

UPHOLDING THE VOLTAIRE DICTUM: MANAGING THE DELICATE BALANCE BETWEEN FREE SPEECH AND A SAFE CAMPUS ENVIRONMENT

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DISCUSSING “HOT BUTTON” ISSUES

- Many topics have given rise to tension and protest on campus recently and give rise to great passion: Israel-Gaza, BLM, the Voice, gay marriage, trans issues etc.
- Our aim with this discussion is to help find strategies to defuse disputes over hot button issues for legal counsel associated with universities.
- We do **not** want to get bogged down the rights and wrongs of particular “hot button” issues. In fact, we think it’s important to be impartial in such circumstances.
- Please be respectful and measured.
- We will have “Chatham House Rules” for this discussion i.e. you can share discussions from the meeting but not attribute it to a particular individual or reveal their affiliation.
- We hope you will find this discussion useful: we are keen to learn from you, and we hope you can learn from us.

US LEGAL LANDSCAPE

- First Amendment (1791) protects a wide range of speech
- But it does allow some restrictions, including when speech is deemed to incite violence as a true threat, *Brandenburg v Ohio*, 395 US 444, 449 (1969)
- In the wake of 7 October 2023 events, universities are grappling with how to balance competing interests of free speech and intimidating and at times violent protests.
- Some measures include encampment bans, designated protest zones, but have sparked fierce debate
- Republicans introduced *Respecting the First Amendment on Campus Act* which passed Congress in September which would make these types of measures unlawful

CURRENT AUSTRALIAN LEGAL LANDSCAPE

- Australia has no equivalent of First Amendment or legislation enshrining a general right to freedom of expression
- Constitution does not explicitly protect freedom of expression

BUT

- Australia is party to a number of human rights treaties, including ICCPR
- Implied freedom of political communication exists because of system of representative government established by Australian Constitution, see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
- Some protections, including for hate speech, under Commonwealth, State and Territory human rights and anti-discrimination laws
- Contrast with First Amendment, eg, *Racial Discrimination Act* makes it unlawful to do an act that is reasonably likely to offend, insult, humiliate – as well as intimidate. There is no imminent threat threshold as in the US

FRENCH MODEL CODE

- Requires universities to ensure freedom of lawful speech and academic freedom
- Allows universities to restrict free speech and academic freedom if necessary to achieve:
 - Core research and teaching mission
 - Comply with legal duties
 - Foster well-being of students and staff
- Is it working? Does it have the balance right?
- See also *Ridd v James Cook University* [2021] HCA 32 for an instance where university codes of conduct and academic freedom were in issue.

SOME STRATEGIES

1. Understand who the protestors, what they are protesting about and what their demands are. This is essential to effective communication with those groups.
2. Have clear policies and procedures in place (which are compliant with relevant laws and the French Model Code) and apply them consistently.
3. When staff, students or visitors engage in behaviours that threaten health or safety or destruction of property, respond proportionately. Peaceful protests should never be handled aggressively. By the same token, the safety of staff and students is also important.
4. Think carefully before calling in the police. If necessary, try and reach an agreement with them first about how the response will be managed. Police presence by itself can sometimes escalate hostilities.
5. Ensure your university has an effective process for handling complaints from both within and outside the university.
6. University Vice-Chancellors: remember the buck stops with you, make your university management applies these principles consistently. Resist pressure from politicians, media commentators and donors.