently the subject of demands for repeal or reform.

One of the greatest threats to an individual's freedom of expression in Australia derives from rules requiring conformity to standards of public morality. "Unacceptable" material is censored. "Unusual" behaviour evinces intolerance. The imposition of rules requiring conformity to standards of public morality necessarily diminishes the individual's right to freedom of expression. Further, the law in one State of Australia (Tasmania) still makes it an offence to engage in homosexual acts, thus limiting a vital aspect of human expression which, at least between adults who consent, should plainly be free.

In Australia, censors of various kinds, acting under legislation, enforce public morality as conceived by them. A great deal of material never reaches individuals in Australia. Public officials have the power, by statute, to forbid the importation, sale, distribution or exhibition of publications which they consider unsuitable for general availability. The Commonwealth (Federal) Censor has power to prevent the importation of any film or video, as well as printed material considered to be blasphemous, indecent, unduly emphasising sex, horror or violence, or likely to encourage depravity. This power is now used sparingly. But it was not always so. Within the last 20 years prosecutions for possessing or importing pornography were common.

State laws also ban or limit the availability material which is not approved. In Queensland, the Objectionable Literature Board of Review frequently bans books. In Tasmania, restricted publications cannot be sold to people below a specified age. In Western Australia and New South Wales classified publications cannot be publicly or the

person responsible is liable to prosecution.

Censorship of this kind has a clear impact on free speech in Australia. Not only is the audience affected by limited access to images and ideas. Artists themselves are limited in the expression of their ideas. They are constrained by uncertainty as to their legal rights and the possibility that something they produce may be deemed to be indecent, obscene, blasphemous or otherwise unlawful. It should be said that in most States in Australia prosecution upon such grounds has greatly diminished in the past decade. Often this fall in prosecutions has occurred in response to more liberal public opinion and sensible prosecuting decisions rather than as a result of change in the substantive law. That law generally remains the same.

The right of an individual to free expression sometimes collides with a right of another individual, such as the right to a fair trial and to reputation. The protection of free speech will not extend to the expression of views or to the disclosure of information which may prejudice the interests of an accused person who is charged and who is awaiting trial. Laws prohibiting sub judice publications, far from diminishing basic civil rights actually protect them, although at a cost of some limitation on complete freedom of expression.

The law of defamation in Australia protects a person's reputution. If a statement or publication adversely affects reputation, an individual may claim financial compensation for the damage done. Intially, the concern of the law of defamation (slander and libel) was the preservation of a person's esteem amongst his or her peers. Today, the people who typically make use of the law of defamation tend to be public figures whose career depends on public reputation, and whose claim of hurt concerns a media publication. The law of defamation acts as an important brake on completely free speech. The amounts awarded as damages for defamation by courts

often bear little apparent relationship to the impact the statement has had on the life of the defamed person. This is so although in many parts of Australia, exemplary or punitive damages have been abolished by law. To some extent, the large verdicts seem to reflect the Australian community's low opinion of the media - an opinion not always entirely unmeritted.

The Australian Law Reform Commission in 1978 proposed reforms of Australia's defamation laws to provide new means of redress by way of rights of court ordered correction and of reply. However, these have not been enacted - largely because of resistance by powerful media interests.

A HIGH LEVEL OF FREEDOM

Despite the foregoing catalogue of restrictions in the law upon freedom of expression in Australia, that freedom is highly prized. It is also widely practised. Some of the legal restraints (eg, blasphemy, sedition, indecency) seem now to be of diminished significance and exercise little real restraint. Other interests (eg privacy) enjoy inadequate protection from the law. Still other interests (eg against pre trial publicity and protection of true reputation) have a legitimate demand for protection. One person's right to free expression does not extend to unreasonable assaults upon the privacy, fair trial rights and reputational integrity of another person.

By and large it is convention, tradition and community expectations (as well as the great power of the media) which defend freedom of expresson in Australia. The law provides little express protection. Only lately have implied constitutional protections been discovered by the High Court of Australia. Attached to this paper is a copy of the *Australian Capital Television* decision of the High

Court of Australia. It may carry portents of things to come in Australia in the larger protection by the law of rights of free expression.

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