**Submission to ALRC ‘Freedoms Inquiry’**

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1. I appreciate the opportunity to make this submission, and to speak with the Commission on its Queensland visit. My comments are in the broad, and are not meant to reflect on the Commission as much as the assumptions underlying its brief in this inquiry. I wish the Commission and its staff well in this venture.

**Problems with the Framing of the Inquiry**

1. The terms of reference in this inquiry are both remarkably broad and yet, in one important respect narrow.
2. The breadth arises in the term ‘traditional rights, freedoms and privileges’. This is quite an unfocused phrase. The term ‘traditional’ is a curious one, to say the least. In the next paragraph I will give a simple illustration of the problem from my central area of expertise (the law of electoral politics).
3. The assumption that there was a ‘traditional’ ‘freedom of speech’ prioritised in the system of regulating elections, which we developed in the late 19th century from a Westminster inheritance, is entirely ahistorical. Election campaigning was primarily regulated to ensure integrity, political equality and enhance deliberation, not some licence of expression. For instance: candidate expenditure was restricted in both amount and style and false claims about the character of candidates were criminalised.

1. Worse, the term belies some of the political motivations for the inquiry. These involve a perception, which has arisen in the jaded culture war between ‘human rights’ and ‘neo-liberal rights’, that certain individual interests have not been sufficiently accounted for in the development of an anti-discrimination or group-centred ‘rights’ agenda.
2. There is a degree of hypocrisy on all sides of this culture war, most obvious in partisan drivers of the debate around ‘freedom of speech’. I have written of this [elsewhere](http://insidestory.org.au/the-freedom-to-be-a-hypocrite).[[1]](#footnote-1) We see evidence of this hypocrisy in recent days in the Prime Minister warning in parliament that it is a criminal offence to ‘insult’ a Royal Commissioner.[[2]](#footnote-2) (We might note that the High Court has twice ruled that an offence of mere ‘insult’ of a public figure is unconstitutional;[[3]](#footnote-3) but the point is the selective political appeal to ‘freedom of speech’). Political progressives in turn have similar motes in their eyes when they call for the retention of laws of ‘offensiveness’ in relation to identity politics (eg in relation to racial or ethnic groups) but otherwise argue for a libertarian approach. When the person on the receiving end of the law is politically untouchable however, almost no one makes a fuss (as happened after the upholding of the crime of writing offensive letters, in *Monis’s case*).[[4]](#footnote-4)
3. The terms of reference for this inquiry tend to confirm the suspicion of sceptical political scientists that rights-discourse is primarily a political rather than legal method: an assertion of power by those whose feel neglected, or to advance their interests on the political agenda.
4. Conversely, in relation to ‘freedom of speech’, the terms of reference are ironically limited. ‘Ironically’ because part of the political driver for the terms of reference is recent debates about speech interests, especially racial vilification laws. ‘Limited’ because the assumption is that there might be a set of formal laws, which directly censor expression, crying out for review. This shows a classic liberal bias in the framing of the question: the liberty of speech is configured as a negative limit on governmental power.
5. Yet any perusal of the actual dynamics of speech in the 21st century would show that a greater and more complex issue than, eg, formal statutory provisions about contempt or racial vilification, is the question of private power to control expression. This power involves the law indirectly, through the use of contractuallegal rights, or action taken under the shadow of laws about fair dismissals or ‘offensiveness’. To give examples: universities disciplining staff for allegedly insensitive private emails; social media organisations cancelling access or censoring content; or a coal miner being lawfully sacked for using the very traditional term ‘scab’ during protected industrial/peaceful picketing action.[[5]](#footnote-5) This would require an investigation, amongst other areas, of contract law, employment law and legal and social notions of offensive.
6. Yet the inquiry focuses only on ‘Commonwealth laws’, understood as statutory law, when a range of private and common law issues are equally, if not more important in relation to ‘freedom of speech’. Defamation law is the most obvious example. Lest it be objected that the Commonwealth parliament has limited power over some of these areas: (i) the Commonwealth has a role in co-ordinating reform (as in the defamation law overhaul undertaken in the 2000s); (ii) it has broad powers to regulate or adjust the behaviour of the powerful (especially corporations, but also universities and bodies it funds); and (iii) if you assume it makes sense to conduct a top-down, abstracted survey of ‘traditional rights, freedoms and privileges’ then you surely would wish to look first at the wider picture of what impacts or detracts from those values.

**Problems with the Scope – and Jurisprudential Assumptions – of the Inquiry**

1. The terms of reference also suffer from another kind of selection bias: jurisprudential rather than political. The embedded assumption is that: (a) there are rights that exist in the abstract, which (b) possess a higher status, if not trumping value, over (c) unexpressed competing values (such as security, equality, etc). This is not an unusual bias, it is one that has infected the High Court’s ‘implied rights’ jurisprudence since 1992.
2. My concern is not Bentham’s belief that all rights’ talk is ‘nonsense on stilts’. Rather, to talk of ‘rights, freedoms and privileges’ in the abstract is nonsensical. First, because rights’ claims are always made in a context which is social, economic, technological.
3. Second, because the proper approach for law reform or regulatory debates is ground up. It is vital to focus on specific human activities and regulations and then examine, eg, liberty interests as part of the matrix various values informing those values. With all the goodwill in the world, it is hard to see how the ALRC can inform itself expertly of the myriad of social contexts needed to cover the vast terrain of issues and laws flagged in its interim report. It would be much better to focus on a couple of key issues of the day, and examine them in depth.
4. Instead, the nature of the inquiry has led the ALRC to have to produce a compendious ‘Interim Report’ that is broad but shallow: and which is still calling (in September) for ‘submissions that identify [additional] Commonwealth laws that warrant further review’ (when the final report is due in December).
5. Finally, as demonstrated in the approach of some constitutional courts in this area, there is a real danger of putting ‘rights’ on one side of a scale – in opposition to – other values. This reductive and often crude balancing exercise needs to be avoided. Where possible, regulators and the law should look to accommodate the various broad values reasonable people might agree upon. Otherwise, we create false dichotomies, and miss creative solutions. (I would commend my co-author Dr Ron Levy’s forthcoming work in this regard on how deliberation can be accommodated in the law regulating electoral politics.)
6. To give an example: the High Court struck down a ban on paid political broadcast advertising during election campaigns, in 1992.[[6]](#footnote-6) This was done ostensibly to preserve the liberty interests in communication of political actors or advocates outside the major parties. Ironically the High Court acted at the suit of television companies. More problematically, it acted even though the legislated restrictions on wealthy groups dominating election campaigns actually opened up, rather than closed down, space for alternative voices in those campaigns. Had the Court taken a more holistic view it would have seen that the bill it struck down was at least as accommodative of substantive liberty of political speech, fair competition and deliberation as the unregulated system it, by default, preferred.

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1. G.Orr, ‘The Freedom to Be a Hypocrite’, *Inside Story*, 11/8/2014. [↑](#footnote-ref-1)
2. ‘Commissioner Heydon Insults a Crime’, *The Australian*, 19/8/2015. [↑](#footnote-ref-2)
3. In the *Nationwide News v Wills*, and *Coleman v Power* cases. [↑](#footnote-ref-3)
4. *Monis v R* [2013] HCA 4. [↑](#footnote-ref-4)
5. *CFMEU v BHP Coal* [2014] HCA 41. [↑](#footnote-ref-5)
6. *ACTV v Commonwealth* (1992) 177 CLR 1. [↑](#footnote-ref-6)