FREEDOM OF SPEECH AND AUSTRALIAN POLITICAL CULTURE

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I INTRODUCTION

The 1992 judgments[1] constituted a high watermark of recognition of freedom of speech in Australian constitutional and political history. Given the absence of an express constitutional, or federal statutory, protection of free speech they were symbolically important. Whether or not the judgments, and subsequent iterations of the doctrine,[2] ushered in a new era for free speech protection is a discrete question, and one which is not the topic of this paper. However, as a moment when a majority of the highest court in the land spoke the language of freedom of political speech for the first time, they remain remarkable.

After the judgments in the 1992 foundational implied political communication cases were announced, the public reaction was considerable. Criticism was directed, perhaps predictably, at the High Court's utilisation of an implied jurisprudence to override the legislature. One commentator, for example, described the High Court's move 'into the interpretation of matters which are not necessarily spelled out in the Constitution ... [as] extremely dangerous'.[3] The judgments also stirred considerable debate in the national parliament, during which then Labor Senator Chris Schacht criticised unelected judges for 'relying on an implied power' to 'frustrate the will of Parliament'.[4] The High Court was described as expressing a 'clear determination to take a more active role in Australian public policy'.[5]

A further line of commentary mooted the possibility of the judgment leading to a line of reasoning that might produce a de facto bill of rights. Speaking at a conference in Darwin in October 1992, shortly after the decisions were handed down, Toohey J suggested that an application of an implied jurisprudence might be capable of interpreting the rule of law in a way that would protect a range of rights. He suggested that:

> the courts should ... conclude that where the people of Australia, in adopting a constitution, conferred power to legislate upon a Commonwealth government, it is to be presumed they did not intend that those grants of power extend to the invasion of fundamental ... liberties ... If such an approach were adopted, the courts would, over time, articulate the content on the limits of power arising from fundamental common law liberties.[6]

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1 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

2 A decisive interpretation of the doctrine was produced in the unanimous decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The doctrine has most recently been updated in *Coleman v Power* (2004) 220 CLR 1, and applied in *Hogan v Hinch* [2011] HCA 4, [47]-[50], [92]-[99].

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 October 1992, 1423 (Gordon Scholes).

4 Commonwealth, *Parliamentary Debates*, Senate, 6 October 1992, 1196 (Chris Schacht).

5 Michael Millett, 'Political Demands on High Court', *Sydney Morning Herald* (Sydney), 7 October 1992, 3.

6 Toohey J, cited in 'Judicial Review in Step with Majority Will', *The Age* (Melbourne), 12 October 1992, 9.

He suggested that the kinds of liberties likely to be so protected might include free speech, freedom of assembly, freedom from arbitrary arrest, and freedom from search and seizure without the issue of an evidence-based warrant. The federal minister for Justice, Senator Michael Tate, reacted strongly to the implications of Toohey J's speech, contradicting his claim that the common law was the historical basis upon which enhanced rights protection had developed, and that the common law could therefore now be seen as the basis for expanded rights protection by the courts. Tate argued that the common law 'has rarely protected individual human rights as distinct from the rights of the property-owning, contract-making classes'.[7] However, others concurred with Toohey. J. Senator Bolkus was quoted in the media as saying that the judgments were 'a first step towards entrenching in our legal system respect for rights'.[8]

A third line of commentary was braver, making expansive predictions concerning the fate of freedom of speech in Australia following the judgments. Such commentary included the prediction by well-respected journalist Margo Kingston that 'it now appears that if the Coalition wins power, it will have to live with far stronger restraints on legislative action by the High Court than it ever thought possible'.[9] Prediction in politics is never an easy game to play, and Kingston was not to know that the Coalition would subsequently win government in five successive elections between 1996 and 2004, and that in the last of those it would win control of both houses of parliament. In fact, in contrast to her prediction, during its term in office the Coalition appears to have faced relatively weak judicial restraints on legislative and executive action.[10]

One of the broader questions that arises from the development of the doctrine of an implied constitutional freedom of political communication, but that featured little in public debate at the time, is whether it resonates with the broader political culture. Did the doctrine enmesh with a political culture cognisant of freedom of speech? Does free speech have a place in the national psyche? In other words, what is the place of freedom of speech within Australian political culture?

I will consider these questions in this paper by investigating the place of freedom of speech within Australian political culture twenty years after the judgments. This will include a consideration of the parliamentary discourse of politicians, a selection of policy developments as they have impacted on freedom of speech, data gathered from attitudinal surveys, and original interviews conducted with everyday Australians. This will enable a qualitative picture to be drawn of the kinds of ideas expressed around free speech and its limits in Australia today. This picture demonstrates the contingent nature of the public commitment to freedom of speech in political culture. While this is consonant with the qualified nature of the constitutional doctrine, it also means free speech has a somewhat precarious position in the national psyche.

II FREE SPEECH IN POLITICIANS' DISCOURSE AND POLICY

Politicians are prone to rhetoric, and the arena of freedom of speech is no exception to this. Many politicians express broad and general support for freedom of speech, however this support tends to be pragmatic and somewhat fleeting, as I will show below.

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[7] Margo Kingston, 'High Court Puts Itself on Trial Over a Bill of Rights', *The Age* (Melbourne), 10 October 1992, 20.

[8] 'High Court's First Step', *Sydney Morning Herald* (Sydney), 2 October 1992, 12.

[9] Margo Kingston, 'Free Speech Ruling Raises Excitement and Hopes', *The Age* (Melbourne), 1 October 1992, 10.

[10] Katharine Gelber, 'High Court Review 2005: The Manifestation of Separation of Powers in Australia' (2006) 41 *Australian Journal of Political Science* 438, 450-1.

Their posturing, therefore, ought not to be misinterpreted as a commitment to freedom of speech in the concrete reality of policy-making.

Examples of politicians expressing general support for freedom of speech are relatively plentiful. In 1992 in the aftermath of the landmark judgments that are the theme of this volume, the Coalition – then in Opposition – urged the government to establish a parliamentary rights and freedoms committee. The purpose of this committee would be to scrutinise draft legislation to ensure that it did not contravene human rights principles, as derived from the obligations in the International Covenant on Civil and Political Rights. The then shadow Attorney-General, Peter Costello, said he would take the proposal to the shadow cabinet and that parliament had a vital role in protecting citizens from interference with their rights.[11]

In parliamentary debate at that time, Opposition Senator Parer described the legislation limiting campaign expenditure[12] that had led to the 1992 judgments as an 'outrageous attack on freedom of speech'[13] and an 'anti-democratic ban' that attempted to 'curtail freedom of speech'.[14] He declared that the Liberal and National parties had consistently stood in 'defence of freedom of speech and democracy in Australia'.[15] In comparison, government Senator Nick Bolkus also defended a conception of freedom of speech, but one that was not absolute and that 'allowed for interventions and intrusions' into the general principle. Both he and the Democrats also pointed out the Coalition's opposition to the introduction of a bill of rights, despite their professed support for freedom of speech.[16]

In 1995, former Prime Minister Paul Keating, in a speech outlining the responsibilities of multiculturalism, described freedom of speech as one of the 'basic principles of Australian society'.[17] In 1996, six months after his election as Prime Minister, John Howard argued that under his leadership Australians were more free to exercise their freedom of speech than they had previously been under the Keating-led Labor government. He added that he saw this change as a welcome development in public life:

> One of the great changes that has come over Australia in the past six months is that people do feel able to speak a little more freely and a little more openly about what they feel … I think there has been that change and I think that's a very good thing … I welcome the fact that people can now talk about certain things without living in fear of being branded as a bigot or as a racist or any of the other ... expressions that have been too carelessly flung around in this country whenever somebody has disagreed with what somebody has said.[18]

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[11] Margo Kingston, 'Parliament Must Reclaim Role on Rights – Costello', *The Age* (Melbourne), 7 October 1992, 3.

[12] *Political Broadcasts and Political Disclosures Act 1991* (Cth).

[13] Commonwealth, *Parliamentary Debates*, Senate, 6 October 1992, 1162 (Warwick Parer).

[14] Ibid 1138.

[15] Ibid 1162.

[16] Commonwealth, *Parliamentary Debates*, Senate, 6 October 1992, 1165-9 (Nick Bolkus).

[17] Paul Keating, 'Opening Address' (Speech delivered at the Global Cultural Diversity Conference, Sydney, 26 April 1995) <http://www.immi.gov.au/media/publications/multicultural/ confer/speech2b.htm> at 13 April 2011.

[18] John Howard, 'Edited Extract from Speech to the Queensland Liberal Party Convention', *The Australian* (Sydney), 25 September 1996, 13.

Howard was making an oblique reference to the public debate around Hansonism,[19] which was telling because he chose not to engage with the question of what she said, but rather emphasised her right to say it. He cautioned that free speech should be exercised 'in a tolerant and moderate fashion', but emphasised the importance of people's right to speak. In the same speech he described freedom of speech as 'a cardinal principle, a given of our free and open society'.

The question of freedom of speech has also arisen in politicians' discourse in the context of other, discrete, issues. One of these is flag desecration. Despite numerous attempts to introduce flag desecration laws over the years, none has been successful. It is probable that a free speech consciousness has played a role in this lack of success.[20] There is evidence of some cognisance of the importance of free speech in parliamentary debates on this issue. For example, in 2003 following an anti-war protest in Perth at which a 17-year old youth burned the Australian flag, a bill was introduced into the Western Australian parliament to protect the national and the Western Australian flags from deliberate defilement.[21] In debate it was argued that a 2002 poll had shown 63% of the public in that state agreed that flag-burning should be a criminal offence. Yet the state's Attorney-General, Jim McGinty – himself no stranger to the implied freedom of political communication doctrine[22] – argued in debate that flag-burning could be considered protected political speech.[23] His view is contestable, given the latitude the doctrine provides to restrictions that, even if they do implicate freedom of political communication, are nevertheless considered reasonably appropriate and adapted to achieving another legitimate government end.[24] Nevertheless, the Attorney-General's citation of the doctrine in opposing a flag desecration law enabled it to be discussed in parliamentary debate.

However, not all parliamentary debate has produced evidence of a strong commitment to, and recognition of the importance of, free speech. In 2006 one more bill, in a succession of bills in the 1990s, was introduced into the federal parliament to protect the national flag from desecration.[25] Its proponent, Senator Bronwyn Bishop, took pains to explain to the parliament that her bill did not place an unacceptable burden on freedom of speech in terms of the constitutional doctrine, because it was 'very targeted' to wilful destruction or mutilation of the flag, where it was reasonable to infer that such acts were intended publicly to express contempt for or disrespect of the flag. She noted that there were other ways of expressing one's political views that did not involve flag desecration. Her bill was not supported in the chamber, and was therefore not enacted.

Outside of the (somewhat rhetoric-laden) arena of parliamentary debate and in the world of policy-making, these commitments to freedom of speech as expressed by

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[19] Malcolm Fraser, 'The Obscenity of Racism', in Robert Manne (ed), *Two Nations: The Causes and Effects of the Rise of the One Nation Party in Australia* (1998) 48–50 and others in this volume; see also Michael Leach, Geoffrey Stokes and Ian Ward (eds), *The Rise and Fall of One Nation* (2000).

[20] Katharine Gelber, *Speech Matters: Getting Free Speech Right* (2011) 41-47.

[21] *Flag Protection Bill 2003* (WA).

[22] In 1996, McGinty attempted to expand the freedom to an implication that the Constitution created an expectation of parity of voting power (conversely expressed as a case against malapportionment). His claim was rejected by the High Court in *McGinty v Western Australia* (1996) 186 CLR 140.

[23] Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 8205b-224a (Jim McGinty).

[24] The second limb of the test is whether a law that implicates freedom of political communication is nevertheless 'reasonably appropriate and adapted to achieving an end in a manner that is compatible with the system of representative government enshrined in the Constitution' (*Coleman v Power* (2004) 220 CLR 1, 66).

[25] *Protection of the Australian National Flag* (Desecration of the Flag) *Bill 2006* (Cth).

members of both major political groupings, appear to be particularly fragile. The 1992 judgments that founded the doctrine of an implied freedom of political communication were themselves concerned with legislation that limited public criticism of members of the Industrial Relations Commission,[26] and that limited political broadcasting during election periods.[27] The first of these cases concerned legislation that appeared to be an unnecessarily broad intrusion into the right of citizens to comment on the actions of public figures and a public organisation. The Industrial Relations Commission, and its members, carried on the work of mediating and deciding industrial relations disputes. The Commission was charged with this task by government, and enabled in so doing by legislation. Being able to criticise such institutions and the work of their members appears part and parcel of political discourse in a democracy.

The second case was more complex – in introducing the political advertising provisions, the government of the time had claimed that limiting paid political advertising during an election period would enhance, rather than detract from, the workings of democracy. This is because it would limit the dominance of political advertising by those with the funds to pay for large amounts of advertising. Moreover, the free time component of the legislation was designed to provide both incumbent political parties (proportionally in accordance with their parliamentary representation) and newly-contesting political parties (with those receiving free time to be decided by lot) with free broadcasting opportunities. Indeed, one pertinent and insightful empirical investigation was conducted into the elections that were held during the period between the enactment of this legislation and the declaration of its invalidity by the High Court. This analysis showed that the legislation enhanced rather than detracted from opportunities for participation in political debate.[28] Candidates who were prevented from relying on electronic advertising instead participated in traditional, non-media based activities to convey their ideas. These included public gatherings, debates and grassroots campaigning. This legislation might more appropriately be characterised as having selectively enabled, rather than as having limited, freedom of political speech. However, this is not generally or well understood. These dual understandings of the legislation's purpose and its interpretation in the High Court are represented in parliamentary debates following the 1992 judgments, in which the Coalition accused the Labor government of hypocrisy for having first claimed that it was introducing the legislation to protect free speech, and then later claiming that the High Court's decision was a victory for free speech as well.[29]

There are other examples of governments introducing policy that impacts negatively on freedom of speech. It would be an understatement to say that many people raised concerns about the Howard government's tendency to do just this. For example, concerns were expressed that government was encroaching into academic freedom,[30]

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[26] *Industrial Relations Act 1988* (Cth), s299(1)(d)(ii), which made it an offence by writing or speech to use words 'calculated ... to bring a member of the [Industrial Relations] Commission or the Commission into disrepute', was held invalid in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[27] The *Broadcasting Act 1942* (Cth), Part IIID, which prohibited political advertising during an election period, and required broadcasters to make free time available for election broadcasts, was held invalid in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

[28] Gerald Rosenberg and John Williams, 'Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia' (1997) 11 *Supreme Court Review* 439-495.

[29] Commonwealth, *Parliamentary Debates*, above n 13, 1162 and ff.

[30] Stuart Macintyre, 'Universities', in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (2007) 41–59.

including the hosting of a Senate Inquiry of the same name.[31] Scientific data on climate change that were perceived to be critical of government policy were silenced, and the Prime Minister was accused of dismissing advice that countered his personal objectives in relation to nuclear power.[32] Non-government organisations that advocated positions that were contrary to government policy lost funding, and experienced other constraints on their ability to advocate on behalf of their constituents. They warned of a general suppression of dissent.[33] Even journalists and the media complained that their access to policy information was curtailed.[34]

In the realm of counter-terrorism policy, a swathe of provisions introduced in the aftermath of September 11, 2001 can be seen as limiting freedom of speech. These include that a terrorist act has been defined as including an intent to advance a 'political, religious or ideological cause'.[35] There is a penalty of five years imprisonment for lawyers who communicate unauthorised information obtained during a person's detention, and for people who fail to give information when detained.[36] The 'advocacy of terrorism' is a criminal offence.[37] It is a crime for a person subjected to a preventative detention order, or their lawyer, to disclose to others that they are the subject of such an order or that they have been detained.[38] Problematic offences of 'urging violence' within the community have been introduced.[39]

The classification regime has also been affected. This regime is normally based on the principle that people should be able to make informed decisions for themselves about what to see, read and hear.[40] It has been amended to prohibit material that advocates the carrying out of terrorist acts.[41] This prohibition extends to material that 'directly or indirectly counsels or urges' or 'provides instruction on' undertaking a terrorist act. Moreover, and inconsistently with the rest of the classification regime, the definition of material that advocates carrying out a terrorist act was expanded to include material that directly praises a terrorist act, 'in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act'.[42] With the introduction of this

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[31] Katharine Gelber, 'Academic Freedom and the "Intellectual Diversity" Movement in Australia' (2009) 14 *Australian Journal of Human Rights* 95-114.

[32] Ian Lowe, 'The Research Community', in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (2007) 60–77; Linda Weiss, Elizabeth Thurbon and John Mathews, *National Insecurity: The Howard Government's Betrayal of Australia* (2007) 37–8, 40–44.

[33] Sarah Maddison and Richard Denniss, 'Democratic Constraint and Embrace: Implications for Progressive Non-Government Advocacy Organisations in Australia' (2005) 40 *Australian Journal of Political Science* 373–90.

[34] Helen Ester, 'The Media', in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (2007) 101–23; David Marr, 'In His Master's Voice: The Corruption of Public Debate under Howard' (2007) *Quarterly Essay* 26–84; Margo Kingston, *Not Happy, John!* (2004).

[35] *Criminal Code*, s100.1(1), enacted by the *Security Legislation Amendment (Terrorism) Act 2003* (Cth); Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) 203.

[36] *Australian Security Intelligence Organisation Act 1979* (Cth), ss34ZS, 34L, enacted by the *ASIO Legislation Amendment (Terrorism) Act* 2003 (Cth); Hocking, ibid, 229-230.

[37] *Criminal Code*, s102.1(1A), enacted by the *Anti-Terrorism Act (No. 2) 2005* (Cth).

[38] *Criminal Code*, ss105.34-105.41, enacted by the *Anti-Terrorism Act (No. 2) 2005* (Cth).

[39] Katharine Gelber, 'The False Analogy Between Vilification and Sedition' (2009) 33 *Melbourne University Law Review* 270-291.

[40] *National Classification Code*, s1(a).

[41] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s9A.

[42] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s9A(2)(c).

provision, the government overrode the 'reasonable adult' test on which the rest of the classification system rests.

It is clear, then, that despite their professed support for freedom of speech governments can have a tendency to implement policy that rides roughshod over this fragile freedom. It is perhaps unsurprising that politicians themselves show evidence of a rhetorical commitment to free speech, but it is notable how fleeting this commitment can be. What, then, are the views of the everyday public?

III PUBLIC ATTITUDES

Survey data demonstrate that freedom of speech is a freedom that most Australians take for granted. People tend to believe both that freedom of speech is important, and that it exists in our society. Survey results consistently and over time have shown high levels of public support for free speech in general terms. For example, a national survey of 437 young people in high schools and youth centres in 2005 showed that, unprompted, the right they most frequently thought existed in Australia was freedom of speech.[43] A national survey conducted in 1991 showed 100 per cent of people agreeing or strongly agreeing that freedom of speech should be included in the Australian Constitution.[44]

Yet the same equivocacy is apparent in public attitudes as was discernible in political rhetoric. The commitment to freedom of speech held by the public fractures under pressure. For example, in a 1991 survey when people were asked whether members of extreme political groups should be allowed to hold public rallies, 42 per cent of people responded that they should not. In the same survey, when asked whether the government should be able to ban a political party if it sees it as a danger to Australia, 55 per cent answered yes.[45] This latter answer is particularly interesting, because the question was worded in terms of the government's perception of danger and not any external or independent criteria of whether the party was dangerous. The same survey asked whether free speech should be allowed for all political groups, even if some of the things those groups believed were highly insulting and threatening to particular segments of society. On this question the answers were relatively evenly divided with 47.7 per cent agreeing and 49.2 per cent disagreeing,[46] so nearly half those surveyed did not believe free speech should be allowed in these circumstances. In a 2003 survey, people were asked whether they agreed or disagreed with the statement that 'censorship of films and magazines has no place in a free society'. Overall, only 23 per cent of respondents either agreed or strongly agreed that censorship should not occur,[47] reflecting a high level of support for censorship. In 2007 the same question in a new survey showed that only 18.8

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[43] Human Rights and Equal Opportunity Commission, *Rights of Passage: A Dialogue with Young Australians about Human Rights* (2005) 46.

[44] Brian Galligan, Roger Jones, Joseph Fletcher and Ian McAllister, *Rights in Australia 1991–1992: National Household Sample*, 1992', computer file, Australian Social Science Data Archive, The Australian National University, Canberra, Mail survey, question g2. Those who carried out the original analysis and collection of these data bear no responsibility for the further analysis or interpretation of them here.

[45] Ibid telephone survey, questions b3, b1.

[46] Ibid telephone survey, question h2.

[47] Rachel Gibson, Shaun Wilson, David Denemark, Gabrielle Meagher and Mark Western, *The Australian Survey of Social Attitudes*, computer file, Australian Social Science Data Archives, The Australian National University, Canberra, 2003, question c3.

per cent of people agreed or strongly agreed that censorship of films and magazines has no place in a free society.[48]

Even when asked more general questions, free speech does not fare particularly well when measured against other issues considered important by the general public. In 1994 then Prime Minister Paul Keating announced the formation of a Civics Expert Group that was tasked with suggesting ways of improving public knowledge about the Australian system of government and civics issues. In order to ascertain existing levels of knowledge, the group conducted a five-month national consultation and a national survey. Their survey showed that only just over a quarter (26 per cent) of people perceived that the main rights and responsibilities of citizens related to civil rights.[49] Ten years later the Australian Survey of Social Attitudes showed that when asked what they thought the main aims of Australia should be for the next ten years, and given a choice between maintaining order, giving people more of a say in government decisions, fighting rising prices or protecting freedom of speech, only 13.6 per cent of respondents ranked freedom of speech first.[50] This shows a strong consistency with the 1994 survey. Four years later, in the 2007 Australian Survey of Social Attitudes, the result on this same question was that 22.2 per cent of respondents ranked freedom of speech first.[51]

In addition to survey data, qualitative interviews help to generate a picture of public attitudes towards free speech. In a large research project on freedom of speech in Australia,[52] I conducted original semi-structured interviews with members of the general public in February 2009.[53] For convenience of reference, I have provided pseudonyms for the interviewees.

Interviewees regarded freedom of speech, and freedom of political speech specifically, as important. They identified it as part of the national culture. For example, Susan said that 'if we didn't have [free speech] here then I don't think it would be the country that [it is]', and June said that free speech was 'part of being Australian'. Some regarded it as a foundational and architectonic liberty, one that is key to achieving other

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[48] Timothy Phillips, Deborah Mitchell, Bruce Tranter, Juliet Clark and Ken Reed, *The Australian Survey of Social Attitudes*, 2007, computer file, Australian Social Science Data Archive, The Australian National University, Canberra, 2008, questionnaire B, question c3.

[49] Civics Expert Group, *Whereas the People: Civics and Citizenship Education: Report of the Civics Expert Group* (1994) 156.

[50] Gibson et al, above n 47, question a9: The answers with roughly equal highest results were maintaining order (36.5 per cent) and giving people more say (37.5 per cent).

[51] Phillips et al, above n 48, questionnaire C, question e2.

[52] ARC DP0663077, with research protocols approved by the Human Research Ethics Committee at the University of New South Wales (HREA06047[PB] / HREC 082146).

[53] These interviews were not, and were not intended to be, 'representative' of the views of all Australians. Semi-structured, open-ended interviews provide an opportunity for informal probing and 'guided conversations', which produce a wealth of data for analysis. Representative sampling in the sense of selecting a group of interviewees that is a microcosm of the demographics of the broader population is explicitly not required in this method of data collection. There are recognised limitations to this method of acquiring data including the problem of generalising from the interviewees' responses, and that the researcher needs to be aware of generating as wide a sample as possible within the method's constraints (Fiona Devine, 'Qualitative Methods', in David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (2nd ed, 2002) 198–207). The composition of the interviewees was as wide as possible, with individuals aged between 18 and 60+; male and female; those who self-identified as white collar or blue collar workers; those with and without children in the household; married, de facto and single; Christian, Muslim and those who did not specify a religious belief; and those from a range of self-identified ethnic backgrounds including Anglo-Australian, Indigenous Australian, Mediterranean, Lebanese and North African. All interviewees were Australian citizens or permanent residents, and individuals working in the fields of advertising, the legal profession, politics, the police force, journalism and market research were excluded from the sample (Gelber, above n 20, 5).

goals. June said, she 'could not imagine living in a society' where she did not have freedom of speech. 'I think it would impact on every part of my life. Every part of my everyday activities would be steered by not being free to just go about without first thinking, "how is this going to impact on me?"'.

To others, freedom of speech was of utility in developing one's individual capacities either individually or as part of the community. Asma said that having free speech means 'you've got dignity ... You have to respect yourself and be who you are'. Latifa said that, 'being afraid all the time about saying what you really think doesn't develop your personality, especially if you are a young person'. Jennifer agreed, 'I think it's important for your own mental health ... It's healthy to have another perspective on things'. Mark said that, 'if I was to get up to speak about gay rights, it would be coming from my heart ... freedom of speech to me is that I'd be able to say it and feel comfortable and confident to be able to'.

Still others compared the Australian experience of free speech – which they viewed generally in a positive light – with that of other countries, who dealt more harshly with dissent. Latifa commented that in Egypt, 'you can't say anything. You can't say your opinions about any political party ... We used to say: "This person has been taken behind the sun" just for taking the chance to say their true opinion ... which meant nobody could reach them'.

The interview subjects demonstrated a general commitment to freedom of speech that was remarkably consistent, and evinced an understanding of several dimensions of the debate. They saw free speech as part of the national culture, as well as important to the development of individual capabilities. And they saw Australia as relatively generous in its defence of free speech.

Yet interviewees were also asked more specific questions about particular instances of speech, and whether they supported free speech in those circumstances. In response to these questions, interviewees demonstrated a similar fracturing of support for free speech as was evinced in other measures of public attitudes. For example, in relation to the question of political protest, Jian said that it was permissible to protest, but 'not [to] make any damage or any inconvenience to other [members of the] public'. Robert said that a protest is acceptable, 'as long as ... you've got the right people there – not just anyone who wants to cause trouble'.

In relation to the vexed issue of flag desecration, interviewees tended to recognise the complicated emotions that would be engendered. Andrew said he 'totally disagrees with' a person burning the national flag, 'but I suppose it's their right'. But others drew the line on free speech at this point. Jennifer said, 'they should be stopped from [burning the flag] in a public place'; Susan agreed that the flag shouldn't be burned in public.

On the question of government funding of independent organisations who produce work with which the government might disagree, the interviewees tended strongly not to support free speech. Jennifer said, 'you wouldn't like to think your government [would] ... willy-nilly throw money at an organisation for them to argue what they wish'. Sean said that 'if an organisation previously expressed the views of the government but then decided it didn't, well of course they should remove funding'. Andrew was of the view that, 'if they're being funded by the government, they shouldn't really be turning round to criticise it'.

IV FREE SPEECH IN AUSTRALIAN POLITICAL CULTURE

The results from comparing politicians' rhetoric with their policy making, the available survey data, and qualitative interviews show a consistency in attitudes towards free speech in Australia. At a general level, free speech has high levels of support. People

believe they have free speech in Australia, and that it is important for a range of reasons. Yet, if you scratch the surface this commitment fractures, and fractures relatively easily.

The 1992 judgments did not usher in an era of robust free speech protection. Indeed, they were never seriously understood as having done so. Rather, the free speech protection they acknowledged was measured, contingent and circumscribed. It permitted restrictions on political speech, where those restrictions were appropriately drawn to achieve a legitimate government goal.

Perhaps it is the case that this cautious approach is, in part, reflective of the political culture on free speech in Australia. That political culture expresses both a general support for freedom of speech, and a preparedness to limit it when some speech is aberrant. Thus, it is consonant with the qualified protection that the constitutional doctrine affords to political speech. It is of course unclear at this point whether the lack of an express constitutional free speech protection in Australia has produced this political culture or not, and there is no room to answer that question here.

It is also unsurprising that politicians rely on free speech as a rhetorical tool when it serves their policy or parliamentary agenda, but that they are prepared to relinquish the principle of free speech when it thwarts their policy directions. Even if this is the case, however, what does seem remarkable is that in political culture in Australia, free speech is seen as quite so expendable. The contingent nature of free speech is of note.

In this context another feature is also remarkable – despite widespread agreement that the freedom of political communication that exists in Australia is far from absolute, there is little discernible agreement on where the line might appropriately be drawn between permissible and impermissible speech. Some of the public attitudes discussed above, for example, would not fit within the limitations that the doctrine implies validly exist on free speech. A view that non-government organisations that disagree with government can justifiably be defunded, for example, reaches well beyond its scope. As does the idea that members of extreme political groups ought not to be permitted to organise public rallies, or the suggestion that flag desecration ought to be only permitted in private, or the notion that protest is permissible as long as it does not inconvenience anyone.

It is perhaps unsurprising that members of the general public are not able to articulate precisely the appropriate boundaries for freedom of speech. These are complicated questions after all. It is also possible that if one were to ask similar questions in other countries, countries with a clearer express protection for freedom of speech in either statutory or constitutional form, that one might achieve similar responses.

Nevertheless, the level of contingency granted this freedom as evidenced in Australian political culture is, I would argue, a cause for concern. Freedoms tend to be enjoyed best when the political culture within which they are exercised recognises them as important. In Australia, such recognition is superficial and fleeting. One would hope that 20 years after the High Court spoke the language of freedom of political communication so explicitly for the first time, public recognition would have consolidated the impact and influence of those momentous decisions. For now, the evidence shows that we cannot be confident that this is the case.