



FREE SPEECH

RIGHTS, PRIVILEGE, OR ILLUSION?

DVE WHITE PAPER

 info@dvesolutions.com.au
 www.dvesolutions.com.au

Free Speech: Rights, Privilege or Illusion

Free speech is often described as the lifeblood of democracy and the foundation of higher education. Yet in Australia, it is neither absolute nor guaranteed by constitutional right. Instead, it exists within a fragile balance. One that is protected to the extent necessary for democracy, but restricted when it collides with other rights, responsibilities, and social expectations.

Universities and other registered higher education providers sit at the intersection of law, policy, and culture. They are bound not only by law but also by governance obligations, codes of conduct, and duty of care. The challenge is not whether free speech exists, but whether universities are prepared to defend it consistently even when it is unpopular, while drawing a firm line where speech becomes harm.

As we have seen recently, Australia's universities and higher education providers occupy the frontline of this debate. They are spaces designed for the contest of ideas, but they are also workplaces, communities, and institutions with legal and moral duties of care. The question is not whether free speech exists, but whether it is truly free when subject to cultural pressures, legal limits, and institutional risk management. More importantly, who decides when free speech crosses the line into harm, and how can that decision be made consistently and fairly within the university or institution?

This paper explores these questions through the lens of recent controversies, the French Model Code, the Australian legal landscape and the governance responsibilities of higher education providers. Is free speech a protective shield for robust, diverse expression or has it become a convenient excuse for hate speech, harassment, and misinformation?

The paradox of free speech

Calls to defend free speech are rarely abstract; they tend to surface in moments of contention. In Australia, recent examples include campus demonstrations linked to international conflicts, student petitions to de-platform controversial speakers, and public debate about whether comedians or media figures “cancelled” for offensive remarks are victims of censorship or consequences. Most recently, Australia has seen a rapid tightening of hate-speech and hate-crime laws, largely driven by rising antisemitism, extremist activity and several high-profile violent incidents.

The paradox is clear: while free speech is celebrated as a foundational value, it is never absolute. Boundaries inevitably exist. The difficulty for universities and providers is to determine whether these boundaries are serving as necessary safeguards for community wellbeing, or whether they risk constraining the very principles of open thought and inquiry that higher education seeks to uphold.

The legal landscape

Unlike the United States, Australia does not have a constitutional “right” to free speech. Instead, the High Court has recognised an implied freedom of political communication in cases such as *Lange v Australian Broadcasting Corporation* (1997) and *Brown v Tasmania* (2017). This freedom is not personal; it exists only to preserve the functioning of representative democracy. In other words, the implied freedom of political communication only applies to stop governments from making laws that unfairly limit political debate.

Alongside limited constitutional protection, a range of laws place boundaries on speech and other forms of communication. [The Criminal Code Act 1995 \(Cth\)](#) prohibits incitement to violence and terrorism, while the [Sex Discrimination Act 1984 \(Cth\)](#) and state-based anti-discrimination laws prohibit vilification and harassment. Universities and higher education providers, in their role as both employers and educators, are also subject to workplace health and safety laws, requiring them to protect staff and students from foreseeable risks.

For universities and providers alike, the [Higher Education Standards Framework \(Threshold Standards\) 2021](#) (HESF) layers additional obligations. Standard 6.1.4 requires the protection of freedom of intellectual inquiry, while Section 2.3 safeguards the safety and wellbeing of students. These dual requirements create a built-in tension: protect speech but prevent harm.

The Campus as a testing ground

Why are universities places where the clash of principles become most visible?

In 2024, the University of Sydney was criticised for allowing former Prime Minister Tony Abbott and podcaster Konstantin Kisin to speak despite student protests claiming their views were harmful. Similarly, Monash University faced controversy when it attempted to cancel an event featuring Bettina Arndt, a speaker on gender issues, before later reinstating it under pressure to respect free speech.

More recently, campus protests over the Israel–Palestine conflict have escalated into confrontations, with some students reporting they felt unsafe to attend class. These examples highlight the institutional dilemma: Is cancelling an event an act of censorship, or is it a necessary step to protect students and staff from harm?

In addition to this complex balancing act, universities and providers must also navigate reputational risk. Hosting a provocative speaker may uphold academic freedom but attract media backlash, donor withdrawal, or government scrutiny. Restricting that same speaker may shield the institution from controversy but erode trust in its commitment to open inquiry.

The classroom and campus are not only places where speech must be protected, but they are places where people must learn how to disagree without destroying the conditions that make debate possible. A recent panel on democracy at the Universities Australia Conference reflected on how educators might teach in increasingly polarised classrooms and the role universities play in navigating conflict. Notably, many students are not asking for difficult conversations to be avoided. Rather, they are expressing a desire to be taught how to disagree productively - how to challenge ideas, listen across difference, and participate in debate without undermining the conditions that make open inquiry possible.

Context matters

Whether speech is permissible often depends on where and how it is expressed. For example, in a tutorial or lecture, provocative arguments may be protected as academic freedom. The same words in a workplace corridor could amount to bullying or harassment under workplace law. On social media, context can shift again in that the speech might be lawful, but reputationally devastating, leading to “cancellation” even without legal sanction.

Free speech in Australia isn't a universal “right to say anything you like.” It's a conditional freedom, mediated by law, workplace or institutional codes, and the cultural context in which the speech occurs. Speech does not simply reflect social reality. It can also reinforce hierarchies, shape norms, and influence who feels able to speak in the first place. This matters because speech is not just an individual act. Language helps construct norms, identities and power relations, which means that debates about “mere words” can never be entirely divorced from their social context or effects.

To address this tension, the 2019 review by former High Court Chief Justice Robert French AC produced the [Model Code on Freedom of Speech and Academic Freedom](#). The Code sets out a clear principle. Universities should adopt a presumption in favour of freedom of expression, limiting it only where speech is unlawful or directly incompatible with the institution's teaching, research or governance functions.

For example, under the Code, a protest against a controversial speaker is permissible, but blocking access to the venue is not. Similarly, offensive or unpopular speech is protected, but incitement to violence is not.

Most Australian universities have now adopted or adapted the [French Model Code](#) as sector best practice. Yet the Code is not a solution or remedy. It does not fully address challenges arising from online expression, such as harassment and doxing, nor does it grapple with the structural inequities that can silence minority voices even when formal speech rights are upheld.

The most difficult question is where to draw the line. Speech becomes harmful when it incites violence, harasses individuals, or spreads misinformation with demonstrable consequences. For example, in 2020, misinformation about COVID-19 on social media led some students to reject health measures, undermining public safety. On UK and more recently US campuses, racist or sexist chants at student events have crossed the line from expression into harassment, attracting both disciplinary and media attention.

Much of the debate exists in the grey zone. Should offensive jokes in a lecture be treated as academic freedom, or as creating a hostile learning environment? Should a student protest that intimidates others be seen as a legitimate form of political expression, or as silencing?

The distinction lies in whether the speech contributes to the contest of ideas or whether it undermines dignity, equality, and safety. Offence is not the same as harm, but repeated exposure to vilification or intimidation can create an environment where some students feel they cannot participate fully in discussions, campus debate or teaching and learning activities at all.

Universities exist to examine offence, disagreement and intellectual discomfort. The line is crossed not when ideas are contested, but when expression becomes targeted degradation, intimidation or exclusion from participating in the academic community.

Free speech vs free harm

The authority to decide when speech crosses the line is fragmented. University executives make operational calls about events. Academic Boards and Councils set governance frameworks. Student discipline panels adjudicate on conduct and, ultimately, courts may intervene when decisions are challenged.

Without clear decision frameworks, incidents are handled ad hoc, shaped by reputational pressure rather than principle. Over time this erodes trust in institutional commitments to both free speech and student safety.

To avoid arbitrary or inconsistent outcomes, higher education providers need a clear, principled framework for decision making. But what does this look like?

It could involve four simple questions:

1. **Legal test:** Is the speech unlawful?
2. **Institutional test:** Does it undermine the mission of the institution?
3. **Risk test:** Does it create a foreseeable risk to health, safety or wellbeing?
4. **Equity test:** Does it disproportionately silence or disadvantage vulnerable groups?

Applied consistently, such a framework ensures decisions are defensible and transparent. For example, a controversial guest lecture might pass the legal and institutional tests but fail the risk test if credible threats of violence are made. In this case, cancellation is not censorship but risk management.

Digital, equity and global dimensions

Speech no longer stops at the campus gates or in the lecture hall. A comment made in a seminar can be recorded, clipped, and shared online, sparking harassment or reputational damage far beyond the original context. Institutions must therefore extend their free speech policies into the digital sphere.

Equity is also critical. Research consistently shows that women, LGBTQ+ students, and international students are more likely to self-censor if they feel unsafe. Thus, a purely formal commitment to free speech may mask deeper inequalities. While universities often emphasise free speech as a universal right available to all students, not everyone experiences the campus environment in the same way. Students who face higher levels of discrimination, harassment or marginalisation frequently moderate their speech to avoid backlash, judgement or harm. As a result, "equal" free speech on paper can translate into unequal participation in practice.

If certain cohorts feel less safe or supported, they are less likely to speak up in classrooms, challenge ideas or contribute to academic debate creating a hidden disparity that formal policy alone cannot resolve. Effective free speech frameworks therefore need to account for differential levels of psychological safety and lived experience.

For instance, studies in Australian and international higher education settings (Vicars, M. & Van Toledo, S. 2021, *Walking the talk: LGBTQ allies in Australian secondary schools*, *Education Sciences*, vol. 11; Denson, N. 2012, *Sexual subjects: GLBTIQ student subjectivities in Australian education policy*, Doctoral thesis, La Trobe University; Ullman, J 2015, *Exploring the schooling experiences of Australia's sexuality and gender diverse secondary school students*, Centre for Educational Research, Western Sydney University) show that LGBTQI+ students often avoid expressing views about gender or sexuality in class discussions due to fears of hostility or stereotyping. Similarly, international students may refrain from contributing to debates on political or cultural issues because prior ridicule make them feel exposed or unwelcome.

Cultural norms also matter. In some educational contexts, the teacher-student relationship is more hierarchical, and students may see open disagreement with teaching staff as disrespectful rather than intellectually expected. In those cases, silence may reflect not only fear of backlash but also deeply embedded norms about authority, participation and what respectful learning looks like.

A university may proudly highlight its free speech charter, but if these students remain silent due to safety concerns, the learning environment is not genuinely open or equitable, illustrating how formal commitments can obscure deeper cultural and structural barriers.

Finally, the global context matters. US students often expect First Amendment absolutism, while UK students now operate under the *Higher Education (Freedom of Speech) Act 2023*, which imposes duties on institutions to secure free speech. Australian universities must navigate this landscape while explaining to international cohorts why the Australian model is different: free but bounded. Ensuring this is highlighted during orientation and onboarding is important in ensuring students, staff and visitors alike all understand what free speech and academic freedom look like in the Australian context.

Free speech, but not free of responsibility

Free speech in Australia is neither absolute nor illusory. It is conditional, contextual and constantly contested. The task is not to prevent all offence (an impossible and undesirable goal) but to protect expression until it crosses the threshold into harm.

The critical question is whether universities and providers are prepared to defend free speech when it is uncomfortable and unpopular, while restricting it only when it truly threatens safety, dignity or the integrity of academic inquiry. In doing so, they must accept that free speech is never free of responsibility or, to put it more simply, free speech in Australia doesn't give you a "get out of jail free card" if an institution calls out your behaviour. It only applies when a government law is crushing political debate in an unreasonable way.

So, if an institution disciplines a student for hate speech, the student can't claim a constitutional right to free speech. They could only challenge it if the punishment was applied under a government law that itself unfairly restricted political communication.

Drawing the line

The challenge, as set out at the beginning of our journey, is not whether free speech exists, but whether it is defended consistently, even when it is uncomfortable. This prompts a further question: Are institutions prepared to draw a clear, principled line when speech becomes harm?

This test is no longer abstract. It lies in the policies institutions write, the protests they manage, the speakers they host, and the decisions their governance bodies take under pressure. The French Model Code provides a framework, but it cannot answer the deeper cultural question: To what extent do institutions live the spirit as well as the letter of the law?

As you consider the reflections and commentary set out in this paper, ask yourself:

- Does our institution's practice align with our policies governing free speech and academic freedom?
- Do we have a clear and defensible process for determining when expression crosses into harm?
- Are our leaders, staff and students equipped to make these decisions fairly and transparently?
- And perhaps, most importantly; when the next test comes (e.g. a protest, a controversial speaker, an online campaign) will we be prepared to uphold free speech when it is uncomfortable, and restrict it only when the threshold of real harm is crossed?

These questions cannot be answered by law alone. They demand institutional courage, cultural maturity, and a willingness to face the paradox head on. Free speech may exist, but it is only as strong as the institutions willing to defend it with clarity and consistency.

Common failure points and making decisions that withstand scrutiny

Across the sector, several recurring failure points emerge when institutions are tested on free speech and academic freedom.

The first is policy fragmentation. Free speech clauses sit in one document, codes of conduct in another, student discipline procedures elsewhere, and risk management frameworks somewhere else again. When an incident occurs, decision-makers must stitch these together in real time, increasing the likelihood of inconsistency or over-correction.

The second is role confusion. Uncertainty about whether a decision belongs with executive management, Academic Board, or Council leads to hesitation, rushed escalation, or decisions being made by the wrong body altogether.

The third is reactive risk management. Under reputational pressure, institutions may default to risk avoidance rather than principled assessment, undermining previously stated commitments to free speech and academic freedom.

Finally, there is often a gap between policy and capability. Staff and students may be told they have freedom of speech, but not where its limits sit, how complaints are assessed, or how harm is distinguished from offence. This opacity fuels mistrust and perceptions of arbitrariness.

Supporting providers through these challenges requires more than policy drafting. It requires helping institutions translate abstract standards into operational reality. Translation work includes governance reviews that test decision pathways, policy frameworks that align free speech with misconduct and wellbeing obligations, and assurance mechanisms that give Academic Boards confidence that decisions are both lawful and defensible.

When institutions invest in this work proactively, they are far better positioned to act decisively when the next controversy arises. Decisions taken within a clear framework are not immune from criticism, but they are far more likely to withstand regulatory, legal and reputational scrutiny.

Defensible freedom in a complex environment

Free speech in higher education will remain contested. Cultural expectations shift, political pressures intensify, and digital amplification ensures that even local incidents can become global controversies overnight.

What happens within institutions inevitably shapes the communities around them. The institution's task is therefore not to eliminate this tension, but to govern it well. Institutions must move beyond symbolic commitments and ask harder questions about systems, roles and levels of accountability. Academic Boards and governing bodies must engage with freedom of speech as a governance issue, not simply a cultural one. Leaders, in turn, must be prepared to explain - clearly and consistently - why difficult decisions were made and how competing rights and responsibilities were balanced.

The question then becomes how institutions navigate this complex landscape in practice. Amid competing expectations and pressures, institutions can struggle to maintain a clear view of the broader governance principles at stake. Some may find that they do not have the necessary expertise in house to help with the navigation.

Where that expertise does not exist internally, external perspectives can be valuable. Independent advisors can assist institutions to translate principle into practice and develop governance frameworks that support defensible, consistent and transparent decision making. Even institutions with strong internal capability can benefit from periodic external review to test how robust, transparent and defensible their frameworks truly are.

Free speech is not protected by good intentions alone. It is protected through robust governance, clear frameworks, and the institutional courage to apply them consistently, especially when doing so is uncomfortable for leaders and governing bodies. Those that get this right do not avoid controversy. They navigate it with confidence, transparency and integrity.

In a sector increasingly shaped by regulatory scrutiny and public accountability, that capability is no longer optional, it is essential. The real test for institutions is not whether controversy can be avoided, but whether they have the courage and capability to govern disagreement in ways that preserve both intellectual freedom and the conditions that make it possible.

What happens within our higher education institutions inevitably shapes the communities around them. Universities do more than generate knowledge. They help model how societies debate complex issues. At times of heightened division, the public often turns to higher education institutions to demonstrate what principled, informed and respectful disagreement can look like.

This paper is not intended to assign blame or offer simple answers. Rather, it is an invitation to reflect on how institutions are navigating these tensions in practice. For those seeking a review of existing frameworks, development of training and orientation materials, or simply a thoughtful conversation about governance in this space, the team at DVE Business Solutions is always open to discussion.