

AUSTRALIA'S RIGHT TO KNOW
FREEDOM OF SPEECH CONFERENCE

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***LET TRUTH AND FALSEHOOD GRAPPLE:
MILTON AS A DUBIOUS GUIDE TO SOME
QUESTIONS ABOUT FREE SPEECH***

KEYNOTE ADDRESS

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MILTON'S AREOPAGITICA

One of the most powerful, impassioned and frequently invoked pleas for freedom of speech is John Milton's "*Areopagitica*"¹. This tract, written in the midst of the Civil War, just at the time Milton's eyesight began to fail irrevocably, went on sale on 23 November 1644, for the modest price of 4d.² Milton was prompted to write his manifesto, directed to the Parliament of England, by his opposition to Parliament's reinstatement earlier in 1643, of a pre-publication licensing regime of the kind enforced by the Star Chamber during the years of Charles I's autocratic rule.

Milton's theme is that in a contest between truth and heresy, in matters both religious and secular, truth will win:

"Let her and falsehood grapple; who ever knew truth put to the worse in a free and open encounter? ...

For who knows not that truth is strong, next to the Almighty; she needs no policies, nor stratagems, nor licensings to make her victorious".³

Not only is the "*scanning of error*" necessary to confirm the truth, but liberty depends on "*free-born men*" being able to "*speak free*"⁴ and to air their grievances:

"For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth: that let no man in this world expect; but when complaints are freely heard, deeply considered and speedily referred, then is the utmost bound of civil liberty attained that wise men look for."⁵

These are stirring words and might well serve as a rallying cry for organisations concerned with freedom of speech and the "*right to know*". Yet those who quote Milton's words often forget that he was railing, not against censorship as such, but against **pre-publication** censorship. The sub-title of his tract, "*A Speech for the*

¹ Reproduced in S Orgel and J Goldberg (eds), *John Milton: The Major Works* (Oxford World's Classics, 2003), 236-273. The title comes from Socrates' *Areopagite Discourse* (c 355 BC), an oration directed to the Athenian Court of the Areopagus, comprising some 300 members elected by the free citizens of Athens: *id.*, 821.

² A Beer, *Milton: Poet, Pamphleteer & Patriot* (Bloomsbury, 2008), 168.

³ *Areopagitica*, note 1 above, 269.

⁴ These are the words of Euripides, quoted by Milton at the commencement of *Areopagitica*.

⁵ *Areopagitica*, note 1 above, 237.

Liberty of Unlicensed Printing”, reflects precisely Milton’s concerns. He remained sanguine about post-publication sanctions for heretics:

*“Those [publications] which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy that man’s prevention can use.”*⁶

By 1649, Milton himself was enforcing an Act restricting the liberty of the press that had been passed by the Rump Parliament as a response to the unrestrained reporting of the trial of Charles I.⁷

I do not see the limitations of Milton’s enthusiasm for free speech as detracting from the power of his words. Nor do I have the temerity to criticise Milton himself. Others are quite capable of doing that, as illustrated by the assessment of recent biographers that Milton was:

“flawed, self-contradictory, self-serving, arrogant, passionate, ruthless, ambitious, and cunning”.⁸

Does this remind you of anyone or any institution in particular?

I use Milton’s defence of liberty to make four general points concerning freedom of speech and its modern corollary, the right to know.⁹ For present purposes, I do not distinguish between the two. The four points concern:

- the philosophical justifications for freedom of expression;
- values that compete with freedom of expression;
- the significance of abuses of freedom of expression; and
- the role of vested interests in the debate about the limits of freedom of expression.

⁶ *Id.*, 272.

⁷ A Beer, note 2 above, 216.

⁸ G Campbell and T N Corns, *John Milton: Life, Work and Thought* (Oxford University Press, 2008), cited by F Kermode, “Heroic Milton: Happy Birthday” *New York Review of Books*, 26 February 2009, 27.

⁹ According to a media release on behalf of Australia’s Right to Know Coalition, the right to know relates to “*information that is relevant and important to [the] lives [of all Australians]*”: Media Release, 10 May 2007.

A QUESTION OF PHILOSOPHY

Milton's tract prompts us to ask why freedom of speech should be regarded as a value worthy of recognition and legal protection. While some might think that the virtues of freedom of speech are self-evident, the inquiry is both complex and of practical, not merely theoretical, significance. Professor Michael Chesterman, in his important book, *Freedom of Speech in Australia*, identifies three principal rationales underlying freedom of speech as a political or philosophical ideal.¹⁰

A Fundamental Personal Right

The first conceives of freedom of speech as a fundamental personal right, reflecting each individual's capacity for self-expression and intellectual and moral development. This is said to be a constitutive justification, in the sense that it is not a means to an end, but assumes that:

"individual autonomy and respect require protection of virtually unconstrained self-expression".¹¹

This rationale for free speech tends not to receive much attention in Australia, at least not in case law, partly because this country has no equivalent to the First Amendment to the United States Constitution.¹² In the absence of a national guarantee of freedom of expression, whether entrenched in the *Constitution* or in statutory form, there is little occasion for most commentators to address basic philosophical issues. Moreover, the notion of a fundamental personal right extends freedom of expression beyond the media or other interest groups, to private individuals. In that sense it is of less concern to the most influential and vocal proponents of freedom of speech than more limited rationales.

¹⁰ M Chesterman, *Freedom of Speech in Australia: A Delicate Plant* (Ashgate, 2000), 19-22. Compare I Moss, *Report of the Independent Audit into the State of Free Speech in Australia* (Australia's Right to Know, 2007) ("*Free Speech Audit*"), par 2.2.

¹¹ M Rosenfeld, "*Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*" 24 *Cardozo L Rev* 1523 (2003), 1535, citing R Dworkin, *Taking Rights Seriously* (1977).

¹² The First Amendment provides that: "*Congress shall make no law ... abridging the freedom of speech, or of the press ...*".

Marketplace of Ideas

The second rationale, embraced by Milton himself, sees freedom of speech as a means of discovering the truth through the marketplace of ideas. The idea owes much to John Stuart Mill, who saw ascertainment of the truth as a process of trial and error requiring uninhibited discussion.¹³ Mill's ideas were incorporated into First Amendment jurisprudence, initially by Oliver Wendell Holmes in his famous dissent in *Abrams v United States*, a case decided just after the conclusion of the Great War.¹⁴ *Abrams* was a sedition prosecution brought against five Russian-born anarchists who, during World War I, had called on the workers of the world to unite and, worse, did so partly in the Yiddish language. Holmes J said that:

“when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought – to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out.”¹⁵

The marketplace of ideas rationale supports not merely the freedom to criticise governments and political institutions, but freedom of artistic expression and indeed the publication of any idea on a matter of significance, regardless of truth or falsity, provided that it does not involve incitement to violence. If ideas are false, so the argument runs, their flaws will be exposed in the course of public debate and the truth will emerge.

The marketplace of ideas rationale is not, of course, restricted to sedition or other security-related offences. Yet it is sobering to contemplate that the very issues debated in the Supreme Court of the United States nearly a century ago form part of Australia's public discourse today, in the context of governmental responses to the threat of international terrorism. The Australian Law Reform Commission, in its 2006 review of sedition laws,¹⁶ concluded that certain offences in the *Criminal Code* (Cth)

¹³ J S Mill, *On Liberty* (1859), ch 2; M Rosenfeld, note 11 above, 1533.

¹⁴ 250 US 616 (1919).

¹⁵ *Id.*, 630.

¹⁶ Australian Law Reform Commission (“ALRC”), *Fighting Words: A Review of Sedition Laws in Australia* (Report 104, 2006) (“*Sedition Report*”).

fail to distinguish clearly enough between legitimate dissent of the kind that should be permitted in a liberal democracy, and expression the purpose or effect of which is to cause the use of force or violence.¹⁷ The recent *Free Speech Audit*¹⁸ pointed to the serious impact of Commonwealth anti-terrorism laws on the ability of the media to report terrorism trials and on the ability of persons being investigated or detained without charge to communicate with the media. To date both sets of recommendations have been ignored.

An Incident of Representative Government

The third rationale has gained currency in Australia as a foundation for the implied constitutional freedom of political communication. On this more limited approach, freedom of expression is primarily a means of ensuring that electors are able to exercise a free and informed choice as an incident of representative government. A concise statement of this rationale for the freedom to receive and impart information and ideas is to be found in an English case which, ironically enough, rejected the Australian notion that defamation law should recognise a special privilege for “*political information*”.¹⁹ Lord Nicholls explained that the:

*“freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions.”*²⁰

The limitations inherent in the third rationale become apparent from the scope of the implied freedom of political communication in Australia. Initially, a majority of the High Court held that the implied freedom drawn from the concept of representative government enshrined in the *Constitution*, although not protecting freedom of

¹⁷ *Id*, par 7.77. The ALRC recommended repeal of s 80.2(7) and (8) of the *Criminal Code* (Cth), which create the offences of urging a person to assist the enemy or those engaged in armed hostilities with the Australian Defence Forces: *Sedition Report*, pars 11.4-11.23. The ALRC also recommended that other sedition laws be repealed or amended and that the term “*sedition*” should be removed from federal criminal law.

¹⁸ *Free Speech Audit*, note 10 above, ch 7.

¹⁹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (“*Reynolds*”), 204, per Lord Nicholls.

²⁰ *Id*, 200.

expression generally, covers discussion of government and political matters.²¹ The majority gave the notion of “*political discussion*” a broad meaning, not limited to discussion about governments, political parties and candidates for public office. In their view, the notion embraces comment on “*political news and [the] public conduct of persons who are engaged in activities that have become the subject of political debate*”, such as trade union leaders and political or economic commentators.²² This approach gives apparent constitutional protection to expression on a wide range of matters of public interest, whether or not truly political in character.²³ The implied freedom would carry with it, for example, the possibility that conduct subject to sedition laws or false assertions about public figures (not necessarily government actors) would be protected.

The *Lange* Test

As happens frequently in constitutional adjudication, a change in personnel of the High Court brought about a modification in doctrine.²⁴ The Court’s unanimous 1997 judgment in *Lange*²⁵ restricted the scope of the implied constitutional freedom. The implication was now said to be derived specifically from the text and structure of the *Constitution*. It was therefore limited to the features of representative government incorporated by ss 7 and 24 of the *Constitution*.²⁶ As the Court explained, these sections:

*“necessarily protect that freedom of communication between the people concerning political or government matters **which enables the people to exercise a free and informed choice as electors.** Those sections do not*

²¹ *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 121, per Mason CJ, Toohey and Gaudron JJ.

²² *Id.*, 124. The test formulated in the joint judgment in relation to the law of defamation (137) was influenced by the principle adopted by the Supreme Court of the United States, in *New York Times Co v Sullivan* 376 US 254 (1964), but the joint judgment modified that principle by requiring the publisher to act reasonably and reversing the onus of proof. Thus a publisher was to have a defence in a case involving communications on matters of public interest, provided he or she had been unaware that the material was false, had not been reckless and had acted reasonably.

²³ A T Kenyon, “*Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice*” (2004) 28 *Melb Uni LR* 406, 414-415.

²⁴ Mason CJ and Deane J retired and were replaced by Gummow and Kirby JJ, respectively. Sir Gerard Brennan, the most senior puisne Judge, became Chief Justice.

²⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (“*Lange*”).

²⁶ These sections require the members of the House of Representatives and the Senate to be “*directly chosen by the people*” of the Commonwealth and the States, respectively.

confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.”²⁷
(Emphasis added.)

Lange laid down a two-level test for determining the validity of a law of the Commonwealth, State or Territory Parliament said to infringe the implied freedom of communication.²⁸ As slightly modified in a later case,²⁹ the test is as follows:

“First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people ... If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid.”

The High Court accepted that the common law of defamation has to be adapted so as to be made compatible with the implied constitutional freedom. This requires the defence of qualified privilege to be extended to communications on government and political matters (in the narrow sense approved in *Lange*) to the public at large, provided that the defendant’s conduct can be regarded as “reasonable”. As a general rule conduct cannot be so regarded unless the defendant:

“had reasonable grounds for believing the imputation was true, took the proper steps, so far as they were reasonably open, to verify the accuracy of material and did not believe the imputation to be untrue.”³⁰

There are many difficulties and uncertainties in applying the *Lange* concept of an implied freedom of communication.³¹ Not least of the difficulties is ascertaining the precise nature of the communications on government or political matters that will attract protection. The indications are, however, that the scope of the implied freedom is very much narrower than that expounded by the Mason Court. The later

²⁷ *Lange*, 560.

²⁸ *Id*, 567-568.

²⁹ *Coleman v Power* (2004) 220 CLR 1, 50, per McHugh J (with whom Gummow and Hayne JJ agreed on this issue).

³⁰ *Lange*, 574.

³¹ R Sackville, “How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary” (2005) 31 *Monash Uni L Rev* 191, 205-206.

authorities have confirmed that the implication will be given a relatively narrow interpretation, in keeping with the need to link the implication to the text and structure of the *Constitution*. For example, the courts have consistently rejected the proposition that the *Lange* principle applies to criticism of judicial officers.³² Similarly, the ALRC has taken the view that the implied freedom of political communication does not affect the validity of the sedition provisions in the *Criminal Code* (Cth), notwithstanding its view that the scope of some of the offences is incompatible with freedom of speech.³³ The important point for present purposes is that current High Court doctrine has accorded a privileged position to an important, but narrow category of political speech. Australian constitutional law has not accepted the broader rationales that underlie the guarantees of freedom of speech to be found in other common law countries.

A Half-Way House

The difficulties with this half-way constitutional house, characterised by Michael Chesterman as resting on an institutional rather than a participatory vision of representative government,³⁴ are revealed by the decision of the House of Lords in *Reynolds v Times Newspapers Ltd*.³⁵ In that case, the House of Lords declined to recognise a category of “*political information*” as a new subject matter for qualified privilege. Lord Nicholls saw no reason in principle to distinguish between political debate and discussion of other matters of public concern.³⁶ He considered that misstatements of fact on matters of public interest, whether or not on issues relating to government or politics, should be protected in the absence of malice on the part of the publisher. Whether the publication concerns a matter of public interest is to be

³² *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1; *John Fairfax Publications Pty Ltd v O’Shane* [2005] NSWCA 164; *APLA Ltd v Legal Services Commission of New South Wales* (2005) 224 CLR 322, 360-362 [63]-[68] per McHugh J; *Peek v Channel Seven Adelaide Pty Ltd* (2006) 228 ALR 553, 555-557 [7]-[12], per Debelle J; 581 [90]ff per Besanko J (with whom Duggan J agreed). See also *R v Lodhi* (2006) 163 A Crim R 448 (S Ct NSW, Whealy J), rejecting a challenge on implied freedom grounds to Pt 3 of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth).

³³ *Sedition Report*, note 16 above, pars 7.26-7.29.

³⁴ M Chesterman, note 10 above, 27-29.

³⁵ [2001] 2 AC 127.

³⁶ *Id.*, 204.

determined by reference to a number of criteria, including the seriousness of the allegation, its source and the steps taken to verify the information.³⁷

Implicit in Lord Nicholls' analysis is the recognition that the rationale for freedom of expression is very much wider than that underlying the implied constitutional freedom of political communication. The *Reynolds* approach also has practical advantages in that it confers greater flexibility on the court to accord appropriate weight to freedom of expression,³⁸ while also acknowledging reputation as “*an integral ... part of the dignity of the individual*”.³⁹ Perhaps not surprisingly, there is empirical evidence that the *Reynolds* principle provides greater leeway to the media and other commentators than the *Lange* doctrine.⁴⁰

PHILOSOPHY MATTERS

The experience of the implied constitutional freedom of political communication in Australia demonstrates that philosophical issues have practical significance. The Australian experience also suggests that the relatively impoverished nature of the debate about fundamental values in Australia reflects the truncated nature of the constitutional freedom and the absence of a national bill of rights. One of the best ways of encouraging ongoing national conversation about fundamental values, including freedom of speech, is for those values to receive appropriate protection (not absolute protection) in a statutory bill of rights or similar instrument. This requires the courts to participate in, if not lead, the debate and is very likely to stimulate Parliaments and the media to contribute actively and constructively in the discussion. I find it odd that the media, which, by and large, is unsympathetic to a bill of rights, has failed to recognise this attribute of a statutory charter. After all, the media may be the principal beneficiaries of a better informed debate.

³⁷ *Id.*, 205.

³⁸ As Lord Nicholls pointed out, reputation is a value explicitly recognised in human rights instruments, including art 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) and s 12 of the *Human Rights Act 1998* (UK), which was about to come into force at the time *Reynolds* was decided: *Reynolds*, 200, per Lord Nicholls (with whom Lord Cooke and Lord Hobhouse agreed).

³⁹ *Reynolds*, 201.

⁴⁰ A T Kenyon, note 23 above, 432ff.

COMPETING VALUES

Few people are anxious to be labelled as opponents of free speech or, worse still, of the public's right to know. Editorial writers are well aware of this reluctance. Yet neither concept can be applied without qualification. The exercise of free speech, or of the right to obtain information that people do not wish to divulge, very often involves a clash with other important values. The critical issue in a debate about suppression orders, freedom of information laws or restrictions on reporting terrorist activities is not whether freedom of speech or the right to know is curtailed. Of course it is. The question is whether the limitation is justified in a free and democratic society, having regard to the competing values at stake.

Milton, despite his fine words in defence of freedom of speech, did not come close to accepting freedom of expression as an absolute value. His concern was primarily to suppress heresy, although his enthusiasm for the executioner as a means of social control of dissident views⁴¹ probably does not strike a chord today, except among a nostalgic minority. Milton's views were, of course, shaped by the times. He did not live in a democracy and he wrote at a time when religious disputation was second in intensity only to the Civil War raging between the supporters of Parliament and those loyal to a doomed King.

Our times are different, but there is no shortage of important values that jostle for supremacy. Most obviously, the freedom to publish false material harmful to an individual's reputation collides with the values of dignity and autonomy historically protected by the law of defamation.⁴² Even commentators who have criticised the failure of governments to implement freedom of information regimes designed to encourage open and accountable government,⁴³ recognise that certain exemptions are both justifiable and necessary. For example, a 1995 review of the *Freedom of*

⁴¹ The executioner's primary role, in the present context, was to burn offending publications.

⁴² Reputation has a number of facets, but includes promoting the dignity and respect associated with membership of a community: M Chesterman, note 10 above, 87, citing R Post, "The Social Foundations of Defamation Law: Reputations and the Constitution" 74 *Calif L Rev* 691 (1986), 712-713.

⁴³ Section 3(1) of the *Freedom of Information Act* 1982 (Cth) states that the object of the legislation "is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth" by specified means.

Information Act 1982 (Cth) recommended extensive liberalisation of the legislation, but accepted that there should be exemptions for documents the disclosure of which would cause damage to Australia's security and documents brought into existence for the purpose of consideration by Cabinet.⁴⁴

The boundaries of freedom of expression are constantly being adjusted, both by legislatures and courts, as social conditions change. Privacy is one value that has competed, with varying degrees of success, with freedom of expression and the media's right to intrude into what is normally a realm from which outsiders are excluded. In their celebrated article on "*The Right to Privacy*",⁴⁵ Warren and Brandeis provided a justification for a right to be let alone:

*"The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."*⁴⁶

As the notion of privacy has developed, it has become more complex, embracing a variety of personal, family and even commercial interests.⁴⁷ It is recognised in international instruments to which Australia is a party⁴⁸ and has been included in statutory charters in force in Victoria and the Australian Capital Territory. Since

⁴⁴ ALRC and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Report 77, 1995), pars 9.2-9.9.

⁴⁵ S D Warren and L D Brandeis, "The Right to Privacy" 4 *Harv L Rev* 193 (1890).

⁴⁶ *Id.*, 196.

⁴⁷ In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, where the High Court left open the possibility that the common law might recognise a tort of unjustified invasion of privacy, Gummow and Hayne JJ (253-254 [120]), quoted from the *Restatement of the Law Second, Torts* (1977) which identifies four ways in which privacy can be invaded: intentional intrusion on solitude or seclusion; appropriation of a name or likeness; publicity given to private matters; and presenting a person publicly in a false light.

⁴⁸ *International Covenant on Civil and Political Rights* (1966), art 17.1 provides that no person shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. Article 17.2 states that everyone has the right to the protection of the law against such interference. Similar language appears in s 12 of the *Human Rights Act 2004* (ACT) and s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

these human rights instruments also protect freedom of expression,⁴⁹ a conflict between values is inevitable.

The established media have a close interest in how the conflict is to be resolved. Hence the strong opposition to proposals to establish by statute a right to claim damages or other relief for invasion of personal privacy.⁵⁰ The opposition is frequently expressed in terms suggesting that any statutory protection of individual privacy is necessarily an unwarranted restriction of freedom of expression. However, it is one thing for the media to claim a right to know about the activities of governments, public organisations and corporations whose conduct has the potential to affect the lives of ordinary people. It is quite another to claim an entitlement to probe the personal lives of individuals at times of grief or trauma, or to information in such matters as health, family finances or intimate relationships. The right to know is not unlimited.

A second example of a clash of values is a product of the dreadful modern experience of genocide and ethnic cleansing. Racism and religious hatred are hardly novel phenomena in Australia or, for that matter, in other developed countries. But it is only in the last forty years that Commonwealth and State legislation has set out to regulate and, in some circumstances, penalise hate speech.⁵¹

Before the enactment of this legislation, purveyors of material designed or calculated to generate hatred towards groups or individuals by reason of their race, religion, ethnicity or sexual orientation were largely free to do so, provided they did not incite immediate violence. Nowadays:

⁴⁹ *Human Rights Act 2004 (ACT)*, s 16; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 15.

⁵⁰ Proposed by the ALRC in 1979 and, in somewhat different terms, in 2008: *Unfair Publication: Defamation and Privacy* (Report 11, 1979); *For Your Information: Australian Privacy Law and Practice* (Report 108, 2008), ch 74. The later proposal would provide a statutory cause of action for a serious invasion of privacy, for example where there has been an interference with an individual's home or family life; an individual has been subjected to unauthorised surveillance; an individual's correspondence (written or electronic) has been misused or disclosed; or sensitive facts relating to an individual's private life have been disclosed.

⁵¹ See, generally, K Gelber and A Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007).

*“anti-vilification laws have become an accepted and normal part of the Australian anti-discrimination policy framework”.*⁵²

In consequence, a body of case law has built up demonstrating the broad potential reach of anti-vilification (or anti-hate speech) laws.⁵³ The narrow focus of the implied constitutional freedom of political communication has meant that issues that otherwise might squarely be debated in a constitutional or a charter of rights setting are not treated that way in Australia.⁵⁴ Accordingly, issues of profound importance receive little attention except in academic circles. Public debate is impoverished.

ABUSE OF FREEDOM

If freedom of speech is to be protected, it follows that, as Milton realised, falsehood must sometimes be sheltered from sanctions or civil action. As I have already noted, few would be prepared to follow Milton’s prescription for remedying abuses of freedom of speech. Yet it does no service to the debate about reconciling freedom of speech with other important values to pretend that journalistic ethics constitute an adequate safeguard against irresponsible media behaviour. Lord Nicholls put the point clearly in *Reynolds*, in response to an argument that the remedy for defamatory imputations of fact lay in the “*ethics of professional journalism*” and that decisions should be left to editorial judgment:

*“Unfortunately, in the United Kingdom this would not generally be thought to provide a sufficient safeguard. In saying this I am not referring to mistaken decisions. From time to time mistakes are bound to occur, even in the best regulated circles. Making every allowance for this, the sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence.”*⁵⁵

⁵² K Gelber, “Hate Speech and the Australian Legal and Political Landscape” in *id.*, 5.

⁵³ See, for example, *Jones v Scully* (2002) 120 FCR 243 and *Toben v Jones* (2003) 129 FCR 515, both of which involved proceedings under Pt IIA of the *Racial Discrimination Act 1975* (Cth) in relation to publications that were found to be reasonably likely to offend, insult, humiliate or intimidate Jews.

⁵⁴ *Jones v Scully* (2002) 120 FCR 243, 304-306 [234]-[240], per Hely J; *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207, 245-246 [111]-[113], per Nettle JA; 806-809 [198]-[210], per Neave JA.

⁵⁵ *Reynolds*, 202.

If “*Australia*” were to be substituted for “the *United Kingdom*” there would not be many in this country, outside the media, who would disagree.

The difficulty with unqualified slogans like the “*public’s right to know*” or “*freedom of speech*” is that they obscure the difficult choices that decision-makers and policy-makers face. They also tend to obscure the truth that merely because a publication does not fall foul of any legal prohibition does not necessarily mean that it can be classified as a responsible exercise of free expression. Lawful publications are quite capable of inflicting serious and unfair damage on those who are unfortunate enough to find themselves in the line of misdirected fire.

There is another difficulty created by irresponsible journalism, even if it is not the norm. Decision-makers and policy makers are influenced by examples of media distortion and inaccuracy that cannot be explained simply as mistakes attributable to the pressures under which journalists and media outlets undoubtedly operate. Abuses of freedom of expression or the right to know harden opposition to reforms of laws, policies or practices that otherwise would command general acceptance. The general point can be made by a specific illustration.

Representatives of the media often lament the failure of the judiciary as a group to understand the requirements of a free press and, in particular, the pressures of time and space to which journalists are subject. This is demonstrated by the *Review of Suppression Orders* published in 2008 on behalf of Australia’s Right to Know Coalition.⁵⁶ The *Review* contains many anecdotal accounts of cases where members of the judiciary are said to have responded unsympathetically to requests for suppression orders to be lifted or even to requests for detailed information concerning suppression orders. Not all of the anecdotal accounts are convincing, but there are enough to demonstrate inconsistencies in approach and over-zealous use of suppression orders in some jurisdictions.

⁵⁶ P Innes, *Report of the Review of Suppression Orders and the Media’s Access to Court Documents and Information* (Australia’s Right to Know Coalition, 2008) (“*Review of Suppression Orders*”).

As I have argued elsewhere,⁵⁷ it is essential that members of the judiciary gain a more sophisticated appreciation of the role and responsibilities of the media and of the difficulties that well-intentioned and capable journalists have in reporting and commenting on court proceedings responsibly and fairly. This involves recognising that many journalists report or comment on judicial proceedings or decisions in a wholly professional manner, with a careful regard for accuracy and fairness. To the extent that unsympathetic responses by judicial officers to reasonable media requests for court proceedings to remain open, or for access to material in court files reflect a lack of appreciation of the legitimate interest of the media or promoting open justice, the responses cannot be defended. Similarly, to the extent that some courts fail to follow the examples of best practice provided by leaders in judicial administration, their procedures should be improved.⁵⁸

Nevertheless, the suspicions harboured by some judicial officers towards the media are not always wholly uninformed or arbitrary. An example of why this is so is provided by a front page article in a national newspaper published by one of the members of Australia's Right to Know Coalition.⁵⁹ The article is headed "*Fury at Lenience on Child Molester*" and reports on what is said to be "*the outrage of many in the community*" at a sentence imposed by a now retired District Court Judge on a 23 year old Aboriginal man who pleaded guilty to having sexual intercourse with a child under ten years.⁶⁰ The article states that the Judge:

"who could have given [the offender] 15 years or more – instead gave him a two-year suspended sentence, and put him on a two-year good behaviour bond".

The sense of righteous outrage is heightened by a quotation from a "*child welfare professor*" who opines that the Judge's decision not to jail the offender was "*inexplicable*". A local State Member of Parliament expressed the doubtless well-

⁵⁷ R Sackville, "The Judiciary and the Media: A Clash of Cultures" (2005) 27 *Aust Journalism Rev* 7.

⁵⁸ The *Review of Suppression Orders* acknowledges that a number of courts have very good access regimes, often in consequence of the assistance provided by media liaison officers: 46 (Federal Court), 54, 58 (Supreme Court of Victoria).

⁵⁹ *The Weekend Australian*, 7 March 2009, 1, 8.

⁶⁰ *R v King*, District Court of New South Wales (5 February 2009).

considered view that the “*monster should be locked up in jail*”. Presumably he was referring to the offender.

The article omits any mention of a critical fact taken into account by the Judge. In his sentencing remarks, the Judge noted that the offender:

“has been in prison for some time over 14 months. He has been living in protective custody, in protection. He has been locked in his cell all day except for one hour each day and he has been assaulted on a number of occasions. He has been visited by his concerned and caring mother but has had no physical contact with her since he has only boxed visits.”

The Judge made it quite clear that in determining the appropriate sentence he took into account the fact that the accused “*has been in protective custody with limited access to his family*” and that he had already served one year, two months and seven days in custody.

I am not in a position to determine how such a serious omission in a front page report came about. One would have expected the author, a senior journalist, to have included in her piece a reference to the prisoner’s time in custody, since it formed an important - perhaps the most important - element in the Judge’s reasoning. If she did, presumably somebody else made a decision to exclude any reference to a critical factor that explained the apparently lenient sentence imposed by the Judge. I can only speculate on the reason for any such decision.

The issue is not whether the sentence imposed on the offender is legally supportable. That will be determined by the appellate process. Nor is the point whether a newspaper is entitled to criticise, even in vehement terms, a sentence imposed on a particular offender or the reasons given by the Judge. Of course it is.

The point is that, independently of whether the article transgresses legal norms, it fails to adhere to basic standards of accuracy and fairness. It is perhaps not surprising that articles of this kind fuel the suspicion that many judicial officers feel towards the media. More importantly, if the so-called “*quality media*” cannot be relied on to maintain basic standards, the barriers to worthwhile reforms, even where the arguments for change carry great force, are likely to be raised even higher. In

short the media themselves must bear some responsibility for the difficulty in achieving liberalisation of legislative or administrative regimes governing public access to official information or freedom of expression on matters of public interest.

VESTED INTERESTS

The fourth lesson to be derived from Milton is that debates about the limits of freedom of expression almost invariably involve vested interests. By 1643, Milton himself had come under vicious attack for his liberal views on divorce, which he had formed in the aftermath of his separation, after one month of marriage, from his seventeen year old wife.⁶¹ Critics within Parliament and elsewhere demanded that his pamphlet, which called for divorce to be freed from “*the bondage of canon law*”,⁶² to be suppressed and burnt. Milton’s defence of freedom of speech reflected his own experience with the forces of censorship. Samuel Warren co-authored the article on “*The Right to Privacy*” after Boston newspapers “*had a field day*” on the occasion of the wedding of his daughter, causing him considerable annoyance.⁶³

Australia’s Right to Know Coalition plainly has a vested interest in promoting its agenda, just as many groups, such as politicians, public servants and organised religions, have a vested interest in resisting removal of constraints on freedom of expression or greater legal protection for whistleblowers. The fact that members of the Coalition have a vested interest in maximising the free flow of information on issues of public importance (and perhaps on some issues of little or no public importance) is not a reason to discard their views, any more than the opinions of professional organisations should be rejected simply because their members might be thought to benefit from the acceptance of those opinions. The source of an idea or proposal is not the sole determinant of its worth. Just because Mussolini caused Italian trains to run on time does not make punctuality something to be despised.

⁶¹ A Beer, note 2 above, 151, 167. It is unclear whether the separation had anything to do with Milton’s view of sex between men and women as the “*promiscuous draining of a carnal rage*” and the “*quintessence of excrescence*”: *id*, 145.

⁶² J Milton, *The Doctrine and Discipline of Divorce* (1643).

⁶³ W L Prosser, “Privacy” 48 *Cal L Rev* 383 (1960), 383.

A body such as Australia's Right to Know Coalition has an important role to play in the public debate concerning freedom of speech. That role includes stimulating discussion on issues that receive far too little attention in this country, in large measure because of the comfortable but simplistic assumption that our liberties are adequately safeguarded. The role certainly extends to exerting pressure on decision-makers to implement changes in areas where the need for reform has been clearly identified but the necessary political will is absent. Within this category I include the protection of whistleblowers⁶⁴ and enhanced freedom of information laws.⁶⁵

There is, however, a qualification. The interests of the major media players are not necessarily those of society at large. Much less are they necessarily compatible with the interests of less powerful minority groups whose values may conflict with the media's untrammelled exercise of freedom of expression or the right to know. It is for this reason that a debate stimulated by the most influential segments of Australia should form only one part of a continuing community wide debate. There is such a thing as becoming too relaxed and comfortable.

CONCLUSION

One of the characteristics of modern society, encouraged by the availability of instantaneous modes of communication, is a general yearning for simple solutions to complex problems. The popular media are by no means the only organs of information and opinion that exploit this desire. Our democratic institutions and elected representatives promote the belief that short-term solutions can be found to issues that require long-term planning and implementation.

The use of the catchcries "*freedom of speech*" and the "*right to know*", as with all slogans, necessarily simplifies the nature of the issues requiring informed debate. Nonetheless, Australia's Right to Know Coalition has performed a service by encouraging discussion of important questions that receive far too little public

⁶⁴ See P Latimer and A J Brown, "Whistleblower Laws: International Best Practice" (2008) 31 *Uni NSWLJ* 766; *Free Speech Audit*, note 10 above, ch 5.

⁶⁵ *Id.*, ch 6, esp 100-102 referring to Australian reviews of freedom of information laws.

attention in this country. It has also done a service by identifying areas in which changes of policy or the implementation of sensible recommendations are needed to enhance legitimate freedom of expression and public knowledge of the workings of governmental institutions (including the courts). But it is a mistake to assume that the interests of the media always coincide with those of the broader society, much less those of less influential groups and individuals whose autonomy and dignity are crucial to a more civil society. That is why encouraging an informed national debate on the limits of freedom of expression is so important. If that debate can be spurred on by the prospect of a federal statutory charter of rights – or even the enactment of a charter – so much the better.