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Forgotten Freedoms Panel Session

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ALRC Freedoms Inquiry, Forgotten Freedoms Panel Session, 19 June 2015, Professor Rosalind Croucher AM, President, Australian Law Reform Commission[1]

Why ‘forgotten’?

This is a nicely alliterative title for our panel, but one is tempted to say that the very fact of having it suggests that nothing is forgotten

What does the idea of ‘forgotten freedoms’ mean in this year of Magna Carta reflections—the 800th anniversary of the first sealing of the iconic document by King John in 1215— a document which has become as much of a metaphor for rights discussion as has the Mabo case in a property rights context.

The ALRC Freedoms inquiry

In making a short contribution to the panel, I will refer to the ALRC’s current inquiry. The Attorney-General, Senator the Hon George Brandis QC, presented us with a wonderful project. It has two main tasks. The first is to identify Commonwealth laws that encroach upon traditional rights, freedoms and privileges—such as freedom of speech, freedom of religion, and the right to a fair trial, among the list of 19 areas we have been given.[2] The second task we have is to critically *examine* those laws to determine whether the encroachment is appropriately justified. We have been asked to focus, but not limit our work, to three areas: commercial and corporate regulation; environmental regulation; and workplace relations. We have called it ‘the Freedoms Inquiry’.

An inquiry like this draws upon both my own work in classical liberal thought and also a number of ALRC recent inquiries. It raises difficult questions of how fundamental rights and freedoms should be balanced in liberal democracies. I am a legal historian, with a particular interest in property law. Some years ago I wrote a doctorate on testamentary freedom, which naturally required a philosophical exploration of ideas of freedom in liberal thought. In the late 17th century, the great English philosopher John Locke thought about freedom and what it meant in the context of ideas of property. He said that:

Freedom is not, as we are told, a liberty for every man to do what he lists ... but a Liberty to dispose and order, as he lists, his person, Actions, Possessions and his whole Property, within the Allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.[3]

In my doctoral work I grappled with the idea of testamentary freedom as essentially reflecting a balance—between ideas of family and ideas of property—as expressed in laws.[4] It was also about prepositions. ‘Freedom’ is neither an abstract nor an absolute concept. It is about freedom ‘from’, and freedom ‘for’.

The concept of ‘testamentary freedom’ or ‘liberty of testation’ was propelled by the same philosophical discourse that led to the ascendancy of concepts of freedom of contract and laissez-faire economics and was part of the ‘liberty to dispose ... what he lists’ in Locke’s thinking. Each expressed the idea of freedom from state control in favour of the power and

choice of the individual. Locke was the English champion of the shift towards individual rights of property away from control of the King and feudal property structures. And it was Locke's advocacy for the protection of citizens in their 'lives, liberties and estates' that has formed the basis of modern discussions of freedom of property and individual rights. 'The end of Law', he stated, was 'not to abolish or restrain, but to preserve and enlarge Freedom'.^[5] And it was his ideas that justified parliamentary supremacy over absolute monarchy in the 'Glorious Revolution' of 1688.

I could talk about this at considerable length, but this is not my task today. It does explain why I found the Attorney's inquiry both of great interest and a great challenge.

My principal task in these few minutes is to speak about the work of the ALRC, particularly the current Freedoms inquiry, because what the ALRC has to do is to take the challenging questions, troubling and all that the background to asking us to do the task may be, and to render these into sensible, principled recommendations for law reform. That is the art of the ALRC's work; and our processes, honed over 40 years, enable us to do so respectfully, building stakeholder rapport, and deliver a report for government within the designated timeframe.

The Freedoms inquiry is an extremely broad reference and also very philosophical on many levels. The anchor word in the Terms of Reference, as we have read them, is 'encroachment' and the central task is to determine when encroachments may be 'appropriately justified'.

We released the first consultation document in the Inquiry, the Issues Paper, in December last: *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (<https://www.alrc.gov.au/publications/traditional-rights-freedoms-ip46>). We received over 70 submissions. This was both a usual and an unusual document for the ALRC. Usual, in that it is always the first step in our consultative process and that we always start with questions, never answers. Unusual, in that it was so open—and necessarily so. We will release our next document at the end of July—and report by December.

As freedom of expression is the focus of this panel discussion, I thought I would concentrate on this. Freedom of speech is one of the freedoms the ALRC is asked to consider in the Freedoms Inquiry and it is good one to use to illustrate our approach. It is by no means the first time the ALRC has had to consider freedom of speech—although the current inquiry uses a different lens. Reviewing some of the ALRC's recent law reform projects, I was surprised how frequently the ALRC has had to consider the importance of the right. So, for example, we have looked at secrecy laws, censorship, classification and privacy—just to name a few. In each case we had to go through a process of balancing: to 'balance' freedom of expression with other rights and interests. The exercise of finding appropriate justifications in the Freedoms Inquiry is analogous to the balancing exercises in these other inquiries.

Rights and freedoms will, of course, sometimes conflict with each other. Few, if any, rights are absolute. It's part of the approach signalled by John Locke, in referring to 'the allowance of laws'. 'Freedom' sits within 'the allowance of laws'—or, as the Privy Council said in 1936, in relation to freedom of speech, 'free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom. So now to some laws. A wide range of Commonwealth laws, for example, may be characterised as interfering with freedom of speech and expression. These laws prohibit, or render unlawful, speech or expression in many different contexts.

Other ALRC 'speech' related inquiries

Privacy

Prior to the Freedoms Inquiry, freedom of expression arose most recently in the ALRC's inquiry into how Australia's laws can be reformed to better prevent and redress *serious invasions of privacy* (<https://www.alrc.gov.au/inquiries/invasions-privacy>). One of the central tasks was to put the 'flesh on the bones' of the statutory cause of action for such invasions that the ALRC had proposed in 2008. The final report was completed in June last year. It will hardly surprise anyone that we heard many concerns that the introduction of a new cause of action for

serious invasion of privacy would damage free speech. Media freedom in particular, we were told, would be undermined, if the media feared being sued for invading people's privacy. In designing the cause of action, as we were required to do under our Terms of Reference, the ALRC was constantly mindful of the need to ensure that free speech would not be unduly undermined.

One of the areas that has already seen an impact from the ALRC's work concerns compensation for serious invasions. The ALRC had recommended statutory change, but anticipated the common law (including equitable jurisprudence) was already on a trajectory towards resolving this matter. I note in particular a decision made by the Supreme Court of Western Australia in which the court pushed the present boundaries of breach of confidence to permit compensation in a 'revenge porn' case (*Wilson v Ferguson* [2015] WASC 15).

Copyright

Freedom of speech also arose in the ALRC's copyright inquiry (<https://www.alrc.gov.au/inquiries/copyright-and-digital-economy>), completed in November 2013.[6] In the final report, we recommended the enactment of a fair use exception to copyright laws. By allowing the use of other people's copyright material without permission or payment in some limited circumstances—when fair—this US style exception to copyright infringement can allow people to use books, films, music and other material in the creation of new books, films, music and other works. Whether one supports the introduction of this contentious exception or not, it seems clear that overly confined or restrictive copyright laws can risk stifling free expression.

One might ask how would Mozart have fared today in writing his 12 variations in C Major K.265—variations on 'Twinkle Twinkle Little Star'. It's not quite 'Kookaburra sits in the old gum tree', but analogous? Or Shakespeare in writing *As You Like It*—which owes much to a novel of Thomas Lodge, including all the main characters?

Censorship

Censorship laws perhaps more directly affect freedom of speech. In 2012, the ALRC completed a review of Australia's censorship laws with the publication of the report *Classification—Content Regulation and Convergent Media* (<https://www.alrc.gov.au/publications/classification-content-regulation-and-convergent-media-alrc-report-118>).[7] The report recognised that classification standards should only be changed after carefully considering community standards, and our inquiry was largely focused on the framework of classification laws, but we nevertheless received enough submissions and community input to recommend that the Government at least consider the scope of the (oddly-named) 'Refused Classification' classification. This is the material that is essentially banned throughout Australia, and some people told us that the scope of the category was probably too broad.

Secrecy

In December 2009, the ALRC published the report *Secrecy Laws and Open Government in Australia* (<https://www.alrc.gov.au/publications/report-112>).[8] In this inquiry we considered, among other things, when public servants can be expected to maintain confidences. By restricting Commonwealth officers and others from communicating government information, secrecy laws can limit freedom of expression.

One interesting case that we considered concerned the now repealed regulation 7(13) of the *Public Service Regulations 1999* (Cth), which provided that an APS employee must not, without the appropriate permission, 'give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge'. Justice Finn of the Federal Court held that the regulation was inconsistent with the freedom of political communication implied in the Australian Constitution, and declared the regulation invalid. It burdened freedom of political communication and was not reasonably appropriate and adapted to serve a legitimate end compatible with maintaining the Australian system of representative and responsible government.

Justice Paul Finn of the Federal Court held that, while there may be public interests or 'legitimate ends' that justify the

burden that secrecy provisions impose on freedom of political communication—including national security, cabinet confidentiality, protection of privacy and the maintenance of an impartial and effective public service—a ‘catch-all’ provision that did not differentiate between the types of information protected or the consequences of disclosure went too far. ‘Official secrecy has a necessary and proper province in our system of government’, Justice Finn said, but a ‘surfeit of secrecy does not’.[9]

The regulation was later repealed and replaced with another regulation that was limited to situations in which it is reasonably foreseeable that the disclosure of official information could be prejudicial to the effective working of government.

Other inquiries

There are quite a number of other examples of ALRC inquiries in which we have considered freedom of speech, including a 2006 report on sedition laws[10] and a 2004 report on Classified and Security Sensitive Information.[11] If a broader view is taken of freedom of expression—and we were to consider laws more generally that affect people’s capacity to speak freely, to live the sorts of lives that give some of us the freedom to speak—then other law reform projects might also be mentioned. For example, we have in recent years completed two inquiries about family violence; [12] and a report on disability and capacity.[13]

Conclusion

Rights are rarely absolute and will sometimes conflict with each other. Few think that free speech is an absolute right. The *International Covenant on Civil and Political Rights* recognises that free speech carries with it special duties and responsibilities, and may be subject to restrictions—but only when necessary and as provided by law.

But the fact that few rights are absolute is not a good argument for too readily diluting one right in the name of another. Lord Hoffmann once said that one will find in the law reports ‘many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word “nevertheless”.’ He went on to say that

Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible.[14]

It seems inevitable that freedom of speech must at least sometimes give way to other interests, but there is little point in calling it a right, if exceptions and excuses are found too easily. It is indeed a difficult challenge.

Stakeholders in the Freedoms inquiry have raised a range of laws that affect free speech—including, not surprisingly, a range of anti-terrorism provisions. They encroach on freedom of speech in certain ways. They were subjected to rigorous scrutiny by parliamentary committee. They were passed and the intention of the legislature is clear.

So, what should our approach be? Remember we have been given 19 dotpoints of possible freedoms, rights and privileges. We have identified an approach. We have identified concerns and we will suggest potential further review work. And we will call for submissions on which laws that limit rights deserve further review. Now it is your turn.

[1] Professor of Law, Macquarie University, on leave for the duration of appointment at the ALRC.

[2] A list of 19 specific examples is included in the Terms of Reference, which are set out on the ALRC’s website: www.alrc.gov.au(<http://www.alrc.gov.au>).

[3] *John Locke—Two Treatises of Government*, P Laslett (ed) (2nd ed, Cambridge: Cambridge University Press 1967), ch vi, [57].

- [4] R Atherton, “Family” and “Property”: A History of Testamentary Freedom in New South Wales with particular reference to Widows and Children’, *PhD Thesis*, University of New South Wales, 1994.
- [5] Locke, above, ch VI, ‘Of Paternal Power’, [57].
- [6] The report, *Copyright and the Digital Economy* (ALRC Report 122) was completed in November 2013 and tabled on 13 February 2014.
- [7] ALRC Report 118, completed in February 2012 and tabled on 1 March 2012.
- [8] ALRC Report 112, completed in December 2009 and tabled on 11 March 2010.
- [9] *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433, [98].
- [10] *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104, tabled on 13 December 2006.
- [11] *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC report 98, tabled on 23 June 2004.
- [12] *Family Violence—A National Legal Response*, ALRC Report 114, tabled on 11 November 2010; and *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117, tabled on 7 February 2012.
- [13] *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, tabled on 24 November 2014.
- [14] *R v Central Independent Television plc* [1994] Fam 192, 202–3.