

# **FREEDOM OF EXPRESSION**

## **Bill Morrow**

Freedom of expression is a negative freedom.

*“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 governed by law.”*

*Lord Wright, 1936*

There is no right to freedom of expression under our Constitution.

[Although the High Court has held that there is an implied guarantee in the Commonwealth Constitution of freedom of communication, at least in relation to public and political discussion.]

Freedom of expression is vulnerable to restriction by law.

If we accept that freedom of expression is in the public interest then it is of interest to the public what restrictions are placed on that freedom.

And there are already quite a few.

The diversity of artistic practice today means that many laws, seemingly unrelated to artistic practice may be breached.

Tattooing children for example is an offence in South Australia (S21A Summary Offences Act 1953).

I will however briefly address a number of areas of the law generally thought to impact on artistic freedom of expression (but not sedition as that is being dealt with by another speaker).

### **Obscenity and Indecency**

The common law does not define “obscenity” but the concern is public morals.

Some form of publication is required which may be by selling, offering for sale, exhibiting or displaying material likely to cause offence to a reasonable adult person.

In many States obscenity and indecency have been made a statutory offence.

In South Australia a person who exhibits indecent or offensive material in a public place is guilty of an offence under the Summary Offences Act 1953 (S33(2)(c)).

Under that Act:

*““indecent material” is defined to mean material that is, in whole or in part, of an indecent, immoral or obscene nature.”*

But no offence is committed by the exhibition of material that is or forms part of a work of artistic merit if there is no undue emphasis on its indecent or offensive aspects

AND

A prosecution cannot be commenced without the written consent of the Minister.

### **Censorship**

There is both State and Commonwealth legislation.

- largely related to the classification of material.

A refusal to classify operates in effect as a ban.

The general principle is that adults should be able to read, hear and see what they want. Halsbury's Laws of Australia state:

*“The legislative principle that adults should be able to read, hear and see what they want does not confer a right to artistic expression upon the individual. Rather it confers a limited right on the consumer.”*

This right is subject to exceptions:

- minors should be protected from material likely to harm or disturb them;
- protection from unsolicited material that is offensive;
- community concerns about depictions condoning or inciting violence;
- community concerns about the demeaning portrayal of people.

Legislation

C/W Classification (Publications, Films and Computer Games) Act 1995  
- introduced a National Classification Code.

Recently a **computer game** dealing with graffiti was banned. (Marc Eko's Getting Up which included “interactive biographies of 56 real graffiti artists”.)

Under current law the highest level rating that a computer game can receive is MA15+ (Mature Accompanied) whereas films can be classified as R18+ (Restricted).

## **Blasphemy**

- A common law offence.
- *“The publication of material which, with a malicious or mischievous intention, asperses the truth of Christianity or of the scriptures in language that is calculated to and has the effect of shocking the feelings and outraging the belief of the general community” – (Halsbury’s Laws of Australia).*
- The offence is assumed to exist in all States except Tasmania (which has a similar statutory offence).
- No reported superior court decisions (there have been inquiries into the offence).

In 1992 the NSW Law Reform Commission recommended that the crime of blasphemy be abolished.

## **Defamation**

Until the end of last year, each State and Territory had its own defamation laws.

From 1 January this year uniform defamation laws apply throughout Australia with each State and Territory enacting similar legislation.

(Tasmania has retained the right for dead people to sue.)

One of the stated objects of the new legislation is:

*“to ensure that the law of defamation does not place unreasonable limits on freedom of expression ...”*

Some features of this new legislation:

- there is an offer-of-amends process aimed at avoiding litigation;
- all jurisdictions now have truth alone as a defence –
  - proof that the defamatory imputations are “substantially true” is a defence, (no requirement for “public interest” or “public benefit”);
- damages for non-economic loss are capped (for the present) at \$250,000.00.

The new legislation does not define defamation but at common law it is injury to reputation by exposing a person to hatred, contempt or ridicule or lowering a person’s estimation in the eyes of right-minded observers.

## **Incitement**

Under the common law it is an offence to solicit or incite another person to commit an offence

- the offence requires an intention that the offence be committed;
- recklessness is not sufficient.

All jurisdictions except South Australia include the offence of incitement in their general legislation. Some States have also included it in anti-discrimination legislation.

Most jurisdictions provide that the offence of incitement is committed even if the crime incited does not occur (but not in NT or Queensland).

## **Racial Vilification**

Both the ACT and NSW have Anti- Discrimination legislation.

The NSW legislation encompasses racial, trans-gender, homosexual and HIV/AIDS vilification.

The Commonwealth legislation deals with racial vilification.

The Racial Discrimination Act 1975 (Commonwealth) was amended in 1995 by the Racial Hatred Act.

Section 18C now provides:

- it is unlawful for a person to do an act, otherwise than in private, if:
  - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
  - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

[Note: an unlawful act is not necessarily a criminal offence.]

But Section 18C does not make unlawful anything said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work or in the course of a discussion or debate made or held for any genuine artistic purpose.

## **Copyright**

Copyright can be used as a restraint on freedom of expression.

This is particularly so now that artists are adopting appropriation as a way of expressing themselves.

- Many believe it is a proper function for art to interrogate the status quo but so much of the social and cultural status quo is littered with copyright and trade marks. Material which has acquired cultural significance but which cannot be reproduced in another work without infringing the rights of the copyright owner.
- The duration of copyright in artistic works has now been extended from life of the author plus 50 years to life of the author plus 70 years as a result of the US Free Trade Agreement negotiations – little or no consideration was given to the public interest in making that decision.

As a result of pressure from corporations in the United States (including Disney) we may be moving to a position where the duration of copyright will become the life of Mickey Mouse!

- Photographs of artistic works in which copyright has expired will qualify for copyright protection in Australia but not in the US.
- Australian copyright law has also shown little tolerance for parody and satire.

The fair use provisions are however presently under review (over 160 submissions have been received by the Commonwealth Attorney-General's Department).

- The introduction of the moral right of integrity has restrained Driller Jet Armstrong's freedom of expression daubing on other people's artwork!
- In 2001 two High Court Judges considered it possible that a person might have an equitable interest in the copyright of a film made surreptitiously. The makers of the film would be constructive trustees and could be required to assign copyright to the property owner on whose land they had trespassed. (*Australian Broadcasting Corporation v Lenah Game Meats*).

## **Privacy**

There is no right of privacy under Australian law.

In 2003 the Queensland District Court decided that there was a tort of invasion of privacy – a stalking victim was awarded damages. There is also some sympathy for the idea in the High Court of Australia.

If such a tort was recognised the rights of photographers to photograph in public would be affected.

(A Privacy Bill has been in existence in South Australia since 1992.)

## **Breach Of Confidence**

A person can be restrained by the courts from breaching a confidence, for example by using indigenous material which has been disclosed in confidence.

### **The Laws Of Other Countries**

With the advent of the internet artistic works can now be exhibited in many countries including countries with very different laws to our own.

This is not much of a problem for artists prepared to stay at home but for artists who travel overseas the possibility exists that they could be arrested on entering the country for breaching the laws of that country because of the publication of the artist's work on the internet (with or without their consent).

The laws of other countries can be quite different from our own. For example at present the Indonesian House of Representatives is being pressured by Muslim groups to pass a controversial pornography bill. Reportedly "any cultural displays and pieces of art judged to be "sensual" will not be tolerated unless displayed in places sanctioned by the government".

Consider also the impact of that bill on the freedom of expression of Indonesian Artists.