Justice and Freedoms in Times of Terror Panel Session

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ALRC Freedoms Inquiry, Justice and Freedoms in Times of Terror Panel Session, 19 June 2015, Professor Rosalind Croucher AM, President, Australian law Reform Commission[1]

Introduction

Thank you for the opportunity to join such an eminent panel today (with David Irvine AO, Professor George Williams AO and Graham Turnbull SC). Coming last made me wonder about contrasts—perhaps 'specific' to 'general', may be one way to describe our different presentations. But a better way is to use the idea of tenses, where the previous speakers have referred particularly to problems of the past and present and I, in talking of the work of the Australian Law Reform Commission, will take those two tenses and add the 'future', because it is to the future that law reform must speak.

In 'Times of Terror'

When George Bush, then President of the United States declared a war on 'terror', a cold shiver ran up my spine. I remembered my studies of history and I was deeply troubled. Isn't fighting 'terror' like fighting 'heresy', 'witchcraft' or 'evil'? The problem is the phantom nature of the noun. This is difficult enough in lay thinking, easily deployable in propaganda, and extremely challenging to pin down in law.

During the Second World War our government, and others, faced problems of confronting the 'terror' of their day. The then Prime Minister, the Right Hon Robert Gordon Menzies, spoke of freedom of speech (and other things) at stake during wartime.[2] Menzies said that 'the worst crime' of fascism and Nazism (which he described as 'the twin brother' of fascism), is 'their suppression of free thought and free speech'. Menzies's own initiatives eight years later to ban the Communist Party (in 1950) were tested well through the checks and balances processes we have in our democracy. He got his legislation through parliament to dissolve the party, but the High Court overturned it. Menzies then took the matter to the people via a referendum and lost. It was a good test of principle and democratic processes. And there are eerie resonances with today.

My principal task in these few minutes is to speak about the work of the ALRC, particularly the current 'Freedoms' inquiry as we have called it, 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—in this case, by December this year.

The Freedoms Inquiry

The Attorney-General, Senator the Hon George Brandis QC, presented us with a challenging 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, including issues concerning reversal of the burden of proof.[3] 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. This is an extremely broad reference and also very philosophical on many levels. The anchor word in the Terms of Reference 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. 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.

Encroaching on rights

Our starting point in the Australian context is parliamentary supremacy—and the common law. Given the constitutional history context in common law countries, this is undeniably the necessary place to start. Many of the rights, freedoms and privileges listed in our Terms of Reference may be seen as creatures of the common law—and long before the various international conventions, like the ICCPR, that now also protect them. The Hon Robert French, Chief Justice of the High Court of Australia, has said:

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[4]

Intrusions upon rights should be minimised, but French CJ also affirmed that this interpretation of Acts by Courts is something that occurs 'against the backdrop of the supremacy of Parliament':

> which can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights and freedoms except to the extent that they may be protected by the Constitution.[5]

Whether the words of parliament are clear enough, is expressed in terms of the principle of legality—a rule of statutory interpretation. Perhaps the primary rationale for this principle of was provided by Lord Hoffmann:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[6]

If Parliament 'squarely confronts' the issue of encroachment and the intention is clear and unambiguous, then the statute will be interpreted to have its desired effect. Subject to the *Constitution*, Parliament can modify or extinguish common law rights. This is the essence of parliamentary supremacy and courts must give full weight to it. In other words, Parliament must confront encroachment squarely, own it politically, and defend it in legislative terms unambiguously. And, I should add, suffer the political consequences: political accountability means you can get voted out.

Justifying encroachments

Given that the focus of our panel session is on 'the appropriate balance between freedom and security', I thought I could look at how the ALRC is grappling with an analogous question: looking at whether laws that encroach on freedoms are *appropriately justified*.

We have been careful to unpick the word 'justified'. This word, and our task, might be considered on two broad levels. The first involves asking, 'justified by what measure', testing the law according to a particular measure or standard, such as a proportionality standard. Laws that pass this standard might be said to have been *substantively* justified. This is the most commonly used meaning of the word justified, in this context, and it is the main focus of the Freedoms Inquiry. The second level concerns asking, 'by what process', focusing on the processes that lead to the making of the law—the *procedural* justification. We use both senses of the word.

In terms of *substantive justification*, we explore the place and role of 'proportionality'. Although it is commonly used by courts to test the validity of laws that limit constitutional rights, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit important, even if not constitutional, rights and principles—like the common law rights and freedoms we are looking at in our inquiry. In Australia, a kind of proportionality test is applied when courts consider the validity of a law that limits the constitutional right to political communication. In considering such laws, courts look at whether

the law is 'reasonably appropriate and adapted to serve a legitimate end'.[7]

Proportionality also comes into play in *procedural justifications*. Although the standard is not prescribed in its enabling Act, proportionality is used by the Parliamentary Joint Committee on Human Rights as part of the parliamentary scrutiny processes for proposed legislation.

Procedural justification is especially important as an aspect of rights review, where it is the processes of parliament that provide the testing ground for rights encroachment. Hence a law that limits important rights may be said to be 'justified' if it was made after a procedure that thoroughly tested whether the limit was *substantively* justified. A quite fundamental procedural justification for laws might be, for example, that the law was made by a democratically elected Parliament in a country with a free press. Another important process is scrutiny by Parliamentary committees.

Rigorous processes for scrutinising laws may be more important in jurisdictions in which Parliament, rather than the courts, is the primary guardian of rights and freedoms and has the ultimate responsibility to balance rights with the public interest—that is, in jurisdictions without a constitutional bill of rights. So called 'political rights review' or 'legislative rights review', Professor Janet Hiebert has written,

> entails new responsibilities and new incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-inspired approach that relies almost exclusively on judicial review for judgments about rights.[8]

The procedural justificatory processes also extend *before and after Parliament*. For example, in developing policies, government departments are encouraged to think about the effect a proposed law will have on fundamental rights. Bills and disallowable legislative instruments presented to Parliament must have a 'statement of compatibility' that assesses the legislation's compatibility with the rights and freedoms in seven international human rights instruments (which include most of the traditional rights and freedoms in the ALRC's Terms of Reference). The Attorney-General's Department plays an important role in providing advice about human rights law and often assists agencies prepare statements of compatibility and explanatory memoranda.[9] The Office of Parliamentary Counsel will also consider common law rights and freedoms when drafting legislation, and may question departments about proposed laws that appear to unduly interfere with rights.

There are multiple parliamentary committees that review legislation, and three committees have a particular role in considering whether proposed laws are compatible with basic rights: the Senate Standing Committee for the Scrutiny of Bills, the Senate Standing Committee on Regulations and Ordinances, and the Parliamentary Joint Committee on Human Rights—established in 2011. David Irvine also reminded us this morning of the important work of the Parliamentary Joint Committee on Intelligence and Security and the Parliamentary Joint Committee on Law Enforcement.

And in terms of the 'post' review processes, law reform bodies such as the ALRC also routinely consider rights and freedoms in their work. (And commentators, like Professor George Williams, also play significant roles in highlighting concerns about laws). Under the *Australian Law Reform Commission Act* (Cth), the ALRC has a duty to ensure that the laws, proposals and recommendations it reviews, considers or makes:

a. do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
b. are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.[10]

Because of the close relationship between many traditional common law rights and many human rights protected by international covenants and instruments, an important role is also played by the Australian Human Rights Commission. The Commission, established in 1986, and its predecessor, the Human Rights and Equal Opportunity Commission, established in 1981, have as their purpose, working

> for the progressive implementation of designated international conventions and declarations through representations to the Federal Parliament and the executive, through other public awareness activities, and where appropriate through intervention in judicial proceedings.[11]

No less importantly, laws are commonly scrutinised by the public and in the press. And indeed as we are today. So, there is a lot

of 'justification' going on: questions being asked, challenges put. But this doesn't always mean that Parliament necessarily gets it 'right'—the pragmatic is not necessarily 'pure'—this is where political accountability comes in and the work of bodies like the ALRC.

Our approach

The concerns raised by George Williams and Graham Turnbull about aspect of the anti-terror laws have also been raised by stakeholders in the ALRC inquiry. They encroach on freedom of speech in certain ways. But the laws were subjected to rigorous scrutiny by parliamentary committee. They were passed and the intention of the legislature is clear. Using my rule of thumb, the rights encroachment was confronted squarely, owned politically and defended unambiguously.

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. We must necessarily 'dance lightly' over the field. Each area may be amenable to an ALRC, or other, inquiry. Indeed many sub-areas already have been—like secrecy, classified information and privacy. The ALRC highlights laws that have been criticised in submissions or other literature and that may appear to be unjustified—but also draws attention to the justificatory processes to which the law may already have been subject. A particularly disproportionate limit on an important right will often suggest the need for review. So might the fact that a law limits multiple rights or that the parliamentary process was necessarily hasty so that review processes were side-stepped or too slow to be considered properly.

There may also be other laws that deserve further review, that won't be highlighted by us. Without testing the justification for these other laws, even in only a preliminary way, the ALRC cannot confidently say that they also do not need to be reviewed. In other words, the fact that a law is not highlighted as perhaps meriting further review should not be taken to imply that the ALRC considers that it does not need further review. And we will call for submissions on which laws that limit rights deserve further review.

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.

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. There will be a major opportunity for further involvement on the release of our next consultation document at the end of July. I encourage you all to get involved.

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

[2] Menzies presented a series of radio talks in 1942 that were later published as a series of essays, The Forgotten People: http://menziesvirtualmuseum.org.au/transcripts/the-forgotten-people (http://menziesvirtualmuseum.org.au/transcripts/the-forgotten-people). The second chapter concerns freedom of speech and expression.

[3] 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).

[4] Robert French, 'The Common Law and the Protection of Human Rights' 2.

[5] Robert French, 'The Common Law and the Protection of Human Rights' 2.

[6] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

[7] This is part of the second limb of the Lange test. 'The test adopted by this Court in *Lange v Australian Broadcasting Corporation*, as modified in *Coleman v Power*, to determine whether a law offends against the implied freedom of communication involves the application of two questions: 1. Does the law effectively burden freedom of communication about

government or political matters in its terms, operation or effect? 2. 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 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?': *Hogan v Hinch (2011)* 243 CLR 506, [47] (French CJ) (emphasis added).

[8] Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 9.

[9] Valuable resources about human rights may be found on the Attorney-General's Department website: www.ag.gov.au (http://www.ag.gov.au/) See also: Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011). Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages... (http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Toolforassessinghumanrightscompatibility.aspx>) . In addition to these guides, agencies are encouraged to consult early and often with relevant areas of the Attorney-General's Department where rights encroachment issues arise. See, eg, *Drafting Direction No. 3.5 - Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* [7], [54].

[10] s 24(1).

[11] Ivan Shearer, 'The Relationship Between International Law and Domestic Law', in International Law and Australian Federalism, Brian Opeksin and Donal Rothwell eds, 1997, 55.