THE RIGHT OF PEACEFUL ASSEMBLY IN THE A.C.T.

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ACKNOWLEDGEMENT

This Occasional Paper was prepared by Mr Robin Handley, then a Lecturer at the Canberra College of Advanced Education, while he was attached to the Human Rights Commission under the Public Service Board's Interchange Program. It was completed by him after he had finished his attachment to the Commission. The Commission acknowledges, with gratitude and appreciation, the skill, time and effort put in by Mr Handley in preparing this Paper, both during the time he was with the Commission and afterwards.

PREFACE

In March 1982, the Human Rights. Commission instituted a public inquiry on the right to freedom to expression as set out in paragraphs 2 and 3 of Article 19 of the International Convenant on Civil and Political Rights and invited submissions from the public.

Article 19(2) and (3) states:-

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

One area of concern revealed in the submissions received was the extent to which laws governing freedom of assembly restricted the right to freedom of expression.

2. The Human Rights Commission, noting that the right to peaceful assembly was a specific right guaranteed by Article 21 of the International Covenant decided to have a separate inquiry into the right of peaceful assembly in the A.C.T.

Article 21 states:-

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The inquiry was restricted to the A.C.T. because the Human Rights Commission's jurisdiction does not cover State legislation on this subject, and also because at that stage it was aware of pending changes to the relevant legislation in the A.C.T.

3. It invited Mr Robin Handley Lecturer at the Canberra College of Advanced Education who was then attached to the Human Rights Commission under the Public Service Board's Interchange Program to research the subject, consider public submissions received, and to prepare this Occasional Paper. Mr Handley had made a special study of the laws relating to public assembly as part of his research for his LL.M degree at the Australian National University.

4. Although the Occasional Paper concentrates on the laws relating to public assembly in the A.C.T. the points made in this Paper would have relevance generally to the laws of the States as well and the Commission is hopeful that this Occasional Paper would prove useful to persons interested in the laws relating to public assemblies in the States and Territories (other than the A.C.T.).

5. The Commission has left open, for later consideration, the desirability of an examination of State laws which by virtue of the Commonwealth Places (Application of Laws) Act 1970 apply to public assemblies held in Commonwealth places in the States and invites persons who may have an interest in this subject, to forward their comments to the Commission, as to whether they feel such an examination would be useful.

PART I: BACKGROUND
CHAPTER 1: INTRODUCTION

Meetings and Demonstrations

6. Recognition of the right to peaceful assembly concerns freedom to organise and participate in demonstrations and public and private meetings. In this context, although the word 'assembly' is generally only thought of as meaning those assemblies which take the form of demonstrations and public or private meetings which involve some protest or action, it does, of course, include assemblies in the widest sense of the word meaning a 'gathering of people' which eccompasses other forms of assembly performing community functions, many of which have become institutionalised. This needs some amplification.

7. Assemblies are a fundamental part of the life of every community. People assemble for a variety of reasons: to engage in political discussion or air political grievances; to participate in religious ceremonies; for social or recreational purposes; in the course of employment; to adjudicate disputes and criminal prosecutions. Without assemblies basic community functions could not be fulfilled. Recognition of the fundamental importance of particular assemblies in the conduct of community functions has in many cases led to their institutionalisation, and to their acceptance as a part of the normal order of things. For example, the assembly in which power to govern the community is founded, has become a parliament. Religious assemblies have become institutionalised in the church. Social and recreational assemblies have adopted institutionalised forms: race meetings, athletics fixtures, football and cricket matches, dances, bingo meetings, clubs. Groups of employees have adopted institutional form in trade unions. The adjudication of disputes and criminal prosecutions has become a function of specialised courts of law.

8. These institutionalised assemblies are not generally envisaged as the subject of the right of assembly. And, indeed, for most practical purposes it is only in relation to demonstrations and protest or action meetings that questions concerning recognition of the right of peaceful assembly arise. Accordingly, in this Occasional Paper discussion of the right of peaceful assembly is limited to this narrower category of assemblies.

Rights

9. Article 21 of the ICCPR refers to the 'right' of peaceful assembly. But what does it mean to say that one has a right to do something? Definition in this area is difficult and has long perplexed philosophers and jurists. The problem seems to lie with differences in how the word 'right' is used and understood, especially among lawyers, philosophers and the public generally. Indeed, it seems now to be widely accepted that any abstract definition is bound to be misleading and that one must examine the typical context in which the word is used in order to understand the meaning of the word when it performs that function.[5]

10. An examination of the use of the word lright[15] indicates that it can be used in three senses. First, a right in the widest sense is a claim derived from some moral standard or rule of law.[7] This is a sense in which the word is commonly used in everyday speech. Secondly, a right in a more restricted sense is a claim recognised though not necessarily enforceable by law. Thirdly, a right in the narrowest sense is a claim not only recognised by law, but for violation of which the law provides a specific remedy. Some jurists contend that such 'positive' rights are the only ones which should be accorded the description 'rights'.

11. A consideration of the relevant law in Australia shows that the right of peaceful assembly belongs in the second category of this analysis. The law recognises the assembly as lawtul to the extent that there are no restrictions on it, but provides no specific legal remedy for violating that lawful 'activity. Remedies may be available as a result of the violation' but'auch remedies derive from coincidentally violating other 'positive' rights, for example that of personal physical security.[8] Thus, the right of peaceful assembly is, in Australia, often more closely defined as a residual 'freedom'. The 'right' comprises the residue of freedom left over when account is taken of allthe many restrictions imposed by law. Hence, reference is commonly made to the freedom of assembly rather than the tight of assembly,

The Right of Assembly in a Liberal Democracy

12. 'Definitions of democracy vary considerably. Some theorists regard liberal democracy as a set of mechanisms or procedures, designed to ensure a high level of government accountability to the electorate:9 others stress the underlying attitudes of tolerance, co-operation and fair play which ensure that these mechanisms and procedures are effective. In most definitions, however, either 'consent' or 'participation' is a key notion,[10] and both presuppose protection of the rights of freedom of expression and peaceful assembly.'

These rights are essential to the very existence of our democratic system of government. Furthermore, the ultimate goal of a democracy is the liberty of the individual: the state of being free - free to act, free to choose, free from restraint or compulsion. 11

13. The right to freedom of expression and the right of peaceful assembly are obviously closely associated: the right to assemble in meetings and demonstrations provides the opportunity to exercise freedom of expression. As Lord Denning recognised in Fubbard v. Pitt (1976), exercise of

> the right to demonstrate and the right to protest ... is often the only means by which grievances can be brought to the knowledge of those in authority - at any rate with such impact as to gain a remedy. 12

A demonstration is a way for groups with no other community voice to mount an effective protest where the money, education or organisational experience essential to some other avenues of protest is lacking. 13

14. Demonstrations and meetings have ’achieved a,greater impact in recent years as a result of television and radio reporting, permitting ,instant communication of sound and pictures to a mass audience nationally and internationally. 14 But this has posed its own problems. Irresponsible reporting can produce a distorted impression of an incident. The over-exposure of a handful of demonstrators 'acting up' in front of the cameras can easily antagonise an otherwise sympathetic public.[15] Accurate, balanced and responsible reporting is essential.

15 One of the dangers of a meeting or demonstration is its potential volatility. Where there are a large number of interacting persons, their behaviour is not always governed by 'established norms. People in a crowd may attain a .state of heightened arousal, susceptible to contagious passions, and impulses which are ordinarily suppressed or controlled may be acted upon [16] Someone or something can easily precipitate what began as a peaceful protest into violent disorder. Yet, public order is essential to the preservation of a democracy in order to enable citizens to participate freely in their community government. The problem is how to prevent and control violence and disorder, without limiting the right of peaceful assembly. To quote Lord Scarman:

> Civilised living collapses - it is obvious - if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. 17

16. No right is absolute. In the case of the right of peaceful assembly, the community accepts, and Article 21 of the ICCPR permits, that certain limitations may be justifiable in the interests of maintaining public order. There may also be a need to accomodate other conflicting rights: in the case of a large demonstration in a public place, the right of citizens who are not demonstrating to go about their everyday business without undue interference. In such a case allowance has to be made for the rights of others, and a judgment made about the rights of each But in making such a judgment, the special importance of the right of peaceful assembly in a democracy must be recognised.

Footnotes to Chapter 1

1. Lecturer in Law at the Canberra College of Advanced Education on secondment to the Human Rights Commission during the first part of 1984.

• The interpretation of Article 21 is examined in Part III.

. Relevant State and Northern Territory law apply to "Commonwealth places" in the States and Northern Territory by virtue of the Commonwealth Places (Application of Laws) Act 1970.

4.. S•3(1) Human Rights Commission Act 1981 (Cwth).

5. E.g. Jeremy Bentham who warned that legal words demand a special method of elucidation:

> We must never take [these] legal words alone, but consider whole sentences in which they play their characteristic role.

Quoted by H.L.A.Hart, "Definition and Theory in Jurisprudence" (1954) 70 Ism 37, 41.

6. C.f. the analysis by W.N.Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (W.W.Cook ed. 1978). There are of course, many analyses. eg. Max Radin, "A Restatement of Hohfeld" (1983) 51 Barv. L. Rev. 1141; H.L.A. Hart "Bentham on Legal Rights" in A.W.B. Simpson (ed), Oxford Essays in Junsprudence (2nd Series 1973); F.K.H. Maher, "The Kinds of Legl Rights" (1965) 5 Melb. u. 14. Rev. 47.

7. F.E.Dowrick, "Introduction" in F.E. Dowrick (ed), Human Rights - Problems. Perspectives. Texts (1979) 1,8.

8. Actions may be for trespass (including assault and false imprisonment).

9. Carl Cowen, Democracy (1973) 7.

10. Robert Y Fluno, The Democratic Community: Governmental Practices and Purposes (1971) 66; Carole Pateman, Participation and Democratic Theory (1976); Barry Holden, The Nature of Democracy (1974); C.B. Macpherson, The Real World of Democracy (1966).

11. J.S.Mill, On Liberty (Oxford University Press ed. 1912) 18.

12. Hubbard v. Pitt [1976] 1 QB 142, 178.

13. Amitai Etzioni, Demonstration Democracy (1970) 18-20.

14. Ibid 12; James D. Halloran, Phillip Elliott and Graham Murdock, Demonstrations and Communications: A Case Study (1970).

15. Such 'acting up' may, however, be provoked by the media itself, as was probable in Ulster in May 1981: e.g. Observer, 10 May4981, p.4; The Times, 15 May 1981, p.9. See also Richard Clutterbuck, The Media and Political Violence (1982).

16. The classic work on the psychology of the crowd is Gustave Le Bon's, The Crowd (1896 English Translation). The most important recent study is Neil J. Smelser, Collective Behaviour (1962).

17. Lord Justice Scarman, The Red Lion Square Disorders of 15 June 1974, Cmnd 5919 (1975) para.5.

CHAPTER 2
ANZAC DAY LEGISLATION IN THE A.C.T. 1980-1984

17. The law concerning the right of peaceful assembly in the A.C.T. has undergone a number of changes in recent years, largely in response to demonstrations held or planned to be held on Anzac clay. It is appropriate that these changes in the law and the events which led up to them should be recited briefly here as the background to Part II of this Occasional Paper on the present state of the law.

18. On 25 April 1980, Anzac Day, a group of about 14 women, dressed in black, attempted to march at the end of the Anzac Day parade as a protest about women raped in war. Some carried placards: one read "Soldiers are Phallic Murderers"; another "Patriots Kill"; another "Heroes Rape". The placards, of approximately 65 by 50 centimetres in size, could be read at a distance of 20 to 30 metres. When the women ignored a police sergeant's instruction not to continue their march, they were arrested and charged with obstructing the police in the execution of their duty. All fourteen were convicted in the Canberra Court of Petty Sessions: eleven received fines of $200 each; three, who had previous convictions, were sentenced to one month's imprisonment. On appeal to the A.C.T. Supreme Court these convictions were set aside. Connor J. held that mere disobedience of a police officer's command to cease a lawful activity could not constitute the offence of obstruction of the police in the execution of their duty.[1] Connor J.'s decision was delivered on 14 January 1981.

19. In the early part of April 1981, the Australian Federal Police and the Returned Services League (RSL) learned that a group of women were again intending to join the Anzac Day parade. The Minister for the A.C.T., Mr Michael Hodgman, said that he had received secret police information from a person who had infiltrated the Women Against Rape organisation, that the group of women intended to break up the parade. The Minister said later that he had been informed that the protest was being organised by Marxists and lesbians.[2] These allegations were not subsequently substantiated. As a result of lobbying by the RSL and the Australian Federal Police, the Minister decided to amend the existing law. Two days before Anzac Day, there having been no consultation with members of the A.C.T. House of Assembly, nor with the locally elected representatives in the House of Representatives and the Senate, a Traffic (Amendment) Ordinance was gazetted, giving power to police officers of the rank of sergeant or above to direct any person not to take part in the Anzac Day parade where there were reasonable grounds for believing that that person might disturb or disrupt the parade.[3] Any person disturbing or disrupting the parade or contravening a police officer's direction committed an offence punishable by a fine of up to $100.

20. Like other A.C.T. Ordinances, being delegated legislation, the Traffic (Amendment) Ordinance was made by Order of the Governor-General acting on the advice of the Federal Executive Counci1.[4] In practice, the Governor-General acts on the advice of the responsible Minister, in this case, Mr Michael Hodgman. The Ordinance took effect on the date of its gazetta1.[5] Thus, legislation with serious implications for civil liberty had been made without any opportunity for consideration by a legislative assembly. Two days after the Ordinance had taken effect, in the course of the 1981 Anzac Day parade, 64 demonstrators were arrested and charged, the majority under the new provision.,

21. The matter was raised in the Senate on 28 April 1981, at Question Time by Senator Evans,[6] and later, in the Debate on the Adjournment, by Senator Ryan.[7] One of the objections to the Ordinance raised by Senator Evans was that it was completely unnecessary

> given the vast array of existing public order legislative provisions which govern marches, assemblies and demonstrations of all kinds in the A.C.T.[0]

Senator Ryan echoed this later when she said that the existing legislation

> had been extremely successful in maintaining order at public occasions, such as Anzac Day and the many rallies, marches and public events that 'occur and have occurred in this Territory for many years.[9]

A table of the number of demonstrations which have taken place in the A.C.T. in recent years is set out in Appendix 1.

22. After consideration by the Senate Standing Committee on Regulations and Ordinances, there was further debate in the Senate on 14 May 1981,[10] when Senator Lewis, the Chairman of the Committee, reported on the action taken by the Committee and tabled two letters received from the Minister, Mr Michael Hodgman. In these letters, dated 13 and 14 May,[11] the Minister undertook to give instructions for the preparation of a draft Ordinance, Setting 04 a general code on the law relating to parades, processions and assemblies in the A.C.T., and to refer the draft Ordinance to the A.C.T. House of Assembly and the Senate Committee for consideration. Further, the Minister undertook that the proposed Ordinance would be made prior to Anzac Day 1982 and would repeal the Traftic (Amendment) Ordinance 1881.

23. Senator Lewis reported that the Committee, on the basis of the Minister's undertakings, recommended that no further action be taken on the Ordinance. There followed a debate on Senator Tate's motion that the Senate take note of the Committee's report, in the course of which the question whether the Ordinance should be disallowed was raised. But after interruption for the Adjournment motion, the debate was not concluded. However, when a further debate took place on 8 September, Senator Ryan's motion to disallow the Ordinance was lost on a tie 12

24. The first prosecution brought for the new offence created' by the Traffic (Amendment) Ordinance 1981 of Ms Lyn Lenox,. failed,[13] and the other prosecutions were later dropped. Ms Lenox was acquitted in Canberra Petty Sessions on 5 August 1981, when Mr Dobson, S.M., found that the prosecution had failed to prove that she was engaging in disruptive conduct, or that she had disobeyed a police officer's direction.[14] Mr Dobson awarded Ms Lenox costs of $600. He was also critical of the drafting of the 1981 Amendment Ordinance and expressed sympathy with the police who were required to enforce the law.

25. With respect to the Minister's undertakings, the Senate Standing Committee on Regulations and Ordinances, having received no communication from the Minister, wrote - to him on 27 August 1981 requesting advice of progress made in the drafting of the proposed Public Assemblies Ordinance [15] In a further letter of24 September the Committee sought an assurance from the Minister that the pro¯Posed Ordinance would be made available to the Committee before Parliament rose for the summer recess.

26. On 14 October, the Minister wrote to the Committee advising that "a substantial amount of work" had been done within his Department on the proposed Ordinance. The following week the Department of the Capital Territory's working paper was made available to the Committee and, on 29 October, officers of the

Department appeared before the Committee to discuss the proposed Ordinance, as outlined in the working paper. The Committee apparently found these discussions "most fruitful", and sought and received an undertaking from the officers of the Department of the Capital Territory and the .Attorney-General's Department on the relationship of the proposed Ordinance with other Commonwealth enactments. The Committee also indicated to the officers its willingness to meet during the summer recess to consider the draft Ordinance. This was not, however, made available, to the Committee until 18 February 1982, two days after Parliament had resumed. In the ensuing weeks, no less than five successive drafts of the Ordinance were considered by the Committee, each including substantial amendments made following the previous discussions with the Committee.

27. It was not until 4 March 1982 that the Minister sent the (third), draft of the proposed Ordinance to the A.C.T. House of Assembly. In a letter accompanying the draft the Minister stated:

> Given the limited time at hand, it may be necessary to have the Ordinance made in a form substantially the same as it is now drafted. However, I will give very serious consideration to any matters you may raise in relation to the Ordinance.

The A.C.T. House of Assembly held a special meeting on 5 March, at which it resolved to appoint a Select Committee to examine the draft Ordinance. Public submissions were invited, oral evidence was heard, and on 16 March: the Select Committee had discussions with the Senate Standing Committee on Regulations and Ordinances. Following this, the Select Committee received a revised (fourth) draft from the Department of the Capital Territory which, in the Committee's view, contained only minor revisions,

28. On 23 March 1982, the Select Committee reported back to the House of Assembly recommending that the draft 1982 Ordinance should not be proceeded with, that a consolidated Public Assemblies legislation is desirable and necessary for the ACT, should be given the highest legislative priority and should take the form of an Act of Parliament rather than an ACT Ordinance. [16] These recommendations were endorsed by the House and transmitted, with the Select Committee's report, to the Minister and to the Senate Committee. Notwithstanding these representations, on 25 March the Public Assemblies Ordinance 1982 (A.C.T.) was made by the Governor-General and on 26 March gazetted by the Minister.

29. On 21 April, the Senate Standing Committee on Regulations and Ordinances, in a majority report to the Senate,[17] concluded that the Ordinance did not offend against the Committee's principles[18] and recommended that no further action be taken. A motion to disallow the Ordinance was moved by Senator Ryan on 22 Apri1,[18] but lost on a tie.

30. Anzac Day 1982 passed peacefully with no arrests being made.[20] There had previously been extensive consultations between the police, the RSL, and other groups who wished to participate in the Anzac Day ceremonies.

31. The 'Labor Government took office on 5 March 1983. Soon after, on 14 April, the Governor-General, acting on the advice of the new Minister responsible for the the Minister for Territories and Local Government, Mr Tom Uren, repealed the Public Assemblies Ordinance 1982 (A.C.T.) .21 The Minister promised that new legislation guaranteeing the right of Assembly would be prepared, and that adequate time Would be allowed for - public consultation and discussion, and for consideration of the proposed legislation by the A.C.T. House of Assembly. 22 Notwithstanding the absence of special legislation, the 1983 Anzac Day ceremonies passed peacefully in Canberra. A march by

340 women to commemorate women raped in war occurred without incident.[23] In accordance with the Minister's promise, the proposed Public Assemblies Ordinance 1984 was made public on 16 April: 1904 and a copy referred to the A.C.T. House of Assembly for its advice and consideration. • Nine days later the 1984 Anzac Day ceremonies again passed peacefully and without incident. A copy of the proposed Ordinance was also sent to the Human Rights Commission with a request for the Commission's comments. A copy of those comments and of the proposed Ordinance are included as Appendix 2 of this Report.

Footnotes to Chapter 2

1. Forbutt v. Blake (1981) 51 FLR 465.

2. Anne Summers, "Overkill on Anzac Day: Senate may think again on Ordinance" National Times, 14-20 September 1980, p.55.

3. The Traffic (Amendment) Ordinance 1981 (A,C.T.) amended the Traffic Ordinance 1937 (A.'C.T.) by the insertion of a new provision, s.23A.

4. The Seat of Government (Administration) Act 1910, (Cwth) s.12(1).

5. Ibid s.12(2)(b).

6. C.P.D. Senate, 28 April 1981, p.520.

7. Ibid p.1427.

8. Ibid p.1432

9. C.P.D. Senate, 8 September 1981, p.520.

10. C.P.D. Senate, 14 May 1981, p.2041.

11. Incorporated in Hansard: ibid p.2042-2043.

12. C.P.D. Senate, 8 September 1981, p.519.

13. "Anzac" Day protest woman acquitted" Canberra Times, August 1981, p.8.

14. The prosecution failed to prove that Ms Lenox had engaged in conduct likely to give offence to persons taking part in the Anzac Day parade (s.23A(3)(c)) or that she had disobeyed a police officer's direction (s.23A(2)).

15. Senate Standing Committee on Regulations and Ordinances, 72nd Report: A.C.T. Public Assemblies Ordinance 1982 (April 1982). Paras 11-14 give an account of the events preceding the gazettal of the Ordinance.

16. A.C.T. House of Assembly, Report of the Select Committee on the Public Assemblies Ordinance (23 March 1982).

17. C.P.D. Senate, 21 April 1982, p.1369: the Senate Standing Committee on Regulations and Ordinances, 72nd Report, above, n.15.

18. The Committee scrutinises the delegated legislation to ensure, inter alia, "that it does not trespass unduly on personal rights and liberties".

19. C.P.D. Senate, 22 April 1982, p.1453.

20. Frank Cranston, "Crowd applauds marchers", Canberra Times, 26 April 1982, p.3.

21. Shortly after this, on 31 May 1983, Senator Lewis introduced the Anzac Day Bill 1983 in the Senate and moved that it be read a second time (C.P.D. Senate, 31 May 1983, p.1015-1016). Debate was, however, adjourned and not resumed until 29 March 1984 when, after several speeches, including that of Senator Evans on behalf of the Government opposing the Bill, debate was again adjourned. (C.P.D. Senate, 29 March 1984, p.929-934). The Bill makes special provision for Anzac Day in the A.C.T., including giving power to the President of the R.S.L., subject to review by the Federal Court, to grant permission to participate in Anzac Day observances, and making it an offence to participate in observance without permission or otherwise interfere with or disrupt the observance.

22. "Uren to repeal the Public Assemblies Ordinance", Canberra Times, 26 March 1983, p.1.

23. "340 marchers honour women raped in war", Canberra Times, 26 April 1983, p.12.

II. THE PRESENT STATE OF THE LAW

CHAPTER 3
THE PERCEPTION OF THE RIGHT OF ASSEMBLY

(1) The Public

32. The popular conception of a right of assembly to which all citizens are entitled, appears to have emerged in Britain in the late eighteenth and early nineteenth centuries. Before this, the right of assembly was probably not identified as a specific right. Rather, the activity of organising and participating in meetings and demonstrations was thought of as a constituent of the general concept of liberty, a concept which has been recognised by the courts since at least the time of Henry **11.**[1]

33. The concept of liberty was understood as meaning freedom from interference with individual physical security and from the exercise of arbitrary power.[2] Further refinement of the concept did not occur until the seventeenth century, when specific rights began to be identified in response to deprivations of liberty perpetrated by the Stuart Kings.[3] So, for example, the claim to a right to petition and its statutory recognition in the Bill of Rights 1689, was a response to James II's committal of "the seven bishops" to the Tower and their subsequent trial for seditions libel arising from their petition to the King for relief from the Declaration of Indulgence.[4]

34. A number of factors contributed to the perception of a right of assembly in the late eighteenth and early nineteenth centuries. First, between about 1760 and 1840 Britain underwent a profound economic, social, and political change. In 1760, the

population was largely rural and the economy almost wholly agricultura1.[5] By 1840, mainly as a result of the Industrial Revolution, a large part of the population (which had increased from seven to eighteen million[6]) was urban and the economy was predominantly industrial. While in 1760 the political consciousness of working people probably did not extend much beyond their local community, by 1840, a more urbanised, less isolated population, which in the previous fifty years had known high unemployment, high food prices, and poor wages and housing, a population which was better educated and informed, had attained a degree of political awareness very different from that of SO years previously. And that political awareness included popular interest in natural rights stimulated by the writings of Tom Paine and agitation by political activists.[7]

35. Secondly, the perception of a specific right of assembly was in part a response to repressive measures taken by the British Government in the late eighteenth and early nineteenth centuries to suppress meetings and processions and quash disturbances.[9] The Government and ruling class feared that without such measures there was a danger that mob action, such as that of the Gordon Riots of 1780,[9] might lead to a revolution In England like that which had occurred in France.[10]

36.. Thirdly, after 1830, there was a gradual liberalisation of Government attitudes. The establishment of the 'new police' forces - in London in 1829,[11] outside London in the 1830's and 1840's12 _ led to improved law enforcement, a reduction in crime, and more effective control of public order. With an effective and readily available instrument to maintain order at meetings and processions, the fear of revolution appears to have faded, and the Government seems to have adopted a more tolerant attitude to such protest activity.

37. Lastly, the early identification of a specific right to petition, in the seventeenth century, probably eclipsed. perception of a right of assembly until the late eighteenth and early nineteenth centuries. This eclipsing occurred for two reasons. First, because of the importance accorded to the right to petition as a channel for expressing grievances and dissent, dating back to before the Norman Conquest.[13] As petitioning:. declined in effectiveness after 1836, when the House of Commons adopted a procedural rule (the 'gag' rule) preventing debate on the presentation of a petition except in rare cases,1[4]. so public assemblies assured greater importance as a channel of protest. Secondly, the belief which may have been held by some that the constitutional protection afforded to the right to petition by the Bill of Rights 1689 also included a right of assembly- for exercise of the right to petition must involve people meeting to discuss their grievances and to prepare and sign the petition, and their going together to deliver the petition[15] - probably did not endure the increased political awareness and the repressive Government action of the early nineteenth century.

38. Certainly, by the mid-nineteenth century, the popular conception of a specific right of assembly seems to have been firmly established in Britain. Thus, in October 1838, a time of growing power for the Chartist movement, the Home Secretary, Lord John Russell, is reported to have said:

> The people have a right to free discussion.- It is free discussion which elicits truth. They have a right to meet.[16]

39. In the U.S.A., perception of this right occurred much earlier, at the time the American colonies were struggling for independence from Britain. The colonists were aware of the need to protect that strand of liberty concerning assemblies, because public meetings and processions played such an important part in

setting up the new democratic processes of government. Had the British Government been able to deprive the colonists of that liberty, then the colonists! cause could never have succeeded.

40. The first formal expression of a right of assembly in the U.S.A. would appear to have been in the Declaration and Resolves of the First Continental Congress of 1774. This recited that:

> Assemblies have been frequently dissolved, contrary to the tights of the people, when they attempted to deliberate on grievances, and their dutiful, humble, loyal and reasonable petitions to the Crown for redress, have been repeatedly treated with contempt, by his majesty's ministers of state,
>
> and resolved, that the people have a right peaceably to assemble, .consider of their grievances, and petition the King; and all prosecutions, prohibitory proclamations, and commitments for the same are illega1.[17]

41. The Pennsylvanian Declarations of Rights 1776 expressly declared the right of the people to assemble and petition for the redress of their grievances.[18] Virginia's ratification.of the federal Constitution in 1788, proposed Bill of Rights amendments including such a right,[18] and North Carolina's ratification was conditional upon the adoption of a Bill of Rights in which the right of assembly would be incorporated.[20] Bill of Rights amendments.. to the Constitution were, of course, subsequently approved and ratified,[21] and it is an indication of the importance accorded to the right of assembly that it is included in the First Amendment, which states that

> Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Law

42. While recognition of the right of peaceful assembly is entrenched in the U.S. Constitution, no such protection is afforded by either the English or Australian Constitutions. The Constitution of the Commonwealth of Australia provides few guarantees of rights.[22] Indeed, a proposal to include Bill of Rights provisions similar to those of the Mercian model was rejected by the Constitutional Convention in 1898.[23] Nor is there statutory recognition of the right of assembly.

43. The common law has traditionally sought to protect the liberty of the individual through the provision of remedies for wrongful conduct rather than through positive assertions of 'right conduct' .[24] Thus, there is no assertion in common law of a 'right' of assembly in the narrowest sense of the word described in the Introduction. The law recognises organising or participating in an assembly as lawful to the extent that there are no restrictions on it, but provides no specific legal remedy for violating that lawful activity. This is a 'right' in the second sense described, often more closely defined as a 'freedom'. Remedies may be available as a result of the violation, but they derive from coincidentally violating other 'postive' rights, for example that of personal physical security, where the law does provide a specific remedy.

44. The attitude of the courts was clearly spelt out in cases such as Ex parte Lewis (1888), where Wills J., in rejecting counsel's submission that there existed a 'right' of public meeting, said:

> Things are done every day, in every part of the Kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not.infrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.25

Lord Hewett C. 3. expressed a similar view in Duncan v. Jones (1936):

> English law does not recognise any special right of public meeting for political or other purposes. The right of assembly, as Professor Dicey puts it ... is nothing more than a view taken by the court of the individual liberty of the subject.[26]

45. In these older cases, the courts were not even prepared to expressly recognise the existence of a 'freedom' of assembly. Since then, however, there is some evidence of a change in the attitude of the courts, or at least in the attitudes of certain judges. In the case of Melser v. Police (1967), Turner J., in the New Zealand Court of Appeal, spoke of the "inherent right of all subjects of the Crown to make legitimate public protests against courses taken by authority" [27] In his judgment in the same case, McCarthy J. said that:

> Unquestionably, freedom of opinion, including the right to protest against political decisions, is now accepted as a fundamental human right in any modern society which deserves to be called democratic. Its general acceptance is one of the most precious of our individual freedoms. It needed no Charter of the United Nations to make it acceptable to us; it has long been part of our way of life. But a democracy is compounded of many' different freedoms, sOte of which conflict with others, and the right of Protest, in particular, if exercised without restraint may interfere with other people's' rights of privacy and freedom from molestation. Freedom of speech, freedom of behaviour, academic freedom, none of these is absolute. The purposes of a democratic society are only made practicable by accepting some limitations onabsolute individual freedoMs. All this, Of course, is rather elementary. The .task of the law is to define the limitations which our society, for its social health, puts on such freedoms.[28]

In E. V. Caird (1970), Sachs L. J., delivering the judgment of the Court of Appeal, spoke of the freedom of assembly more succinctly and positively:

> In conclusion this court feels it necessary to advert to the clear line that exists between the freedom of citizens to assemble peaceably in a permissible place to express their views in a lawful manner, a right which the courts always safeguard, and the unlawful act of doing something which threatens a breach of the peace 29

In a dissenting judgment in Hubbard v. Pitt (1976), Lord Denning M. R. spoke of "the right to demonstrate and the right to protest on matters of public concern":

> These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done ... Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitements to violence or obstruction to traffic, it is not prohibited.[30]

Lord Denning found support for his interpretation of the law in Lord Scarman's report on the Red Lion Square disorders of 1974:[31]

> In his recent inquiry on the Red Lion Square disorders, Scarman L. J. was asked to recommend that "a positive right to demonstrate should be enacted" He said that it was unnecessary: "The right, of course, exists, subject only to limits required by the need for good order and the passage of traffic"[32].

Lord Scarman wrote:

> Amongst our fundamental human rights there are, without doubt, the rights of peaceful assembly and public protest and the right to public order and tranquillity. Civilised living collapses - it is obvious - if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more Complex than a choice between two extremes - one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of the protesting procession. A balance has to be struck, a compromise found that will accommodate the exercise of

> the right to "protest within a framework of public order which enables ordinary citizens who are not protesting to go about their business and pleasure without Obstruction or inconvenience 33

46. While these recent judgments suggest that judges have begun to speak more positively at least of 'freedom' of assembly, there is yet to be an English or Australian case in which the majority of a court given primacy to recognition and protection of the right or, indeed, a freedom of assembly. The courts have, thereby, failed to keep abreast of the consensus of public opinion, which, since the mid-nineteenth century and earlier, has asserted that every citizen has a right of assembly.

Human Rights Treaties

47. The movement at the international level since the Second World War has been to define and promote recognition and protection of the different constituents of the concept of liberty. The right of peaceful assembly has figured prominently in post-war human rights treaties. It is notable that in each case it is to a 'right' that reference is made. Article 20(1) of the Universal Declaration of Human Rights 1948 proclaims that

> Everyone has the right to freedom of peaceful assembly and association.

This formula was followed in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which provides that

> •
>
> Everyone has the right to freedom of peaceful assembly and to freedom of association with others ...

And Article 21 of the ICCPR states that

> The right to peaceful assembly shall be .recognised .

48. Thus, it is evident that while the public's perception of the right of assembly and the perception evident in the human rights treaties are in accord, the perception of the law accords with neither. The next three chapters make a detailed examination of the law as it affects the right of assembly. The interpretation of Article 21 of the ICCPR is considered in Part

Footnotes to Chapter 3

. Among the writs developed during the reign of Henry II (1154-11-89) was a writ called de odio et atia, used to liberate a person who was unjustly imprisoned, the forerunner of the writ of babeas corpus. (Leonard V. B. Sutton, "Habeas Corpus - Its Past Present and Possible World-Wide Future" (1967) 44 Denver L. J. 548, 549.)

2. This is apparent in Magna Carta 1215. See e.g. Chapters 39/ 40 and 61. (J. C. Holt, Magna Carta (1969); W. S. McKechnie, Magna Carta - The Heritage of Liberty (1971); W. Stubbs, Constitutional History of England (6th ed. 1967)i, 568 FF; W. S. Holdsworth, **A** History of English Law (2nd ed. 1937)i, 63 and ii, 215.)

3. The Stuarts asserted a divine right to absolute sovereignty, the 'Divine Right of Kings'. (T.F.T. Plucknett, A Concise History of the Common Law (5th ed. 1956) **49** ff.)

4. For the wording of the petition see Macaulay's History of England (1914 ed.) ii, 999. The case is reported as The Seven Bishops Case (1688) 12 St. Tr. 427. After James II had fled to France, the crown was formally offered to William and Mary on 13 February 1689, on the conditions set out in the Declaration of Right. Later that year, on 25 October, the Declaration was embodied in the Bill of Rights (1 Will. and Mary, St. 2, C.2. (1689)). On these events *see* **T. F.** T. Plucknett, Taswell-Langmead's English Constitutional History (11th ed. 1960) 443 ff.

5. See e.g. G. M. Trevelyan, British History in the Nineteenth Century: 1782-1919 (1965 ed.) 23 ff.; Alan Harding, A Social History of English Law (1966) 333 ff.

6. B. R. Mitchell, European Historical Statistics 1750-1970 (1976) 24.

7. J. H. Plumb, England in the Eighteenth Century (1714-1815) (1950) 156-157.

8. E.g. The Seditious Meetings and Assemblies Act 1795, the Unlawful Oaths Act 1797, The Combination Acts of 1797 and 1800. (Elie Halevy, England in 1815 (2nd ed. 1949) 154 ff.). Later, the six post-Peterloo Acts: Holdsworth, **cit xiii**, 207-209; Sir Llewellyn Woodward, The Age of Reform 1815-1870 (2nd ed. 1962) 65-66.

9. Described e.g. by Dorothy Marshall, Eighteenth Century England (1962) 477-480; Frank Brennan, Too much order with too little law (1983) 21-23; Charles Dickens, Barnaby Rudge (1973 Penguin ed.).

10. Plumb, op cit 155; Douglas Hay et al, Albion's Fatal Tree (1975) 338-340.

11. The Metropolitan Police Act 1829.

12. The Municipal Corporations Act 1835 required the Council for each reformed municipal borough to appoint a Watch Committee who would be responsible for appointing a police force for the town. The Country Police Acts of 1839 and 1840 permitted, but did not compel, the establishment of country police forces. Finally, the County or Borough Police Act 1856 required each county to set up a police force, and, thereafter, both county and borough forces, were subject to inspection by H. M. Inspectors of Constabulary. (J. J. Tobias, Crime and Industrial Society in the 19th Century (1967) 232-237; David Philips, Crime and Authority in Victorian England (1977) Ch.3.) .

13. Holdsworth, op cit x, 696 ff.; the House of Commons' Select Committee on Public Petitions, Report No.639 (25 July 1832); Thomas Erskine May, The Constitutional History of England (1861) i, 437 ff.

14. Colin Leys, "Petitioning in the Nineteenth and Twentieth Centuries" (1955) 3 Political Studies 45 ff.

15. Halevy, op cit 153.

16. Sir Robert Peel, addressing the House of Commons, quoted a report of a speech by Lord John Russell at a dinner in Liverpool on 3 October 1838 (Hansard's Parliamentary Debates 3rd Series v.45, 108-109).

17. Bernard Schwartz, The Bill of Rights - A Documentary History (1971) i, 216.

18. Ibid i, 266 - Article XVI.

19. Ibid ii, 765 - Article 15.

20. Ibid ii, 933 and 968.

21. The first 10 amendments took effect in 1791.

22. S.51(xxxi) ensures that the acquisition of property by the Commonwealth shall be "on just terms"; s.80 guarantees trial by jury for Commonwealth offences tried on indictment; s.92 states that trade within the Commonwealth shall be "absolutely free"; s.116 restricts the power of the Commonwealth to legislate in respect of .religion.

23. The 1898 Melbourne Convention - J. A. La Nauze, The Making of the Australian Constitution (1974) 230.

24. A. V. Dicey, An Introduction to the Study of the Law of the Constitution (10th ed. 1959) 197-199.

25. Ex parte Lewis (1888) 21 QBD 191, 197.

26. Duncan v. Jones [1936] 1 KB 218,222.

27. Melser v. Police [1967] NZLR 437, 444.

28. Ibid 445.

29. E. v. Caird (1970) 54 Cr App.R. 499, 511.

30. Hubbard v. Pitt [1.976] QB142, 178-179.

31. Lord Justice Scarman, The Red Lion Square Disorders of June 15 1974 Cmnd 5919 (1975).

32. Hubbard v. Pitt [1976] QB 142 179.

33. The Scarman Report on the Red Lion Square Disorders, op cit para 5.

CHAPTER 4
COMMON LAW PREVENTION AND CONTROL MEASURES

49. This and the next chapter consider the role of the law as a mechanism of prevention and control. In the context of right of assembly, the law fulfils two interrelated functions. First, and most important, the law gives the police and others the power to prevent disorder and preserve the peace, thereby enabling citizens to enjoy their rights. Secondly, the law can be used to achieve a balance between competing claims to the exercise of rights "to reconcile the freedom of demonstrators' with the interests of the rest of the community",[1]

50. There are both common law and statutory prevention and control measures. The latter are the subject of the next chapter. This chapter deals with on the common law measures.

(1) Breach of the Peace

51. The concept of a 'breach of the peace' is central to common law powers for the prevention of disorder, and an important component of a number of statutory offences. For example, the citizen has a common law power of arrest where a breach of the peace has been committed, or where the citizen reasonably apprehends that one will be committed in his presence.[2] Yet, until recently, as Professor Glanville Williams has remarked, there was a "surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law".[3] He submitted that the general meaning of a breach of the peace in criminal law is an act involving some danger to the per son.

52. However, there are two recent decisions of the English Court of Appeal which do discuss what constitutes a breach of the peace. In R. v. Howell (1981),[5] which concerned an arrest without warrant for an apprehended breach of the peace, Watkins L. J., giving the judgment of the Court, said:

> We cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or is likely to cause such harm, or which puts someone in fear of such harm being done ... we are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other dieturbance.6

Therefore, an essential component of a breach of the peace is actual or prospective harm. to a, person or his property. Unfortunately, this definition was not followed by a differently constituted Court of Appeal, six months later, in E. v. Chief Constable of the Devon and Cornwall Constabulary: ex parte Central Electricity Generating Board (1981).[7] At issue in the later case was whether the police had a power of entry to assist in removing protestors "sitting-in" on private land to prevent the inspection of a site by Central Electricity Generating Board employees. Notwithstanding the passive and peaceful nature of the sit-in, the Court held that thejpolice had 4 power of entry in order to prevent actual or apprehended breaches of the peace occurring when the removal took place. Lord Denning went so far as to say:

> If anyone unlawfully and physically obstructs the worker, by lying down or chaining himself to a rig or the like, he is guilty of a breach of the peace. Even if this were not enough, I think that their Unlawful Conduct gives rise to a reasonable apprehension of a breach of the peace.8

53. The British Law Commission, in their report Offences Relating to Public Order,[9] obviously preferred the Court of Appeal's definition of a breach of the peace in E. v. Howell, requiring actual or prospective harm to a person or his property. This would appear to be the more commonly accepted meaning of breach of the peace.[10]

Police Powers to Prevent a Breach of the Peace

54. As already noted, the concept of a breach of the peace is central to common law powers for the prevention of disorder. The police constable has a duty to preserve the peace and, therefore, to prevent breaches of the peace. Like all citizens, the constable has a, common lAw power of arrest where a breach of the peace has been committed in his or her presence or is reasonably apprehended in the immediate future.

The law was recently restated by the English Court of Appeal in R. v. Howell (1982):

> We hold that there is a power of arrest for breath of the peace where (1) a breach of the peace is committed in the presence of the person making the arrest, or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach, or (3) where a breach has been committed and it is believed that a renewal of it is threatened.[1°b]

It should be noted that reasonable apprehension of a breach of the peace requires that the apprehended breach of the peace be both imminent in time and in the immediate physical proximity. 10c These qualifications also apply to other common law

preventive powers for, in addition to the power of arrest, the courts have also' approved a wide range Of other police conduct which may be justified in the performance of their duty.

55. In Humphries V. Connor '(1864), [11] the plaintiff, a Protestant woman, was walking through Swanlibar, a largely Catholic Irish town, wearing an orange lily in her button hole. This provoked "several persons" who followed her, making "a great noise and disturbance" and threatening her with personal violence.[12] The defendant, an inspector of constabulary, asked the plaintiff to remove the lily, and when she refused he "gently and quietly, and necessarily and unavoidably, removed the lily from the plaintiff, doing her no injury whatever" 13 In an action for assault, the Court of the Queen's Bench held that the defendant had a good defence if he could show that what he did was, under the circumstances, necessary to prevent a breach of the peace. Fitzgerald J., Whilst concurring with the judgment of his two brothers, doubted

> whether a constable is entitled to interfere with one who is not about to commit a breach of the4peace, or to do, or join in any illegal act, but who is likely to be made an object of insult or injury by other persons who are about to break the Queen's peace.[14]

Bumphries v. Connor was followed in O'Kelly v. Barvey (1882).[15] The defendant, a. local justice of the peace, called on a Land League meeting to disperse, fearing a violent clash with a counter-demonstration organised by Orangemen. When Land League supporters refused to disperse, the defendant put his hand on the plaintiff in an attempt to disperse the crowd. In an action by the plaintiff for assault and battery, the Court of Appeal held that the question to be resolved was this:

> [A]ssuming the plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the defendant believing as he did that there Would be a breach of the peace if they continued so assembled, and that there was no other

> way in which the breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting - was the defendant justified in taking the necessary steps to stop and disperse it?[16]

The Court of Appeal found that the defendant was so justified.

56. Thus, it would appear that a police constable can take whatever action is, under the circumstances, necessary to prevent a breach of the peace; in the case of a public meeting this includes dispersing the meeting, if the constable reasonably believes that there is no other way to avoid a breach of the peace.

57. Thomas v. Sawkins (1935)[17] established that the police also have power to enter and remain on private premises (as opposed to public premises to which the police have a right of access) when a public meeting is being held there and the police reasonably believe that if they are not present a breach of the peace will be committed. A hall had been hired to hold a public meeting to protest against the Incitement to Disaffection Bill, which was then before the British Parliament, and to demand the dismissal of the Chief Constable of Glamorgan. When two police officers arrived at the hall, they were told that instructions had been given not to admit police officers. Despite this, they insisted on entering and sat in the front row, refusing a request from Thomas, one of the convenors of the meeting, to leave. Thereupon, Thomas went to the police station, lodged a complaint, and gave an undertaking that there would be no breaches of the peace if the police were immediately withdrawn. On returning to the meeting, Thomas again asked the police officers to leave, but they again refused. When Thomas laid his hand on one of the officers to eject him, the other police officer,. Sawkins, pushed Thomas's arm away. As a result of other police officers arriving, no further attempt was made to eject them. No criminal offence was committed at the meeting, nor was there a breach of the peace or any disorder, before or after the arrival of the police.

Thomas preferred an information against Sawkins alleging that Sawkins had unlawfully assaulted and beaten him. The local justice dismissed the information on the ground that the police officers were entitled to enter in carrying out their duty. The justice found that the police had reasonable grounds for believing that breaches of the peace would occur if the police were not present. But as Professor Goodhart pointed out, the justices did not say "who was likely to cause these breaches of the peace or where they would take place; whether by the supporters of the meeting or by their opponents, in the hall or outside". [18] On appeal to the Divisional Court, Lord Hewart C. J. held that:

> it is part of the preventive power and, therefore, part of the preventive duty, of the police, in cases where there are reasonable grounds of belief as the justices have found in the present case, to enter and remain on private premises ...
>
> [a] police officer has ex virtute officii full right ... [to enter and remain on private premises] when he has reasonable grounds for believing that an offence is imminent or is likely to be committed.[19]

It is notable that Lord Hewart, with whom Avory and Lawrence JJ. agreed,[20] did not restrict this power of entry to apprehended breathes of the peace. He held that the power exists where any offence is apprehended.

58. Professor Goodhart called the case "a constitutional innovation" on the basis that there was absolutely no authority for the court to uphold the existence of such a power.[21] He pointed out that although both Lord Hewart and Avory J. identified as a material fact that the public had been invited to attend the meeting, it is clear that an invitor is entitled to exclude any individual he chooses, and that an excluded person attempting to enter the meeting, commits a trespass. Goodhart went on to say that:

> if the police were entitled to enter after the invitation was withdrawn, it follows that they would have been entitled to enter even if no invitation had ever been given; nor can a distinction be drawn between a private meeting halt and other private premises, for the occupier of a hall has as much right to exclude a trespasser as has the occupier of a private house. Therefore, if the police are entitled to enter a private hall,. as in the present case,, it will not be possible to deny them an equal right when they demand entry into a private house[22]

Thus it would appear, following Thomas v. Sawkins, that a police officer has a power to enter and remain on private premises whenever he or she reasonably believes that it he or 'she is:not present an offence or a breach of the peace will be committed.[23] The only check on this power is the requirement for reasonable belief, which the police officer will have to establish to the satisfaction of the court, if the exercise of the power is challenged.

59. Summarising the discussion so far, the police have the following common law powers to prevent a breach of the peace: first, a power of arrest (in common with all citizens); secondly, a power to take whatever action is, in the circumstances, necessary - this includes interfering with a person (assault - Humphries v. Connor), and dispersing a meeting (O'Kelly v. Harvey); and thirdly, a power to enter and remain on private premises (Thomas v. Sawkins).

Obstruction of the Police in the Execution of Their :Duty

60. Exercise of the above common law powers are backed up by criminal sanctions for obstruction. It is an offence to wilfully obstruct a police officer in the execution of: his duty. [24] Until recently, it was thought that mere disobedience of a police officer's instruction during the course of a meeting or demonstration, could constitute the offence. The basis for this was the decision in Duncan v. Jones (1936).25

61. At 1 p.m. on 30 July 1934, about thirty people collected to hold a public meeting to protest against the Incitement to Disaffection Bill in Nynehead Street, Deptford, near the entrance of an unemployed training centre. The appellant, Mrs Duncan, was about to mount a box, on the opposite side of the road to the training centre, to address the meeting, when the Chief Constable of the district told her that the meeting could not be held in Nynehead Street, but that it could be held in Desmond Street, about 175 yards away. Mrs Duncan replied that she was going to hold the meeting where she was, and started to speak to the people assembled. Inspector Jones, the respondent, who had accompanied the Chief Constable, then arrested Mrs Duncan and she submitted without resistance.

62. She was convicted by a local magistrate of obstructing a police officer, Inspector Jones, in the execution of his duty, and fined 40 shillings. On appeal to the London Quarter Sessions, it was not alleged that there was any obstruction of the highway or of the access to the unemployed training centre, except insofar as the box and people surrounding it necessarily obstructed the street.

63. Nor was it alleged that Mrs Duncan or any of the people present at the meetinbg had either committed, incited or provoked a breach of the peace. But it was proved or admitted that following a previous meeting held at the same place on 25 May 1933, which Mrs Duncan had addressed, there had been a disturbance inside the training centre for the unemployed. The superintendent of the centre, who had attributed the disturbance to that meeting, fearing a repetition of the disturbance, contacted the police prior to the meeting of 30 July 1934. As a result, the chief Constable and Inspector Jones apprehended a breach of the peace if the meeting were allowed to be held.

64. The deputy-chairman of the London Quarter Sessions was of the opinion:

> (1) that in fact (if it be material) the appellant must have known of the probable consequences of her holding the meeting namely, s. disturbance and possibly a breach of the peace - and was not unwilling that such consequences should ensue;
>
> (2) that in fact the respondent reasonably apprehended a breach of the peace;
>
> (3) that in law it thereupon became his duty to prevent the holding of the meeting; and
>
> (4) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty. 26

The appeal was, therefore, dismissed. Mrs Jones appealed by way of case stated to the Divisional Court on the question whether the deputy-chairman could, in law, make such a finding.

65. The Divisional Court dismissed the appeal with minimal reasoning and citing no authority for their confirmation- of the deputy-chairman's findings. Lord Hewart C. J. said:

> In my view, the deputy chairman was entitled to come to the conclusion to which he came on the facts which he has found and to hold that the conviction of the appellant for wilfully obstructing the respondent in the execution of his duty was right.[27]

Humphreys J. could "conceive no clearer case than that"i[20] and Singleton J. was "Of the same opinion".[29]

66. Lord HeWart dismissed Beatty v. Gillbanks (1882)[30] as a "somewhat unsatisfactory cass",[31] and seemingly, though it is not clear, distinguished it on. the basis of Field J.'s finding that the Salvation Army officers (charged with Unlawful assembly) who marched through the streets of Weston-Super-Mare did not intend a disturbance Of the peace as the natural consequence of their acts,.[32] By way of contrast, Lord Hewart noted that the deputy chairman of the London Quarter Sessions

had found that Mrs Duncan "must, have known of the probable consequences of her holding the meeting - namely a disturbance and possibly :a breach of the peace - and was not unwilling that such consequences should ensue".[33] But this-is not a true contrast, because the Salvation Army officers must also have known that "the probable consequence" of their procession would be a disturbance and breach of the peace,[34] and Mrs Duncan probably did not "intend" a disturbance of the peace as the natural consequence of her act, even though she knew it was probable.

67. A question often asked about Beatty v. Gillbanks is why the Salvation Army officers were charged with unlawful assembly and not obstruction of the police in the execution of their duty as in Duncan v. Jones. What used to be the commonly given' answer,[35] that the latter offence did not exist in 1882, has been shown to be incorrect: obstruction of the police in the execution of their duty has been a statutory offence in England since 1831.[36] The correct explanation is that until Duncan v. Jones, the courts' had taken the view

> that unless an assembly was unlawful, the police had no duty to disperse it, and hence the offence of obstructing ... the police when in the execution of their duty could not be proved without first proving an unlawful assembly.[37]

In Betty v. Gillbanks the police therefore preferred to proceed on a charge of unlawful assembly. In any event, it was considered at that time that obstruction of a police officer involved physical obstruction, meaning some act of direct interference with police activity 38

> Daintith states that Duncan v. Jones was:
>
> a radical departure from the established principle that the powers and duties of the police in relation to public meetings were confined to dispersing unlawful assemblies. For this principle the

> Divisional Court substituted the proposition that the police had a duty to prevent breaches of the peace, and hence a power to proscribe any conduct, whether or not amounting to an unlawful assembly, which created in them a reasonable apprehension of a breach of the peace.[39]

684 Duncan v. Jones is also a radical departure from the other previously mentioned cases on preventive police powers.- Humphries v. Connor, O'Kelly v. Harvey, and even Thomas v. Sawkins, reflect a judicial policy encouraging the preservation of order by the police by providing immunity from civil or criminal liability in respect of the reasonable exercise of powers to prevent a breach of the peace," In these three cases, the police officers (a justice of the peace in O'Reilly v. Harvey) were able to plead as a defence that they had acted reasonably in the execution of their duty to prevent a breach of the peace, and were, therefore, immune from liability. Most people would accept that it is desirable for the law to encourage preventive police action by providing such immunity.

69. However, it is quite another thing to adapt such a judicial policy to support the creation of a criminal offence. The reasonable apprehension of 'a breach of the peace, which is the precondition for the exercise of these preventive powers and, therefore, the basis of the immunity from liability, becomes in Duncan v. Jones a vital element in the offence of obstruction of the police. What had formerly been a shield - the immunity from the liability - became, in Duncan v. Jones, a sword. Whether or not a person who has disobeyed a police officer's instruction commits an offence, depends upon whether the police officer reasonably apprehended a breach of the peace. Where there is such reasonable apprehension, disobeying a police officer's command makes conduct unlawful which would otherwise be lawful. Professor Wade concluded that this

> makes the apprehension of a policeman, provided it is reasonable, the decisive factor as to whether a meeting should be held ... The case thus leaves the law in the unsatisfactory position that it is for the

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> police to decide whether a political party can organise a meeting in a district Where its opponents are known to be hostile. The apprehensions of a single policeman based upon the fears of somebody else may apparently be decisive. 41

Wade and Phillips consider

> [t]he threat to liberty in Duncan v. Jones domes from the finding as to Mrs Duncan's knowledge of the possible consequences of her holding the meeting, without any allegation of incitement or provocation by her of any person to commit a breach of the peace.[42]

As Professor Goodhart has observed:

> At first sight it may seem unreasonable to say that a. police officer cannot take steps to prevent an act which, when committed, becomes a punishable Offence. But it is on this distinction between prevention and punishment that freedom of speech,. freedom of public meeting and freedom of the press are founded. [43]

70. Duncan v. Jones was followed in Piddington v. Bates (1960). [44] That Case concerned the picketing of a printer's works by 'eighteen men. Chief Inspector Bates told Piddington that two pickets at each of the two entrances was enough. Piddington moved to join the pickets, pushed gently past Bates, and was gently arrested and charged with obstructing a police officer in the execution of his duty. On conviction, he appealed to the Divisional Court, but the Court accepted the magistrate's finding that Bates "was justified in anticipating breach of the peace unless steps were taken to prevent it", and dismissed the appeal. Lord Parker with whom Ashworth and Elwes J. J. agreed, stated the law at follows:

> First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is clearly not enough. Secondly, it is not enough that his contemplation is that there is a remote possibility; there must be a real possibility of a breach of the peace. Accordingly, in every case, it becomes a question of whether, on the particular facts, it can be said that there were reasonable grounds on which a constable charged with this duty reasonably anticipated that a breach of the peace might occur.45

71. In New Zealand, Duncan v. Jones was followed in a case with similar facts, Burton v. Power (1940), [46] and, more recently, in Police v. Newnham (1970),[47] where Mahon J. stated that

> the power of a police officer to arrest a person who is not engaged in any conduct unlawful per se ... exists in a formulated category of cases where -a police officer is required to adopt a course of action in order to prevent a breach of the peace or in order to safeguard lif or property, and where his course Of action is hindered by someone to the extent that the constable finds himself obstructed in the course of carrying out that duty. 48

72. Until 1981, there were no reported cases in which Duncan v. Jones had been discussed in an Australian court, although it seems to have been generally accepted that the principle set out in Duncan v. Jones applied.[49] In that year, the case of Forbutt v. Blake[50] was decided by Connor A. C. J. in the Supreme Court of the Australian Capital Territory. This case involved a group of woman attempting to march at the end of the Anzac Day parade as a protest about women raped in war. (see paragraph 18 above)

73. Whilst Connor A. C. J. found that the police officer "reasonably anticipated a real possibility of a breach of the peace if he did not intervene",[51] Connor declined to follow Duncan v. Jones, stating that he had been unable to discover any reported case in Which Duncan v. Jones had been adopted or applied by any Australian Court. He foresaw that if that case were followed there would be "quite extraordinary results":

> A policeman might bona fide form the view that the attendance of a person, holding an exalted public office, at an official function might provoke some errant members of the public to commit breaches of the peace. He could presumably order that person to stay away from the function and, if he disobeyed, could charge him with obstructing the police in the

> execution of their duty. Members of parliament could thus be forbidden to address hostile audiences during election campaigns. It is to be observed that the penalty for the offence of obstructing the police 'under s.64(1) Australian Federal Police Act 1979 (Cwth)], if tried on indictment, is imprisonment for two years. I am quite unable to attribute an intention to the legislature to expose a person to such a Penalty for disobeying a police order to cease a lawful activity in circumstances Where the only relevant police duty is to prevent a breach of the peace ' by other citizens against him what was said by O'Brien J. in B v. Londonderry Justices (1891)[52] seems much in point: 'If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent the result, not the legal condemnation of those who exercise those rights'.[3]

74. So saying, Connor allowed the appeals against conviction. Thus, at least in the Australian Capital Territory, what Brownlie has called "an intolerable restriction on freedom of speech and freedom of assembly"[54] has been removed.[55] Where there is violence, there remain a wide range of criminal offences available to the police.

Binding-Over to Keep the Peace and be of Good Behaviour[56]

75. In their role as officers Of the peace,[56]a justices have long hacia duty to do all they reasonably can to suppress riots and otherdisturbances of the peace.[5613] Allied to this duty, justices have, in their magisterial capacity, power to order a person appearing before them to enter into a recognisance, with or without sureties, to keep the peace and be of good behaviour for a specified period in the future. A recognisance is a written undertaking to secure compliance with the terms of the order, for breach of which the person bound over and his sureties forfeit .a specified sum to the Crown. A refusal to enter into a recognisance, or a failure to provide any sureties that may be required, is punishable by a term of imprisonment.

76. A binding-over order is designed to prevent future misconduct or breaches of the peace, described by Blackstone as "preventive justice":

> This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and give full assurances to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace or for their good behaviour.[57]

Avory J. in Lansbury v. Riley (1914)[58] described the power to bind over

> as a branch of preventive justice, in the .exercise of which 'magistrates are invested with large 'discretionary powers for the maintenance of order and the preservation of the public peace it rests on the maxim or principle salus populi suprema lex [the welfare of the people is the paramount law], in pursuance of which it sometimes happens that individual liberty may be sacrificed and abridged for the public good.[5].

Whether or not such a sacrifice of individual liberty can still be justified will be considered later..

77. The origin of the power to bind over is ancient and obscure. The requirement to give sureties is probably founded in the Anglo-Saxon system of frankpledge, whereby the ten families in a tithing were mutually responsible for each other's conduct. The power to bind over is probably coeval with the commissioning of conservators of the peace at the end of the twelfth century.[80] There is a distinction between the power to bind over to keep the peace, and the power to bind over to be of good behaviour. The former is said to emanate from the common law and be exercisable on a complaint that a person has threatened personal violence or has actually assaulted another person. The terms of an order to keep the peace can be specifically in respect of the complainant, or more generally in

respect of all the Queen's subjects. The power to bind over to be of good behaviour is thought to derive from the Justice of the Peace Act 1361,[61] and be exercisable where a person has committed or threatened to commit any criminal offence whether or not a breach of the peace was involved 62 But whatever the origin, the courts have made it clear that the power to bind over is indisputably part of the jurisdiction of the justice of the peace, and others like magistrates and judges who have similar authority.[63]

78. The distinction between the power, to bind over to keep the peace and the power to bind over to be of good behaviour is no longer of great significance. Glanville Williams says there is no doubt that the latter power is inclusive of the former 64 Many binding-over orders now require that a person both keep the peace and be of good behaviour. However, while in E. v. Wright; ex parte Klar (1971)[65] Bray C. J. said that it seemed to him that the two powers had "undergone some sort of process of merger", he went on to say that it was "regarded as one power with two species".[66] Further, where there has been some statutory re-enactment, this may refer specifically, to one power or the other.[67] Nevertheless, for the purposes of this discussion, the two types of order will be treated as one.

79. Statistics for England and Wales quoted by Grunis show that binding-over orders are widely used.[68] In 1973, Magistrates Courts imposed $^{9}.93^{8}$ orders. Binding-over orders are used in respect of a wide range of conduct. First, where an offence has been committed, a binding-over order is made, usually in addition to the prescribed penalty, as an incentive to the defendant not to repeat the offence. Secondly, on the laying of an information or complaint, where although no offence is found to have been committed, or is even, on occasion, alleged, the court believes that such an order is necessary in order to prevent apprehended future misconduct.

80. Binding-over orders are not confined to situations of public disorder. Such orders are used in domestic disturbances, quarrels between neighbours, cases of persistently annoying conduct such as threatening letters or telephone calls, soliciting by prostitutes and transvestites.[69] In relation to public order, binding-over orders have been used in cases of obstruction of the highway, obstruction of the police in the execution of their duty, the threatening, abusive or insulting words and behaviour, and provoking a breach of the peace 76

81. One of the leading cases on binding-over orders is Lansbury v. Riley (1914).[71] In 1913, George Lansbury spoke on a number of occasions at meetings of suffragettes campaigning for the vote for women, advocating militancy and urging women to continue breaking the law. He was summoned on an information charging "that he was a disturber of the peace and an inciter of others to commit breaches of the peace and that he was likely to persevere in such unlawful conduct" [72] The magistrate found that Lansbury's speeches incited others to commit breaches of the peace, that he was likely to continue making similar speeches, and, therefore, required Lansbury to enter into a personal recognisance of 1,000 pounds, and to find two sureties for his good behaviour of 500 pounds each, in default of which he would be imprisoned for three months. The Divisional Court, on an appeal by way of case stated, upheld the magistrate's decision, stating that it need not be shown that any one was put in bodily fear - mere apprehension of a breach of the peace is sufficient. 73

82. An earlier case, Wise v. Dunning (1902),[74] concerned a Protestant crusader, Pastor George Wise, who had held a number of public meetings in Liverpool, in the course of which he insulted Roman Catholics by, for example, calling them "rednecks", wearing what looked like rosary beads, and waving a crucifix above his head. As a result there had been

disturbances, allegedly caused by incensed Roman Catholics. A magistrate ordered Wise to enter into a recognisance of 100 pounds, with two sureties of 50 pounds each, to keep the peace and be of good behaviour for the ensuing 12 months, and in default to be imprisoned for two months. The Divisional Court upheld the magistrate's order. Lord Alverstone C. J. held that for a binding over order to be made,

> there must be an act of the defendant, the natural consequences of which, if his act be not unlawful in itself, would be to produce an unlawful act by other persons.[75]

His Lordship found that there was abundant evidence that Wise had used insulting and abusive language which had caused an obstruction and provoked a breach of the peace, and that he intended to continue doing so. Beatty v. Gillbanks[76] was distinguished on its facts: in that case, the Salvation Army officers had not intended that a disturbance should be the consequence of their acts. Wise had used deliberately insulting words and gestures, knowing there were Roman Catholics in the audience, and that the natural consequence was likely to be a disturbance 77

83' Fifty years later, in Everett v. Ribbands (1953).[78] Denning L. J., as he then was, said that a binding-over order,

> can only be made against the man if two things exist: first, a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach; secondly, a reasonable fear that this threat will be carried into effect. The order, once made, will result in imprisonment if the accused man has no friends to stand by him. This imprisonment must be founded on something actually done by him. It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do. Hence there must be something acutally done by him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law.79

Regrettably, Lord Denning's obiter dictum, described by Glanville Williams as an ."admirable... statement of what the law ought to be",[80] does not reflect the current state of the law. The power to bind over has even been used against witnesses'. In the course of the trials of those arrested during the anti-National Front demonstrations in Southall, London in 1979, a number of demonstrators or by-standers "who had been called as witnesses for the defence and Who had not themselves been arrested or charged were bound over by the Magistrates".[81] In E. v. Aubrey-Fletcher; ex parte Thompson (1969), 82 binding-over order was made against Thompson who had been charged with using insulting words and behaviour. When, at the end of the first day, the magistrate adjourned the trial, he bound Thompson over to keep the peace for three months on his own recognisance of 500 pounds, with imprisonment for 90 days in default. On Appeal to the Divisional Court, Lord Goddard C. J. held that such an order could be made at any time during the proceedings, provided it had emerged that there might be ,a breach of peace in the future [83] Edmund Davies L. J., agreeing, held that:

> There must emerge during the course of the hearing, which need not be a completed hearing, material from which it may fairly be deduced that there is at least a risk of breach of the peace in the future.[84]

In this case, the hearing had not reached that, stage and the order was, therefore, quashed.

84. As explained earlier, a recognisance is a written , undertaking to secure compliance with the terms of the order, for breach of which the person bound over and his sureties, if any, forfeit a specified sum to the Crown. At common law, the duration of the order and the sum or sums specified in the recognisance are within the unlimited discretion of the magistrate. Flick gives the example of a case in 1789 where a person was bound over for fourteen years (later reduced to two)

on his personal recognisance of 10,000 with two sureties of 5,000 each.[85] The sum specified in the recognisance can also exceed **the** maximum fine permitted in respect of the criminal offence of which a person has been convicted, where a binding-over order is made as an additional preventive)11easure.0[6] In the case of Courts of Petty Sessions, the power to impose a term of imprisonment in default of entering into the required recognisance is now limited by statute, in England and Wales to six months,[8]7 in Australian jurisdictions according to the general sentencing powers of Courts of Petty Sessions. In the A.C.T. the maximum is six months,imprisonment.[88] Judges of the and N.S.W. Supreme Courts have the unlimited powers of judges of the King's Bench Division of the English High Court as at the date of reception of *N.S.W.*, 25 July 182.8. It was thought until recently that judges of the A.C.T. Supreme Court had similar powers; but there is now some doubt whether this ex officio power was transmitted under the A.C.T. Supreme Court Act. Statutory rectification may be required.[88]a

85. The power to make a binding-over order does not include the imposition of any further conditions. In E. v. Wright: ex parte Xlar (1971),[89] Klar was convicted of two offences committed in the course of a demonstration against the war in Vietnam. The magistrate ordered Klar to enter into his own- recognisance in the sum of $250 to be of good behaviour and keep the peace and "not engage in any activity which involves a breach of public order' during the ensuing 12 months". On an application for the prerogative writ of certiorari to quash the binding-over order, the Supreme Court declined to quash the order but struck out the condition. Bray C. J. held that the magistrate had no power to impose additional conditions,[90] while Zelling J. held that the condition was, in any event, bad for uncertainty.91

86. The binding-over power of justices of the peace was assumed in each Australian state on foundation, as part of the applicable Imperial law [92] In R. V. Wright; ex parte Klar the Supreme Court of South Australia held that the power of justices of the peace to bind over persons to keep the peace and be of good behaviour, possessed by justices of the peace in England on 28 December 1836, the date of foundation of South Australia, was thereafter possessed by justices of the peace in South Australia.[93] Thus, the common law and the Justice of the Peace Act 1361 continue to apply unless modified by later local legislation.[94] With respect to the A.C.T., this was acknowledged by Connor A. C. J. in Forbutt v. Blake.[95]

87. In most Australian jurisdictions the ancient binding-over power has been largely superseded by statutory enactment, although often this is substantively only a partial codification.[96] For example, in the A.C.T., section 547(1) Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.) recognises the power of justices to make a binding-over order in a case of apprehended violence to the person of another, or apprehended injury to property. Sections 196 and 197 of the Court of Petty Sessions Ordinance 1930 (A.C.T.) give power, respectively, to order sureties to keep the peace, or be of good behaviour. The ancient binding-over power has also often been expanded by statute. So, for example,. section 19B of the Crimes Act 1914 (Cwth) allows a Court of Summary Jurisdiction to release an offender on a binding-over order without proceeding to conviction. However, there is currently doubt about whether A.C.T. magistrates possess the power to bind over because their powers in this respect appear to be those of a justice of the peace, and in the A.C.T. the powers of a justice of the peace re extremely limited. 96 As with judges of the A.C.T. Supreme Court, the persons of the A.C.T. magistrate d may require statutory rectification.

88.- A justice of the peace can make a binding-over order on his own initiative against any person appearing before him, or on the laying of an information or complaint requesting that the defendant be bound over. Originally, in the latter case the defendant had no right to give evidence contradicting the complainant's allegations, or to cross-examine the complainant Or his Or her witnesses. Nor was there power to award costs, nor any right of appeal because a binding-over order does not constitute a cOnviction.[97] In England, this was altered by section 25 of the Summary Jurisdiction Act 1879, now section 91 of the Magistrates Courts Act 1952, although a right of appeal was not established until the Magistrates' Courts (Appeals from Binding Over Orders) Act 1956. The higher courts have also clearly stated that magistrates considering a request for a binding-over order, must comply with the rules of natural justice,[98] and allow the defendant or his/her legal representative an opportunity to make representations against the imposition of an order, when the recognisance is being considered. 98a

89. In the A.C.T., the procedure is regulated by the Court of Petty Sessions Ordinance 1930. There is no special power of arrest without warrant to take _a person before a magistrate justice to have him or her bound over [99] Grounds for an arrest must exist in the ordinary way. Under section 199(1) of the Ordinance, where an information in writing is laid before a magistrate' on oath, the magistrate may, if he or she thinks fit, issue a warrant of arrest.

90. The Ordinance also sets out the procedure to be followed when there is a breach of the recognisance .[2] However, what has never been clear is what conduct constitutes a breach of the undertaking to keep the peace and/or to be of good behaviour, which justifies the sum specified in the recognisance being forfeited to the Crown.[3] Is it only conduct of a similar nature to that which the binding-over order was designed to

prevent, which constitutes a breach? Or does any criminal misconduct constitute a breach?

91. In Devine v. E. (1967),[4] Devine was convicted of unlawfdl carnal knowledge of a girl under the age of 16 and released (under section 20 Crimes Act 1941 (Cwth)) on his entering into a recognisance to be of good behaviour for a period of three years' and to appear for sentence if called upon at any time during that period. Two and a half years later he was convicted. of three traffic offences, all relating to one incident.

Application was made to estreat The recognisance, on the ground ' that the traffic offences constituted a breach of the condition binding Devine to be of good behaviour, and he was sentenced' to three years hard labour. Although the conviction was quashed by the High Court on other grounds, Windeyer J. expressed doubt as to whether the traffic offences constituted a breach of the recognisance:

> I cannot perceive the rationale of the proposition that by driving a motor car at more than thirty miles an hour the offender would render himself liable to be punished for having had intercourse with a girl under the age of 16.[5]

92. Grunis concludes that "most conduct which justifies the making of a binding-over order can also serve as a basis for forfeiture",[6] though he submits that this is subject to the important limitation that to justify forfeiture the conduct should also constitute a crime.[7] In any event, it is clear that this question should be resolved by statute, for otherwise a person bound over does not know what he/she can or cannot do.

93. A number of other criticisms can be levelled at the power to bind over. As noted above, there is no limit either on the sums specified in the recognisance, or on the period for which the order is made. There is no power to impose a fine in lieu of imprisonment, and there is uncertainty over what conduct justifies the making of a binding-over order.

94. The beginning of this section on binding-over included a quote from Blackstone describing the power to bind over as "preventive justice". At the time this power developed, over six hundred years ago, and for the ensuing centuries, there was no established professional police force· —law enforcement and the maintenance of order was community responsibility. Today, with a professional police force who have extensive common law and statutory powers, it is arguable that there is no longer a need for this brand of ‹preventive justice which can mean the Sacrifice of individual liberty where a person has neither committed a criminal offence,[8] nor been involved in an actual breach of **the** peace. Furthermore, in recent years a much wider range of sentencing options have been developed, in particular the use of Conditional discharges and suspended sentences.[8] While in the federal sphere existing sentencing powers do need clarification,[10] nevertheless use of the „conditional discharge or suspended sentence gives the courts a sufficient power to make an order to deter an offender from repeating past criminal conduct.-

95. The law of binding-over is clearly in need of review.[11]

The Use of the Injunction,, as a Control

96. Finally, in this chapter on common law prevention and control measures, there is the injunction. Though of its nature adjectival to other rights and obligations recognised by law,[12] the injunction, developed originally in the 'Court of Chancery, is an equitable remedy which can be used to restrain the doing of an unlawful act. An interlocutory ¯injunction may be granted after the issue of the writ if the plaintiff can show that he/she may suffer irreparable loss pending the determination of his/her claim.

The use of the injunction in the control of assemblies is novel. In the University of Sydney v. Greenland (1970),[13] Street J. intimated that injunctive relief might be available to forestall threatened demonstrations in the public streets.[14]

97. This was tested some years later in Meriton Units Pty Ltd V. Rule (1983).[14]a The plaintiffs, who were erecting a14 storey building on land owned by them in Kings Cross, sought the continuance of an interlocutory injunction restraining the defendants, members of a residents' action group, from holding meetings on the footpath or on land opposite with intent to disrupt work on the site. Needham J. held that unless there was evidence that the defendants had interfered with the plaintiff's operations, crowds opposing the plaintiff's operations would not amount to an actionable nuisance:

> It may create an annoyance, but unless otherwise shown the courts would protect common law rights of freedom of speech and association.[14]b

98. In the English case Hubbard v. Pitt (1976),[15] a group of about six people who objected to changes in the character of the neighbourhood where they lived and Worked, .picketed the office′ of an estate agent, Prebble & Co., whom they believed was improperly assisting property developers. The plaintiffs, who were partners in the firm of Prebble & Co. sought an interlocutory injunction to restrain the defendants from picketing. Forbes J., granting the interlocutory injunction, held that the picketing was an unreasonable user of the highway and a public nuisance. The majority of the Court of Appeal,. Stamp and Orr L— J. J., Lord Denning M. R. dissenting, upheld the interlocutory injunction, but on the ground that the plaintiffs had a real prospect of establishing at trial that the defendants had committed a private nuisance against them,[16] and that the balance of convenience favoured the grant of an interlocutory injunction to stop the picketing until the trial of the action. For if the picketing were to continue, "the continuance might well cause very Serious damage to their

business")-[7] Both Stamp and Orr L. J. J. doubted Forbes J.'s finding that there had been an unreasonable User of the highway constituting a public nuisance.

99. Lord Denning M. H. held that "the presence of these halt dozen people on a Saturday morning for three hours was not an unreasonable user of the highways"[19] and, therefore, did not constitute a public nuisance. He went cm to say, with regard to the tort of primate nuisance upon which the Plaintiffs had relied in their claim,

> Picketing is not a nuisance in itself. Nor is it a nuisance for a group of people to attend at or near the plaintiffs' premises in order to obtain or communicate information or in order peacefully to persuade. It does not become a nuisance unless it is associated with obstruction, violence, intimidation, molestation or threats.[19]

100. A private nuisance is "an unreasonable interference with the enjoyment by its owner of an estate in land",[20] actionable as a tort. A public nuisance is "an interference with the rights of the public, or a section of the public ",[21] actionable both as a common law misdemeanour, and as a tort. The importance of the distinction between the torts of private and public nuisance is that the latter is generally only actionable at the suit of the Attorney-General,. acting in the public interest. The Attorney-General may be Prepared to act at the relation of an individual Person (including a local authority) but otherwise a person can only maintain an action if he can show he has suffered material damage over and above the rest of the community.[22]

101. Thus, locus standi may be a Problem for those seeking relief for public nuisance, and in the absence of some express statutory provision, a public authority is no better placed than an ordinary individual 23 However, in New South Wales, unlike other States, local councils do have special standing by virtue

of section 587 of the Local Government Act 1919 (N.S.W.), which enables them to institute proceedings "in any case in which the Attorney-General might take proceedings on the relation or on behalf or for the benefit of the council for or with respect to enforcing or securing the observance of any provision made by or under this Act ... n.24

102. Wallington[25] sees a particular danger for -civil liberties in the use of interlocutory ,injunctions following the decision of the House of Lords in American Cyanamid Co-v. Ethicon Ltd (1975).26 Their Lordships declared unanimously that there was no rule requiring that a 'plaintiff seeking an interlocutory injunction had to satisfy the court that he had a prima facie case, as had been thought previously.' The plaintiff need only show

> that the claim is not frivolous or vexatious; in other words, that there is a Serious question to be tried ... the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.[27]

103. In practice, the majority of cases involving interlocutory proceedings never proceed to trial, and the outcome of the interlocutory proceedings has the effect of a final determination.[28] It is, therefore, essential that the substantive issues are considered at the interlocutory stage. The House of Lords decision precludes this. Wallington notes that where intangible interests are involved, especially civil liberties, "the steam quickly goes out of the claire:[28]

> A dispute over the holding of a public meeting fades into oblivion with the issue which was to have been its subject-matter.[30]

104. There is also a bias in favour of the plaintiff who has secured interim relief, for it is then up to the defendant to ensure the matter goes to trial.

105. In Australia, while Wallington's,comments on the finality of interlocutory proceedings hold good, the courts have declined to follow American Cyanamid Co. v. Ethicon Ltd. In Beecham Group Ltd v. Bristol Laboratories Ptv Ltd (1968)0[1] the High Court held that on an application for an interlocutory injunction the plaintiff must make out a prima facie case,

> in the sense that if the evidence remains as it is, there is a probability that at the trial of the action the plaintiff will be held entitled to relief.[32]

This test was applied by a Full New South Wales Supreme Court in Shercliff v. Engadine Acceptance Corporation Pty Ltd (1978),[33] and by Mason J. in ACOA v. Commonwealth (1979),[34] both courts declining to follow the test set out by the House of Lords in American Cyanamid Co v. Ethicon Ltd.

106. To conclude, one would expect that the use of the injunction as a control for public assemblies or demonstrations in Australia is likely to remain rare. The problem of locus standi, and the availability of other statutory controls examined in Chapter 5 militate against it.

Footnotes to Chapter 4

1. British Government Green Paper, Review of the Public Order Act 1936 and related legislation Cmnd 7891 (1980) para-120.

2. This power was recently affirmed by the House of Lords in Albert v. Lavin [1981] 3 All E.R.878.

3. Glanville Williams, "Arrest for Breach of the Peace", [1954] Crim.L.Rev. 578, 578.

4. ;bid 579, and see Michael Supperstone, Brownlie's Law ot Public Order and National Security (2nd ed. 1981) 1-3.

5, R. v. Howell [1981] 3 All E.R.383.

6. Ibid 389.

7. R. v. Chief Constable of the Devon and Cornwall [1981] 3 All E.R.826.

8. Ibid 832.

9. British Law Commission, Offences Relating to Public Order Report No.123 (1982) paras 5.8, 5.9, 5.14. See also the , Commission's Working Paper No.82, Offences Against Public Order (1982).

10. A. T. H. Smith, "Breaching the Peace and Disturbing the Public Quiet" [1982] Pub.L.212. Whilst I am not aware of any recent Australian cases discussing the meaning of breach of the peace, violence was certainly a component of the breach of the peace envisaged in Forbutt v. Blake (1981) 51 FLR 465.
    (a) Eg Parkin v. Forman and Valentine v. Liiley [1983] 1 QB 92; ftBean v. Parker (1983) 147 JP 205; Read v. Lavin [1982] AC 546, 565.
    (b) R. v. Howell [1982] QB 416, 425. A very similar meaning was applied by the House of Lords in Albert v. Lavin [1982] AC 546, 565.
    (c) A.T.H. Smith, "Public Order Law 1974 - 1983: Developments and Proposals"]1984] Crim L. Rev. 643, 648. But note the discussion of 'Close proximity' in Moss and others v. Charles McLachlan The Times Law Report 29 November 1984, a case on would be miners' strike pickets.

11. Humphries v. Connor (1864) lr. CLR 1.

12. Ibid 2.

13. the emphasis is original.

14. Ibid 9; W. Birtles, "The Common Law Power of the Police to Control Public Meetings" (1973) 34 Mod. L.Rev.587, 590.

15. O'Kelly v. Harvey (1883) 14 L.R. 1 . 105.

16. Ibid 109.

18. A. L. Goodhart, "Thomas v. Sawkinst A Constitutional Innovation" (1936) 6 Camb. L. J. 22, 28.

19. Thomas v. Bawkins [1935] 2 K.B.249, 254-255.

20. Ibid 255-257: Avory J. specifically refers to reasonable grounds for believing "seditious speeches would be made and/or that a breach of the peace would take place". Lawrence J., whilst agreeing with the conclusion, limits his eight-line judgment to the facts.

21. Goodhart, op cit 22; 25 ff.

22. Ibid 25.

23. E. C. S. Wade, "Police Powers and Public Meetings" (1937) 6 Camb. L.J. 175, 175-176.

24. A detailed description of this offence is included in Ch.6.

25. Duncap v. Jones [1936] 1 K.B.218.

26. Ibid 220.

27. ',bid 223.

28.

29. Ibid 223-224.

30. DgAlly v. Gillbanks (1882) 9 Q.B.D.308.

31. Duncan v. Jones [1936] 1 K.B.218, 222.

32. Ibid: Lord Hewart quoting Field J. in Beatty v. Gillbanks (1882) 9 Q.B.D.308, 314.

33. The deputy-chairman of the London Quarter Sessions quoted above.

34. Wade, op cit 178.

35. E.g. R. F. V. Heuston, ,Essays in Constitutional Law (2nd ed. 1964) 143.

36. T. C. Daintith, "Disobeying a Policeman. A Fresh Look at Duncan v. Jones" [1966] Pub. L.248, 249-251.

37. IbiLl 252.

38. Brownlie, op cit 111.

39. Daintith, op cit 253.

40. Ibid 258.

41. Wade, op cit 178-179; S. H. Bailey, D. J. Harris and B. L. Jones, Civil Liberties Cases and Materials (1980) 174 quote R. Kidd, British Liberty in Danger (1940) 24: "The police are set up by this judgment as the arbiters of what political parties or religious sects shall and shall not be accorded the rights Of freedom on speech and freedom of assembly".

42. Wade and Phillips, Constitutional and Administrative Law (9th ed. 1977 by A. W. Bradley) 503.

43. Goodhart, op cit 30.

44. Piddi gton v. Bates [1960] 3 All E.R.660.

45. Ibid 663. Brownlie, op cit 113-114 notes that two points should be borne in mind in considering Piddington v. sates - first, the facts disclose some physical obstruction; secondly, police intervention involved limitations on the right to picket. Brownlie does not express an opinion as to whether these points could be used to distinguish this case from Duncan v. Jones. Given that picketing is a work-related demonstration, this seems unlikely. For a discussion of other cases on obstruction of the police in the execution of their duty where the power to prevent a breach of the peace was not in issue see Daintith, op cit 254-257; Brownlie, op cit 114-116.

46. Burton v. Power [1940] N.Z.L.R.305.

47. Police v. Newnham [1978] 1 N.7-.L.R.844.

48. "big] 848.

49. Geoffrey A., Flick, Civil Liberties in Australia (1981) 111-112; E. Campbell & H. Whitmore, Freedom in Australia (1973 ed.) 169-170.

50. Forbutt v. Blake (1981) 51 FLR 465.

51. Ibid 470.

52. E. v. Londonderry Justices (1891) 28 L.R. lr. 440, 450 and see Beatty v. Gillbanks (1882) 9 Q.B.D.308, 314 where Field J. said:

> The present decision of the justices, however, amounts to this, that a man may be punished for acting lawfully if he knows that his doing so may induce another man to act unlawfully - a proposition without any authority to support it.

53. Forbutt v. Blake (1981) 51 FLR 465, 475.

54. Brownlie, op cit 113.

55. At the time, the Liberal Government was persuaded that as a result of the decision in Forbutt v. Blake the powers of the police to control assemblies were inadequate. The Traffic Ordinance 1937 (A.C.T.) was therefore amended to include a new provision (s.23A) enabling police to give directions in respect of the Anzac Day ceremonies. Contravention of a direction constituted an offence. However, s.23A has now been repealed.

56. On binding over orders generally, see Flick, op cit 113-118; Asher D. Grunis, "Binding-Over to Keep the Peace and be of Good Behaviour in England and Canada" [1976] Pub. L.16; Brownlie, ap cit 312-315; D. G. T. Williams, Keeping The Peace (1967) Ch.4; Glanville Williams, "Preventive Justice and the Rule of Law" (1953) 16 Mod. L. Rev.417.

56a 'Conservators of the peace' were first appointed following a royal decress of 1195 issued by Archbishop Hubert Walter, Richard I's chief justiciar. (T. F. T. Plunkett, Taswell - Langmead's English Constitutional History (11th ed. 1960) 123; W. S. Holdsworth, A History of English Law (2nd ed. 1937) i, 286-287.) After acquiring extensive policing, judicial, and administrative functions, their title was later changed to 'justice of the peace' by an Act of 1363 (36 Edw.III, st. 1, c.12: Holdsworth, op cit i, 288).

56b D. G. T. Williams, Keeping the Peace (1967) 30-32; R. v. Pinney (1832) 5 Car. & P. 254, 271-273 (172 E.R.962, 971-972).

57. Blackstone, Commentaries on the Laws of England (1769) iv, 251. Quoted e.g. in Lansbury V. Riley [1914] 3 K.B.229, 234, Devine v. E. (1967) 119 CLR 506, 514.

58. Lansbury v. Riley [1914] 3 K.B.229 234.

59. Ibid 237.

60. Grunis, op cit 18; D. G. T. Williams, op cit 88.

61. 34 Edw.III, c.l.

62. E.g. Glanville Williams, op cit 418; Flick, op cit 113-114; **R.** v. Wright: ex parte Klar (1971) 1 S.A.S.R. 103, 106-107 (Bray C. J.).

63. E.g. in the A.C.T. magistrates and judges of the Supreme Court. Devine v. R. (1967) 119 CLR 506, 514; Forbutt v. Blake (1981) 51 FLR 465, 474.

64. Glanville Williams, op cit 418; Grunis, op cit 25.

65. E. v. Wright: ex parte Klar (1971) 1 S.A.S.R. 103, 106-107.

66. Ibid 197.

67. E.g. Court of Petty Sessions Ordinance 1930 (A.C.T.): s.196 refers to keeping the peace, s.197 to being of good behaviour.

68. Grunis, op cit 17 - for 1971 and 1972 the figures were 8,802 and 9,478 respectively. There are no published Australia-wide or State statistics specifically for binding-over Orders.

69. D. G. T. Williams, op cit 91.

70. For recent examples in Britain see D. G. T. Williams "Civil Liberties and the Protection of Statute" (1981) 34 Current Legal Prob. 25, 30 and D. G. T. Williams, "Protest and Public Order" (1970) 28 Camb. L. J. 96, 104 ff.

71. Lansbury v. Riley [1914] 3 K.B.229.

72. Ibid.

73. Ibid 234-235, Bray J.; H. Street, Freedom, the Individual and the Law (4th ed. 1977) 54. Lansbury v. Riley was followed in **R.** v. Sandbach: ex parte Williams [1935] 2 K.B.192, see Avory J. at p.196.

74. Wise v. Dunning [1902] 1 K.B.167.

75. Ibid 176.

76. Beatty v. Gillbanks (1882) 9 Q.B.D.308.

77. Wise v. Dunning [1902] 1 KB 167, 175-176. See the discussion of Beatty v. Gillbanks and Wise v Dunning in D. G. T. Williams, Keeping the Peace 1967) 105-110, and Grunis, op cit 32-35. There is an extensive American literature on the issue of free speech, whic is constitutionally protected by the First Amendment, and the hostile audience. The courts rely on 'the clear and present danger of imminent violence' test to reconcile the competing interest of free speech and public safety. D. G. Barnum, "Freedom of Assembly and the Hostile Audience in Anglo-American Law" (1981) 29 Am. J. Co p. L. 59; John Carson, "Freedom of Assembly and the Hostile Audience: a Comparative Examination of the British and American Doctrines" (1969) 15 N,Y.L. Forum 798; Z. Chafee, "Freedom of Speech and Assembly: The Problem of the Hostile Audience" (1949) 49 Colum. L. Rev.1118; "Hostile-Audience Confrontations: Police Conduct and First Amendment Rights" (1976) 75 Mich. L. Rev,180; Richard E. Stewart, "Public Speech and Public Order in Britain and the United States" (1960) 13 Vand. L. Rev.625.

78. Everett v. Ribbands [1952] 2 Q.B.198.

79. Ibid 206.

80. Glanville Williams, op cit 417.

81. Patricia Hewitt, The Abuse of Power (1982) 125. Ms Hewitt goes on to say that "the magistrates ... sometimes gave the impression that they believed that anyone participating in a demonstration must be a criminal. These binding-over orders would, however, almost certainly have been overturned on appeal". In R. v. Swindon Crown Court: ex 'parte Pawittar Singh [1983] Current Law 377a, the victim of an assault was bound over to keep the peace after the defendant had agreed to be bound over and the prosecution had offered no evidence against him. The Divisional Court held that the victim was not a person who was, or whose case was, before the court and accordingly there was no power to bind him over to keep the 'peace.

82. '2. v. Aubrey-Fletcher: ex.parte Thompson [1969] 2 All E.R.846.

83. Ibid 847.

84. Ibid'848.

85. Flick, op cit 117, referring to R. v. Bowes (1789) 1 Term. R.696.

86. E. v. Sandbach: ex parte Williams [1935] 2 K.B.192.

87. S.25 Summary Jurisdiction Act 1.879 (Eng. & W.) now s.91 Magistrates Courts Act 1952 (Eng. & W.).

88. E.g. s.476 Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.) limits the sentencing power of magistrates to 6 months imprisonment.

(a) This was brought to the attention of the Attorney-General's Department by Dr D O'Connor of the Department of Law at the Australian National University.

89. E. v. Wright:'ex parte Klar (1971) 1 S.A.S.R.103.

90 Ibid .112.

91. „Ibisa 138.

92. Flick, op cit 114.

93. B. v. Wright: ex parte Klar (1971) 1 S.A.S.R.103, 108 (Bray C. ,L), 121 (Chamberlain J.), 129-130 (Zelling J.).

94. Flick op cit 114. In N.S.W. and Victoria the Act is specifically included in the litt bf iMperial StatUtet which continue to be applicable.

95. R. A. Brown, "And hast thou slain the jabberwock? The law relating to demonstrations in the A.C.T." (1974) 6 F.L.Rev.107, 113.

96 Once again, revealed by Dr. D. (:)Connor.

97. Glanville Williams, op cit 423, 427. Patricial Hewitt op cit 125 notes that in England even though a binding-over order does not constitute a conviction, it is still recorded on the Police National Computer along with criminal convictions.

98. E.g. in R. v. Aubrey-Fletcher: ex parte Thompson [1969] 2 All E.R.846, 847 Lord Parker C. J. emphasised that the defendant or his advisers must be given an opportunity to argue against the making of a binding-over order. Flick, op cit 118; Brownlie, op cit 314.

98a. E. V. Central Criminal Court: ex parte Boulding [1984] a All ER 766, 769 (Watkins L.J.).

99. The arrestor could rely on the citizen's common law power of arrest where a breach of the peace has been Committed, or where the citizen reasonably apprehends that one will be committed, in his presence.

1. Justices of the Peace in the A.C.T. do not have the same powers as those holding the ancient statutory office. In the A.C.T. such powers are exercised by magistrates. See the discussion in Forbutt v. Blake (1981) 51 F.L.R.465, 474-475.

2. Court of Petty Sessions Ordinance 1930 (A.C.T.) s.205.

3. Discussed in Grunis, op cit 36-38; Glanville Williams, op g.it 426.

4. Devine v. E. (1967) 119 C.L.R.506.

5. Ilkid [515].

6: Grunis, op cit 37.

7. Grunis cites Blackstone, Commentaries (1769) iv, 254 as authority.

8. Grunis, op cit 41.

9. On suspended sentences see e.g. D. G. T. Williams, "Suspended Sentences at Common Law" [1963] Pub. L.441; M. Ancel, "The System of Conditional Sentence or Sursis" (1964) 80 Id..._Q.Rev.334; A. E. Bottoms, "The Suspended

Sentence in England 1967-1978" (1981) 21 Brit. J. Criminology 1 - Bottoms considers some of the unexpected effects of widespread use of suspended sentences; Fiori Rinaldi, Suspended Sentences in Australia (1973); D. A. Thomas, Principles of Sentencing (2nd ed. 1979) Ch.5.

10. Australian Law Reform Commission, Sentencing Federal Offenders Report No.15 (1980).

11. The law of binding-over is currently under examination by the British Law Commission.

12. Peter Wallington, "Injunctions and the 'Right to Demonstrate'" (1976) 35 Camb. L.J.82, 83.

13. University of Sydney v. Greenland [1970] 2 N.S.W.R.350.

14. Kenneth H. Gifford, Case Note, (1971) 45 A.L.J.627.

14a Meriton Units Pty Ltd V. Rule [1983] A.C.L.D.342. At the time of writing, this case had not yet been reported in the law reports. However, Needham J's statement is further evidence that judges are now prepared to speak more positively of the common law protection of rights and freedoms.

14b Ibid.

15. Hubbard v. Pitt [1976] 1 Q.B.142.

16. Brownlie, op cit 71.

17. Hubbard v. Pitt [1976] 1 Q.B.142, 189 (Orr L. J.).

18. Ibid 174.

19. Ibid 177.

20. Wallington, op cit 97; Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor (1937) 58 C.L.R.479.

21. Wallington, loc.cit.

22. Ibid 98.

23. Flick, op cit 93-94.

24. Quoted by Gifford, op cit 629.

25. Wallington op cit 98.

26. American Cyanamid Co. v. Etbicon Ltd [1975] A.C.396.

27. Ibid 407 (Lord Diplock).

28. Wallington, op cit 86.

29. Ibid 91.

30. Ibid 87.

31. Beecham Group Ltd v. Bristol Laboratories Pty Ltd (168) 118 CLR 618.

32. Ibid 622.

33. Shercliff v. Engadine Acceptance Corporation-Pty Ltd [1978] 1 N.S.W. LR 729.

34. Administrative and Clerical Officers Association v. The Commonwealth (1979) 26 ALR 497. (High Court).

CHAPTER 5
STATUTORY PREVENTION AND CONTROL MEASURES

Introduction

107. Before. considering specific statutory provisions, there are four matters to which attention should briefly be drawn.

Why the Need for Statutory Provisions?

108. If, as is apparent from the last chapter, there are a wide range of common law prevention and control powers, why is there a need for statutory provisions? There appear to be two reasons.

109. First, disorder, disturbance, and riots may reveal weaknesses in the common law (and in existing statutory provisions) which are best corrected by statute rather than by the haphazard development of the common law through the judicial process. To bring about a change in the law the courts must wait until litigants bring a dispute before them and then must act in the context of the particular dispute. Any development of the law is therefore piecemeal. The legislature is not so restricted, and can move quickly, making sweeping changes where these are seen to be necessary. The legislature also has at its disposal specialist resources and the capability to create new institutions in order to implement changes in the law.[1] There is, nevertheless, a danger for liberty in hasty legislative change, for Parliament may Overreact at a time of crisis, imposing unwarranted restrictions on the exercise of rights and freedoms.

110. Secondly, the police seem to prefer to rely on statutory rather than common law powers. This is, presumably, because statutory powers appear definitive and more accessible. However, the appearance is sometimes illusory, for the difficulties of interpreting a statute may make the use of statutory powers more problematic than common law powers,[2] where the courts may be prepared to adopt a more liberal approach in their analysis and interpretation of precedent.

The 'Ad Hoc' Nature of Statutory Provisions

111. Because, generally, new public order legislation is passed as inadequacies in the law or new needs are identified, public order legislation is 'ad hoc' in nature, and rarely the product of a comprehensive review of the law.[3] Even where a government responds to a serious breakdown of law and order by setting up an inquiry, its terms of reference are often narrowly defined.[4]. Law and order is also of fundamental importance as a political , issue, and the Government's political stance will usually dictate its reaction to calls for reform.

The Use of Delegated Legislation

112. Both primary legislation (statutes) and secondary legislation (ordinances, regulations, by-laws etc), otherwise called 'delegated' or 'subordinate' legislation, are used in the prevention and control of disorder. However, there are strong grounds for arguing that all legislation limiting the exercise of rights and freedoms should be primary legislation and, thereby, subject to the full process of parliamentary debate and scrutiny.[5] It is unsatisfactory for a piece of legislation like the now repealed Public Assemblies Ordinances 1982 (A.C.T.), which fundamentally affected the right of assembly in the A.C.T., to be made, in reality, by a Minister.6

113. Where delegated legislation is used, its validity may be open to challenge on the ground that it is ultra vires, i.e. in excess of the delegated power.[7] A challenge can be direct if a plaintiff can establish standing, or, more commonly, indirect, for example, where a person is prosecuted for breach of a regulation or by-law, and that persOn[t]s defence is that the regulation or by-law is ultra vires, and therefore, invalid. While it is unlikely that a challenge to an A.C.T. Ordinance would succeed,[0] given the breadth of the power delegated to the Governor-General by section 12(1) of the Seat of Government (Administration) Act 1910 (Cwth) to make Ordinances "for the peace, order and good government of the Territory", challenges to regulations and by-laws have succeeded in other jurisdictiOns.[9] Of particular significance is the case of Melbourne Corporation v. Barry (1922)[10] where the High Court affirmed a decision of the Supreme Court of Victoria quashing a by-law which sought to control processions through the City of Melbourne.

Location

114. Some statutory provisions apply specificially only to processions on the highway. A 'procession' was defined by Isaacs J. in Melbourne Corporation v. Barry (1922) as

> prima facie a moving assemblage of individuals for a common purpose, and, if on a highway, using the highway for the normal purpose of passage.[11]

115. Other statutory provisions, commonly by-laws, govern the use of public places such as parks, beaches, and other open spaces for various purposes including public meetings.[12] Yet others, like the now repealed Public Assemblies Ordinance 1982 (A.C.T.), apply to all public assemblies of three or more persons held in any public place[13] Public meetings on private premises are not usually covered.[14]

116. An organiser who wishes to use a public building to hold a proposed assembly must obtain the consent of the responsible public authority. In England, some local councils have refused, requests by the National Front to use their premises to hold. meetings. It would appear that local councils exercise an unfettered discretion in deciding to whom to let their premises, and the refusal of a request probably cannot be challenged.[15] This is not, however, true of parliamentary and local elections in England, where candidates are entitled by statute to the use of school and other meeting rooms.[16]

117. The position in Australia would appear to be the same, but with no provision being made in respect of the use of public buildings for election meetings. A local authority could, therefore, discriminate between different organisations in deciding whether to allow the use of a public building.

Advance Notice of Public Assemblies

The Need

118. In order to perform their duty of preventing disorder and maintaining the peace, the police depend on community co-operation and support. Police rely on the public for reports of crime, of suspicious circumstances, and for information on all kinds of public events.. In the case of public assemblies, the police see the need for advance notice in order to plan, where necessary, for police officers to be present to prevent violence and damage to property, and to minimise inconvenience and disruption to other citizens not participating in the assembly, in particular, by preventing the obstruction of pedestrians and traffic. If the assembly is expected to be a large one, or to provoke a-counter-demonstration, it may be necessary for large numbers of police to be present or immediately available on

call. This may entail reorganising the allocation of officers. for other police duties, drawing on support from neighbouring forces, and preparing a detailed strategy for the deployment of police .officers at the assembly. Where violence or serious inconvenience or disruption is anticipated, the police will also need to consider the use of their powers to control the assembly, and in an extreme situation, to prevent it taking place.

119 As it is generally accepted in most western democracies that the police hay a preventive as well as a corrective role, in relation to public assemblies, it would be necessary for them to have full information as to the time, place and nature of the event, and an opportunity to consult the organisers of the proposed assembly so that any potential problems can, where possible, be resolved

120 An estimate of the number of demonstrations which have taken place in the A.C.T. in recent years is set out in Appendix 1 In 1983, the police recorded 67 demonstrations,involving a total of 14, 747 participants. There were violent incidents during two of the demonstrations but no-one was arrested.

A Statutory Requirement?

121. Given the need of the police for this information, can the police rely on the organisers of assemblies to volunteer the requisite information at the appropriate time, or is it necessary to impose a statutory duty on organisers to make the information available? In the wake of recent disorders in the United Kingdom, this question has been the subject of extensive discussion.

122. A memorandum from the Commissioner of the Metropolitan Police to the Home Affairs Committee of the House of Commons inquiring into the law relating to public order in February 1980,[17] stated that the police are in fact notified by the organisers of 85% of assemblies "in sufficient time for

differences of Opinion to be resolved and any necessary arrangements made". [18] Lord Scarman in his report on the Red Lion Square disorders of 1974,[19] estimated that the police are notified in the case of at least 80% of all assemblies. He went on to say that "in the few instances where no notification is given, the police have so far experienced no difficulty in finding out that a demonstration is planned".[20] In oral evidence to the Home Affairs Committee, the Deputy Assistant Commissioner of the Metropolitan Police was unable to recall any occasion when serious public disorder had taken place which the Police had not known about in advance.[21] The Committee itself noted that:

> Since the purpose of virtually all marches, is by definition, to secure public attention and to demonstrate the support for a cause, it cannot be difficult for the police to discover organisers' intentions. Indeed, it is significant that the only instance put to us of organisers seeking to keep secret their intention to march appears to have been in an attempt to avoid opposition and, moreover, despite the attempted secrecy the police were aware of the organisers' intentions.[2]z

123. In his memorandum to the Committee, the Commissioner stated that in the case of the 15% of assemblies where the police are not notified, in some cases the police "eventually obtain the necessary information by seeking intelligence from informants or by monitoring the press and publicity generally".[23]

124. Despite this evidence that in the majority of cases the organisers of assemblies volunteer the required information to the police, or if not, that the police are able to obtain the information from other sources, the Committee, nevertheless, recommended that there should be a statutory notice requirement. They gave the following reasons for so concluding :24

> first, a notice requirement would serve "as the formal trigger for discussions between police and organisers designed to agree the ground rules for the march";[25]
>
> secondly, it would emphasis the responsibility of organisers for the safety and good behaviour of their supporters;
>
> thirdly, for the convenience of the police, who would be assured of full details of the proposed assembly a reasonable time in advance; and
>
> fourthly, the legal standing of the assembly would be confirmed by the requirement for and acceptance of notice.

125. The National Council for Civil Liberties argued strongly against a notice requirement. They argued that the proposed creation of a criminal offence as the Sanction for failure to give notice, was creating a criminal offence 'for something which is not a public order matter",[28] and that this would damage existing co-operation and good relations between the police and local groups. The N.C.C.L. went on to cite how Lord Scarman, in his report on the Red Lion Square disorders in 1974, had recommended against a statutory notice requirement. He said that since the majority of demonstrators voluntarily give notice, such a notice provision would "force upon the law a largely unnecessary requirement, which can be at times an embarrassment to law-abiding citizens".[27]

126. The Home Affairs Committee believed these fears to be exaggerated and drew attention to the local legislation which currently requires advance notice of processions in 110 local authority areas in Great Britain.[28] The Committee had not been "given examples of the onerous operation of the many local Acts which presently include a notice stipulation".[29]

127. The principal argument against a notice requirement, at least where a criminal offence is the sanction for failure to give notice, is that it would discourage spontaneous demonstrations in response to an urgent need. The British

Government's Green Paper on public order[30] gives as examples of spontaneous demonstrations a march against a factory closure, or in favour of a pedestrian crossing outside a school after a fatal road accident.[31] The Home Affairs Committee recommended that, in order to overcome this problem, there should be added to the minimum period of notice required a waiver: "or as soon as reasonably practicable after that time". This would enable the organiser of a spontaneous demonstration to avoid criminal sanctions if, on a prosecution for failure to give the minimum required notice, he/she could satisfy the court that notice had been given to the police as soon as was reasonably practicable.[32] This is the solution adopted by the West Midlands County Council Act 1980.

128. The Home Affairs Committee concluded that there should be a national requirement for minimum advance notice of 72 hours or as soon as reasonably practicable after that time. Lord Scarman in his report on the Brixton disorders of 1981[33] also recommended an advance notice requirement might be formulated. Noting his change of mind since the report on the Red Lion Disorders of 1974, Lord Scarman said

> I think subsequent events have shown that the need [for an advance notice requirement] does exist - though the procession urgently called in protest against some sudden, unforeseen event must be protected. 34

129. If one accepts that there is a need for an advance notice requirement, then the next question is what form that advance notice requirement should take?

The Form of the Advance Notice Requirement

130. First, there are in a number of Australian jurisdictions that are referred to as 'permit' or 'licence' systems.[35] The priorpermission of the responsible Minister, the Commissioner of Police, or some official is required before an assembly can be held. This, of course, has the effect of notifying the police of a proposed assembly, but there is no freedom of assembly under such a system since assemblies can only take place if licensed, at the discretion of the licensing authority. Such a system can be rejected on this ground alone. Fisse and Jones believe such a system is also offensive because it smacks "of state paternalism, especially where governmental or municipal policies are the source of the demonstration or discussion". Further, "permit systems lend themselves to arbitrary or biased decisions where the decision maker is a municipal or police official".[36]

131. Secondly, there are 'notification' systems, of which that proposed by the Home Affairs Committee of the House of Commons is an example. Such systems operate in three Australian jurisdictions and 110 local authority areas in Britain.[37] The organisers of a proposed assembly are required to give a minimum period of advance notice and specified details of the proposed assembly to the Commissioner of Police.

132. If such a system is adopted, an important consideration is what sanction to impose for failure to give the required notice. There seem to be two options. The first option makes failure to give notice a criminal offence punishable by a fine. In the second option, failure to give notice is not an offence, but the organisers of an assembly and possibly the participants, lose an immunity from criminal liability for offences relating to the movement or free passage of traffic or pedestrians, or the obstruction of any person or vehicle in a public place,

conferred on organisers of and participants. in an assembly of which advance notice has been given and where other conditions have been complied with.[38]

133. The second option is preferable because failure to give notice is not, thereby, made a criminal offence. . The Home Affairs Committee dismissed this option for no better reason than that "it is usual practice for advance notice provisions in local Acts to be backed up by some financial sanction for non-compliance",[38] recommending instead a fine not exceeding four hundred pounds.

134. The British Government's Green Paper, in a section on general principles, emphasised that the object of reform

> should be to clarify and improve the law for the sake of the public at large and those who wish to demonstrate. Accordingly, any change which would make the law harder to administer or the task of the police more difficult is unlikely to be of general benefit.[40]

135. It is important that any notification system should be easy to understand and simple to adhere to. This was not the case with the now repealed Public Assemblies Ordinance 1982 (A.C.T.) which was excessively complicated, difficult to comprehend, and, thereby, likely to hinder citizens in the exercise of their right of assembly.

136. There follows a brief description of the systems operating in New South Wales and South Australia, and a fuller description of the system proposed for the A.C.T..

New South Wales

137. Section 4 of the Public Assemblies Act 1979 (N.S.W.) requires the organiser of a proposed assembly in any public place to give written notice to the Commissioner of Police of the date of the proposed assembly, the time of commencement, the location or route, and the expected number of participants. At least seven days notice must be given unless notice is waived by the Commissioner or the assembly is authorised by a court.

Where the required notice has been given, the Commissioner may apply to the Supreme Court, under section 6, for an order prohibiting the assembly ,.. but he/.she must first invite and consider representations from the organiser of the proposed assembly. The hearing will be before 4 single judge, usually of the Administrative Law Division of the Supreme Court, whose decision is final and not subject to appeal. Failure to give notice of a proposed assembly is not an offence, but participants in such an 'unauthorised' public assembly, lose the immunity conferred by section 5 whereby .

> a person is not, by reason of anything done or omitted to be done by him for the purpose only of his participating in that public assembly, guilty of any offence relating to his participating in an unlawful assembly or the obstruction of any person, vehicle or -vessel in a public place.

Although participation in a prohibited assembly is also not an offence, the recent .experience of Women Against Rape demonstrators in Sydney suggests otherwise. On the application of the N.S.W. Police Commissioner, Lee J. of the N.S.W. Supreme Court prohibited a proposed assembly of W.A.R. demonstrators which was planned to coincide with the official 1983 Anzac Day parade.[41] In granting the prohibition order, Lee J. said that he was satisfied

> that the holding of the defendants' march would be an affront to many who wodld be there at the Anzac Day march. Not only does it deflect from the nature of the day but it could also be seen as casting a slur on the servicemen who gave their lives 42

Despite the prohibition order, some 200 W.A.R. demonstrators tried to join in the official Anzac Day parade. Although there was no violence or disorder, 168 women were arrested by the police and charged with "causing serious affront or alarm",[43] an offence under section 5 of the Offences in Public Places Act 1979 (N.S.W.) .[44] This provides that

> A person shall not, without reasonable excuse, in, near or within view or hearing from a public place or school behave in such manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or affronted.
>
> Penalty: $200.

138. The case was referred to the N.S.W. Supreme Court, by way case stated, and Wood J. confirmed the magistrate's finding that there was no sufficient evidence to constitute a prima facie case of the offence charged [45] The police appear to have followed Lee's J.: comments literally in prosecuting this offence. Nevertheless, that the police should have acted in this way, as if participation in the prohibited assembly was in itself an offence, seems to be contrary to the intention of the Public Assemblies Act It also highlights two failings of the Act. First, that neither the grounds on which the Commissioner May apply to the Court, nor the grounds On which the Court may make such an order are specified, thereby leaving the Commissioner without guidance and the Court with an unlimited discretion. Secondly, neither the Commissioner nor the Court can impose conditions as an alternative to respectively, seeking or making a prohibition order.

South Australia

139. The Public Assemblies Act 1972 (SA) provides a similar notification system, although under section 4 only four days notice is required. Notice must be served on either the Chief Secretary, the Commissioner of Police, or the Clerk of the local authority, each of whom may lodge objections with the person who served notice at least two days before the date of the proposed assembly. Objections must also be published in a State newspaper or in such a manner that they come to the notice of those intending to participate in the assembly. An objection must specify the grounds upon which the proposed assembly would "unduly prejudice the public interest". Where an objection has been made, Any intending participant may apply to the Court for a review, and the judge may, under section 5(2):

> (a) if he is not satisfied that proper ground for any objection Made to the proposal exists, quash the objection and approve the proposal; or
>
> (b) may approve any other proposals submitted to him before, or at the hearing of, the application.

Failure to give notice is not an offence but participants lose the immunity conferred by section 6, on participants in an assembly which conforms with approved proposals.

140, The South Australian Act suffers from the same defects as the New South Wales Act, although section 4(6) of the South Australian Act does specify that an objection to a proposed assembly "may be made ... on the ground, that it would, if effectuated, unduly prejudice any public interest". "Public interest" is not, however, defined.

141. By way of comparison, most British local legislation requires either 24 or 36 hours notice of proposed public assemblies, although in recent years this has occasionally been

extended to 72 hours.[46] British local legislation does not usually provide powers for the control of assemblies,[47] this -being the province of the Public Order Act 1936, to which reference is made later in this chapter.

The Proposed Public Assemblies Ordinance 1984 (A.C.T.)

142. The controversial Public Assemblies Ordinance 1982 was repealed after the Labor Government took office, by the new Minister for Territories and Local Government, Mr Tom Uren, on 14 April 1983., The Minister promised that new draft legislation would be prepared, and that adequate time would be allowed for public consultation and discussion and for consideration of the proposed legislation by the A.C.T. House of Assembly. 48 In accordance with this promise, the proposed legislation was made public and a copy sent to the House of Assembly for consideration on 16 April 1984.

143. The proposed Ordinance provides that not less than 3 persons are required to constitute a public assembly. Why persons? Is it really necessary for the Ordinance to become operative for so small an assembly? And can the limitations imposed by the Ordinance be justified in terms of Article 21 of the ICCPR? For example, Article 21 permits, inter alia, restrictions which are necessary in a democratic society in the interests of public order. It seems unlikely that an assembly of 3 persons is going to pose a threat to public order. If this is so, and the limitations imposed by the Ordinance cannot otherwise be justified under Article 21, then the Ordinance does not comply with Article 21. It would be preferable if "public assembly" were defined by reference to a larger number of persons, for example, 12 persons. This 'would bring the proposed Ordinance (and in particular the power to give directions under section 19(2)) into line with the power of dispersal contained in section 8 of the Public Order (Protection of Persons and Property) Act 1971 (Cwth) (discussed later in this chapter) which arises "Where there is an assembly consisting of not less than twelve persons".

144. To obtain authorisation for an assembly, the organiser is required to give to the Commissioner (of the Australian Federal Police) not less than 7 days notice of a proposed public assembly.[49] The notice must specify the name and address of the organiser, the name of the organisation or body represented (if any), the date, time, place, proposed route, expected number of participants, and purpose for which the assembly is to be held. 50

145. If the Commissioner does not within 3 days of receiving the notice inform the organiser that he/she opposes the assembly, then the assembly will be considered to be authorised.[51] Within these time limits, the Commissioner can inform the organiser that he/she does not oppose the assembly, either unconditionally[52] or subject to certain terms and conditions.[53] The power to impose terms and conditions is subject to the qualification that the Commissioner is not entitled to specify terms and conditions "compliance with which would have the effect of altering substantially the nature of the assembly to which the notice relates".

146. If the organiser does not accept the terms and conditions, he/she can apply to the Supreme Court of the A.C.T. for a review, and the Court has a wide power to affirm, set aside or vary the terms and conditions.[54] Regrettably, the preparation of the organiser's case for a review is made more difficult by the omission of a requirement for the Commissioner to notify the organiser of the reasons for having approved the proposed assembly subject to certain terms and conditions. (Similarly, there is no requirement for the Commissioner to give reasons for opposing a proposed assembly.)[54]a

147, The Commissioner can also, within 3 days, inform the organiser that he/she opposes the assembly, if the Commissioner is of the opinion that it would not be in the "public interest" for the assembly to be held.[55] In forming this opinion the Commissioner is required to have regard to

> (a) the objects of this Ordinance specified in section 2 and, in particular, the right of peaceful assembly referred to in paragraph 2(a); —.[58]

Section 2 states that the objects of the Ordinance are

> (a) to recognise the right of peaceful assembly in accordance with Article 21 of the Covenant [on Civil and Political Rights] ...
>
> (b) in conformity with the Article, to ensure to the greatest extent that is practicable, that persons in the Territory may exercise the right to participate in public assemblies subject only to such restrictions as are necessary in the interests of public order and safety or to protect the rights and freedoms of other persons,
>
> and this Ordinance shall be construed accordingly.

148. The inclusion of such an objects clause is novel, and presumably designed to meet the Minister's promise that the right of assembly would be guaranteed in the new legislation. However, in practical terms its utility is limited. Both the Commissioner and the Court must have regard to the objects clause in determining the "public interest"[57] and the courts will use the clause in clarifying any ambiguities that arise in interpreting the provisions of the Ordinance. But apart from this, it is difficult to see what other application the objects clause can have unless as the basis of an action for violation of the right of assembly. But it seems unlikely that the courts would recognise such an action.[58]

149. In forming an opinion as to the "public interest", the Commissioner is also required to have regard to

> (b) any likelihood that if the relevant public assembly were to be held -
>
> (i) serious public disorder would be occasioned;
>
> (ii) the safety of any person would be placed in jeopardy;

(iii) damage to property would be occasioned; or

(iv) the assembly would cause an obstruction that would, in the circumstances, be of unreasonable size or duration.[59]

Requiring the Commissioner to have regard to "any likelihood" of the matters referred to in paragraphs (i) to (iv) could unduly restrict exercise of the right of assembly. [60] It would be preferable for the Commissioner to be required to have regard to "whether there is a strong probability". The wording of paragraph (b)(ii) and (iii) also seems unnecessarily wide, and it would be preferable if some other test were used, for example, that used in section 6 of the Public Order (Protection of Persons and Property) Act 1971 (Cwth), whether "unlawful physical violence to persons or unlawful damage to property" would be occasioned. Further, given the existence of paragraphs (b)(i), (ii) and (iii), then paragraph (b)(iv) goes beyond what is strictly necessary to protect the rights and freedoms of others which appears to be the only other ground under Article 21 of the ICCPR which could be used to justify a restriction based on paragraph (b)(iv). Presumably the objective of paragraph (b)(iv) is to prevent undue interference with the freedom of movement of others by, for example, a demonstration totally obstructing a City Centre. This objective could be achieved by redrafting paragraph (b)(iv) along the following lines: "the assembly would unduly restrict the freedom of movement of others".

150. In addition to informing the organiser that he/she opposes the proposed assembly, the Commissioner can also apply to the Court for an order prohibiting it,[61] but before doing so he/she must confer with the organiser and consider the organiser's representations.[62] On the Commissioner's application to the Court, the Court may, in its discretion, prohibit the assembly or impose terms and conditions in relation to its conduct.[63] In making such an order, the Court, like the Commissioner, is required to consider the public'interest, and have regard to the same matters as the Commissioner.64

151. There are two anomalies about this provision. First, the Commissioner can only apply to the Court for a prohibition order where notice is served on the Commissioner "not less than 7 days" before the date of the proposed assembly. Thus, the Commissioner cannot apply for a prohibition order where less than 7 days notice is given, or where no notice is given. Secondly, if the Court does make a prohibition order, no penalty is specified for non-compliance. Presumably, demonstrators failing to comply would be in contempt of court. This point needs to be clarified.

152. If less than 7 days notice is given of a public assembly, the Commissioner can inform the organiser that he/she does not oppose the proposed assembly, either unconditionally, or subject to terms and conditions.[65] The organiser can apply to the court for a review of the terms and conditions in the same way as described above. If the Commissioner does not so inform the organiser, then the assembly is considered to be unauthorised,' although the organiser may apply to the Court for an order authorising the assembly. [66] Again, in determining such an application, the court is required to consider the public interest, and may specify terms and conditions. If the Court authorises the proposed assembly, the Commissioner can then apply to the Court for an order revoking the Court's authorisation.'[67]

153. The inducement for organisers to seek authorisation for a proposed assembly is the immunity afforded by section 4 for participants in an authorised assembly, provided it complies with any terms and conditions which may have been imposed:

> a person who participates in the assembly is not, by reason only of that participation, guilty of an offence against this Ordinance or Against any law of the Territory relating to the movement or free passage of traffic or pedestrians or the obstruction of a person or vehicle in a public place.

154, However, this section only gives immunity in respect of offences under A.C.T. Ordinances (e.g. obstruction of traffic etc under section 21 Traffic Ordinance 1927) and not Commonwealth Acts which, without specific authority, cannot be overriden by a Territory Ordinance.'" Therefore, a participant in an authorised public assembly could still be prosecuted for 'unreasonable obstruction' under section 9 or section 11(2)(a) of the Public Order (Protection of Persons and Property) Act 1971 (CWth). - But a court might take the view that any public assembly which was authorised would not constitute an 'unreasonable' obstruction (even if it would otherwise constitute a 'mere' obstruction).[69] Nevertheless, the uncertain value of the immunity provided by section 4, supports the argument that this legislation should take the 'form of an Act of Parliament rather than an Ordinance.

155. Furthermore, the immunity provided by section 4, which would operate as a defence to a prosecution, only applies if the public assembly has been held "substantially in accordance" with the particulars specified in the notification served on the Commissioner and any terms and conditions which may have been imposed. The ,onus appears to be on an accused to satisfy the court of compliance, an onus which may prove a heavy one if a large number of people participated in the assembly. Placing such an onus on an individual participant, now accused of an offence, also seems unduly burdensome, since that individual participant, unless an organiser of the assembly, will have had no control over the conduct of the assembly. It would be preferable to put the onus on the prosecutor to satisfy the court that the accused (and only the accused - not other participants) did not act "substantially in accordance" with the particulars of the notification or any terms and conditions imposed. Only then, in the case of an authorised assembly, would the accused lose the immunity conferred by section 4.

156. Failure to Seek authorisation is not an offence. Indeed, section 5 provides:

> (1) Subject to sub-section (2), it shall be lawful for a person to participate in a public assembly that is not an authorised public assembly.
>
> (2) Sub-section (1) does not operate so as to constitute a defence to a prosecution of a person for an offence against any law in force in the Territory consisting of an act or omission occurring in the course of participation by that person in a public assembly that is not an authorised public assembly.

157. The net effect of section 5 appears to be that participation in an unauthorised public assembly is lawful provided no offence is committed; for if an offence is committed, the lawful participation in the unauthorised public assembly cannot constitute a defence to prosecution. Section 5(1) is of a declaratory nature, and no specific remedy is provided for interference [70] However, a common law action of trespass for assault or unlawful detention may be available if a person's right to liberty and security of person has been violated simultaneously, for example if a police officer unlawfully arrests and detains a person taking part in a demonstration.

Power to Give Directions

158. The previous chapter described the common law duty and powers of a police officer to take action to prevent an apprehended breach of the peace, but how, following the decision in Forbutt v. plale,[71] mere disobedience of a police officer's command to cease a lawful activity did not constitute the statutory offence of obstruction of a police officer in the execution of his duty.

3,59,: A new power to give directions is provided by the proposed Public Assemblies Ordinance. Section 19(2) states that

> Where -
>
> (a) the conduct of a person in or near a public assembly is such that a. reasonable person would, in all the circumstances, have found to be offensive or insulting; and
>
> (b) a police officer of or .above the rank of Sergeant has .reasonable grounds for believing that -
>
> (i) another person has found that conduct to be offensive or insulting; and
>
> (ii) the conduct is likely to cause or provoke a breach of the peace,
>
> the police officer may direct the first-mentioned person to leave the vicinity of the public assembly. -

The penalty for contravening such a direction is a fine not exceeding $500.

160. There are three elements to the power to give directions under section 19(2)'.: First,: the conduct must be such that a reasonable person would find it offensive or insulting - an objective test. Secondly, the police officer must have reasonable grounds for believing that another person found the conduct offensiveor insulting. Thirdly, the police officer must also have reasonable grounds for believing that the conduct is likely to cause or provoke a breach of the peace.[72]

161. It is unfortunate that the concept of a 'breach of the peace' is employed as part of the third element. 'Breach of the peace' is not defined in the proposed Ordinance; nor is it defined elsewhere. It remains a common law concept, the meaning

of which is unclear.[73] It would be preferable if the concept of a 'breach of the peace' were abandoned in favour of a clearer and more certain statement of the proscribed conduct. The British Law Commission, in their report on Offences Relating to Public Order,[74] discussing one of the two proposed statutory offences to replace the common law offence of unlawful assembly, stated, in paragraph 2.6, that

> The desire for clarity and reconsideration of possible unsatisfactory concepts have also led us to abandon the concept of "breach of the peace" common to both the existing law and the Working Paper proposals. Although its meaning has to some degree been settled by recent authority 'the Court of Appeal decision in E. v. Howell (1982)], some uncertainty remains [as a result of the decision of a differently constituted Court of Appeal a few months later in E. v. Chief Constaige. of Devon and Cornwall, ex parte C.E.G.B. (1982)[110]], and the concept therefore seems unsatisfactory for use as a principal element in any new statutory offence.

162. Drawing on the British Law Commission's recommendations,[77] a revised section 19(2)(b)(ii) might read:

> the conduct is likely to cause a person of reasonable firmness present at the scene to fear violence to any person or property.

163. However, even if these amendments were made, is such 'a power to give directions, where only one person need be offended or insulted, a permissible restriction under Article 21 of the ICCPR?

164. First, it should be clear what the words "offensive and insulting" mean in this context.- For example, political protest, even if foolish or misguided, would not normally constitute offensive or insulting behaviour.[78] In the Victorian case of Worcester v. Smith (1951), O'Brien J. said that behaviour to be 'offensive' .... must, in my opinion, be

such as is calculated to wound the feelings, arouse anger or resentment or disjust or rage in the mind of a reasonable person. The mere expression of political views, even when made in the proximity of the offices of those whose opinions or views are being attacked, does not in my opinion amount to offensive behaviour. 78a

165. Secondly, can the offending or insulting of only one person, even where there are reasonable grounds for believing that the conduct is likely to cause or provoke a breach of the peace, justify a police direction which restricts a person's right of assembly? Is such a restriction permitted by Article 21 of the ICCPR? Presumably only where there is a real danger of injury to a person or property. - This is achieved by the amendment to section 19(2)(b)(ii) proposed above.

166. In Western Australia and South Australia the Commissioner of Police has an almost unqualified power to issue directions for regulating traffic, preventing obstructions and maintaining order.[78]b Failure to comply with a police officer's request to observe the directions is an offence, punishable by a fine not exceeding $100 in Western Australia, or $40 in South Australia [79] In Western Australia, a person must first have been acquainted with the directions. In South Australia, the directions must have been published in a newspaper circulating throughout the State, or in such other manner as to ensure so far as reasonably practicable that they will come to the notice of those persons likely to be affected.

The Power of Dispersal

167. In their role as officers Of the peace, justices have long had a common law duty and power to disperse unlawful and riotous assemblies. An applicable Imperial statute received on settlement was the Riot Act 1714.[80] Section 8 of this Act provides that:

> if any persons to the number of twelve or more are unlawfully, riotously and tumultously assembled together to the disturbance of the public peace it is the duty of the justices of the peace or the sheriff of the county or the mayor to go to the place where the rioters are assembled and make a proclamation in a prescribed form ordering them to disperse. If persons to the number of twelve or more unlawfully, riotously and tumultuously remain or continue together for one hour after such proclamation they are guilty of felony. 81

The proclamation required to be read in a loud voice is set out in section 2:

> Our Sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitation or to their lawful business upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies. God Save the King.

The "pains" contained in the Act, on conviction of the felony, were a maximum sentence of life imprisonment.

168. While the Riot Act 1714 no longer applies in any Australian jurisdiction,[82] the Riot Act procedure for the reading of a proclamation has been retained in most Australian jurisdictions. 83

169. For the A.C.T., the relevant provision is section 8 of the Public Order (Protection of Persons and Property) Act 1971 (Cwth). This provides that where there is an assembly of not less than 12 persons and

> (a) persons taking part in the assembly have conducted themselves in a way that has caused a member of the Police Force of the rank of Sergeant or above reasonably to apprehend[84] that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property; or
>
> (b) the assembly is being carried on in a manner involving such unlawful violence or damage.
>
> (s.8(1))

a police officer of the rank of sergeant or above may give an oral direction, in such a manner as to be audible to the persons constituting the assembly, or to as many of them as practicable in "the following form or to the like effect":[85]

> In pursuance of the Public Order (Protection of Persons and Property) Act of the Commonwealth of, Australia, I [name of police officer] being a Sergeant [or higher rank, as the case may be], direct all persons taking part in this assembly to disperse forthwith. Persons who fail to disperse may render themselves liable to the penalties provided by the Act.
>
> (s.8(2))

If, after 15 minutes, the assembly, numbering not less than 12 persons, continues,

> each of those persons who has, without reasonable excuse, failed to comply with the direction is guilty of an offence, punishable on conviction by a fine not exceeding Five hundred dollars or imprisonment for a term not exceeding six months, or both.
>
> (s.8(3))

170. The offence is triable summarily, but a prosecution can only be instituted with the written consent of the Commonwealth Crown Solicitor or his deputy. [86] A number of people were convicted of this offence after anti-Apartheid, anti-Vietnam War demonstrations in Canberra on 21 May 1971, the "day of

rage".[87] Brown's analysis of section 8 and the unreported decisions of two stipendiary magistrates, suggests that the drafting of the section is far from satisfactory.[88] For example, what do the words "to the like effect" in section 8(2) mean? How closely must the prescribed proclamation be followed? Brown submits very closely.[88] And what constitutes a "reasonable excuse" under section 8(3)? Brown submits that any reasonable excuse for remaining after the expiry of the 15 minutes should be a valid defence.[80] There is not yet a reported decision of an appeal against summary conviction to help clarify the interpretation of the section.

171. Brown also questions whether section 8 can apply to counter-demonstrators. For they do not have the common purpose of, nor are they taking part in the assembly as such. Nevertheless, they cquld be the initiators or provokers of violence.[81]

172. Section 8(4) confers power on any "person" to use force to disperse an assembly in respect of which a direction has been given, or, even where no direction has been given, to disperse or suppress an assembly where unlawful violence or damage is already occurring. The degree of force which may be used is such as the person

> believes, on reasonable grounds, to be necessary for that purpose and is reasonably proportioned to the danger, which he believes, on reasonable grounds, is to be apprehended from the continuance of the assembly. 92

173. The old common law power of the citizen to suppress a riot may, thereby, be impliedly limited, since section 8 only applies to assemblies of twelve or more persons, while at common law a riot can be constituted by three or more persons.[83] On the other hand, section 25(1), which excludes the operation of "the common law with respect to the offences of taking part in an

unlawful assembly, a rout, or a riot", could be read narrowly so as not to affect the common law power of the citizen, which does not relate, directly to the offences of unlawful assembly, rout or riot.[94]

174. Under section 17 there is a similar but more extensive power to disperse assemblies taking place in relation to diplomatic, consular or international organisation staff (who are not Australian citizens or permanent residents of Australia), their residences, and the premises of those organisations. This power is so wide-ranging that Campbell and Whitmore have commented that "it is difficult to see how any sort of public meeting or demonstration can be held outside an embassy or consulate, or indeed in the vicinity of a protected person" [95] Section 14 states that the provisions of this part of the Act are intended to give effect to the duties imposed by international law for the protection of such "organisations, persons and premises, but Campbell and Whitmore suggest that "the provisions go very much further than is necessary to meet international obligations". 96

Power to Regulate and Prohibit

175. The power of the Court to grant an order prohibiting a proposed assembly on an application by the Commissioner of Police under the Public Assemblies Act 1979 (N.S.W.) and under the proposed Public Assemblies Ordinance 1984 (A.C.T.), has already been described above. It was noted that in New South Wales even where the court makes such an order it is not an offence to organise or participate in a prohibited assembly,[97] although immunity from liability for obstruction and related offences is thereby lost.

176. Under the proposed A.C.T. Ordinance, both the Commissioner and the Court can make their approval of a proposed assembly subject to specified terms and conditions.[98] Even so, it would not be an offence to fail to comply with such terms and conditions, although the immunity from liability for obstruction and related offences would be lost.

177. In Australian jurisdictions where a 'permit' is required for an assembly to be held, it is an offence to organise or participate in an assembly for which no permit has been obtained.[99] Where a permit is issued this may be subject to conditions. Further, in Queensland, whether or not a permit has been obtained, the Police District Superintendent of Traffic

> may at any time prohibit the holding of a procession upon any road ... if, in his opinion, such procession will occasion a breach of the peace in or cause obstruction ta traffic upon such road or if for any other reason whatsoever it is, in the Opinion of the District Superintendent, desirable that such procession should not be held.'

178. The issue of a prohibition order is an extreme step which should only be used as a last resort. The power to impose conditions is less drastic and at least allows the assembly to proceed. But in both cases, it is important that the person or body upon whom the power is conferred, is held accountable for its exercise.

Footnotes to Chapter 5

1. Kevin S. Pose & Malcolm D.H. Smith, Maher. Waller and Derham's Cases and Materials on the Legal Process (3rd ed. 1979) 247-248.

2. E.g. in the A.C.T. police misinterpretation of their powers of arrest: McIntosh v. Webster (1980) 30 ACTR 19, and (1980) 32 ALR 603; Donaldson v. Broomby (1982) 40 ALR 553.

3. For a survey of English legislation see D.G.T. Williams, Keeping the Peace (1967) 11. In Australia, the Public Order (Protection of Persons and Property) Act 1971 (Cwth) was the product of the anti-war demonstrations of the late 1960s. E.go'the demonstration against Marshall Ky (P.M. of South Vietnam) outside the Canberra Hotel on 18 January 1967 - "Arrests Made at Demonstration" Canberra Times 19 January 1967, p.1. (4 men were charged with offensive behaviour, and 2 of them also with resisting arrest - N.S.W. police were accused of brutality); the anti-conscription 'sit-in' outside the Lodge on 19 May 1968 - "Obliging Police arrest 69" Canberra Times, 20 May 1968, p.1. (69 arrested and chargedwith obstructing traffic under s.21 Traffic Ordinance 1937 (A.C.T.) - 67 were convicted and fined $10 each - S.M. fines 67 for anti-draft protest" Canberra Times, 21 May 1968, p.3). The Public Assemblies Ordinance 1982 (A.C.T.) was the product of the controversial Women Against Rape demonstrations of Anzac Day 1980 and 1981.

4. E.g. Lord Justice Scarman, The Red Lion Square Disorders of 25 June 1974 Cmnd 5919 (1975); Lord Scarman, The Brixton Disorders of 10-12 April 1981 Cmnd 8427 (1981). The terms of reference of the South Australian Royal Commission under Mr Justice Bright, Report on the September Moratorium Demonstrations (1971) were more wide-ranging. Following the Bright Report, the South Australian Government initiated new legislation which later took effect as the Public Assemblies Act 1972 (SA).

5. As Senator Susan Ryan said in the debate on her motion to disallow the Public Assemblies Ordinance 1982, the Minister should proceed

> by an Act of Parliament so that we, as Senators, will have the opportunity from the beginning to be involved in the debate rather than only, as in the case of delegated legislation, having the power simply to allow or disallow.

(C.P.D. Senate, 22 April 1982, p.1455-1456.)

6. By s.12(1) of the Seat of Government (Administration) Act 1910 (Cwth) power is delegated to the Governor-General to make Ordinances "for the peace, order and good government of the Territory". However, by convention, the Governor-General only acts on the advice of the responsible Minister, the Minister of State for the Capital Territory.

7. Westminister Corporation v. London and North Western Railway [1905] AC 426, 430 (Lord Macnaghten); Kruse v. Johnson [1898] 2 QB 91, 99-10.0 (Lord Russell of Killowen C.J.). J.M. Evans, De Smith's Judicial Review of Administrative Action (4th ed. 1980), 355; Harry Street and Rodney Brazier (eds), De Smith's Constitutional and Administrative Law (4th ed. 1981) 348 ff.

8. Unsuccessful challenges have been made: Commonwealth of Australia v. Carkazis (1978) 23 ACTR 5; Golden-Brown v. Bunt (1972) 19 FLR 438.

9. Although many have failed, e.g. De Morgan v. Metropolitan Board of Workds (1880) 5 QBD 155; Kruse v. Johnson [1898] 2 QB 91; Ex Parte Kaye (1910) 10 SR (N.S.W.) 350.

10., Melbourne Corporation v. Barry (1922) 31 CLR 174, discussed by D.G.T. Williams, Keeping the Peace (1967) 55. See especially Mr Justice Isaacs at 31 CLR 198.

11. Melbourne Corporation v. Barry (1922) 31 CLR 174, 196.

12. Michael Supperstone, Brownlie's Law of Public Order and National Security (2nd ed. 1981) 34 ff.

13. But see the definition of "public place" in s.4 of the Ordinance.

14. Although under s.4 of the Public Assemblies Ordinance 1982 meetings on private premises in the open air do seem to be covered.

15. Brownlie, op cit 41.

16. Representation of the People Act 1949 (Eng. Sc. W.) ss.82 and 83.

17. The Fifth Report from the Home Affairs Committee of the House of Commons, The Law Relating to Public Order H.C. 756 (1980): Vol.I Report with Minutes of Proceedings, Vol.II Evidence and Appendices.

18. Ihigi Vol II, 43 para 16.

19. Scarman Report on the Red Lion Square Disorders, above n.4.

20. Ibid Para 129.

21. Home Affairs Committee Report, op cit Vol.II, 57, Q. 1697175.

22. Ibid Vol.I, para 33.

23. Ibid Vol II, 43, para 16.

24. Ibid Vol.II, paras 35-36.

25. Ibid - a direct quote from the British Government Green Paper, Review of the Public Order Act 1936 and related legislation Cmnd 7891 (1980), para 71.

26. Ibid Vol.II, 144-145, Q. 408.

27. Scarman Report on Red Lion Square Disorders, op cit para 129.

28. Home Affairs Committee Report, op cit Vol.I, para 32; Vol.II, Appendix I, Annex B; Green Paper, op cit para 66.

29. Home Affairs Committee Report, op cit Vol I, para 32.

30. Green Paper cited above, n.25.

31. Ibid para 68.

32. Home Affairs Committee Report, op cit Vol.I, para 39.

33. Scarman Report on the Brixton Disorders, above n.4.

34. Ibid para 7:45.

35. Queensland - Traffic Regulations 123 and 124; Western Australian - Police Act 1892-1981, s.s.52(3), 54B; Tasmania - e.g. Hobart City Council by-laws; Northern Territory - Traffic Act 1949, s.28. In the A.C.T. such a system used to exist until the relevant provision, Traffic Ordinance 1937, s.23 was repealed on 25 March 1982. For an account of these systems see the Review by the Attorney-General of the-Commonwealth and the Attorney-General for Western Australia of laws in relation to Public Assemblies (1979).

36. W.B. Fisse and J.B. Jones, "Demonstrations: Some proposals for Law Reform" (1971) 45 AU J 593, 593; V.T. Bevan, "Protest and Public Order" [1979] Pub L 163, 171.

37. Australia: Victoria - under Melbourne City by-laws; New South Wales - Public Assemblies Act 1979; South Australia - Public Assemblies Act 1972.
Britain: See Home Affairs Committee Report, op cit Vol II, Appendix 1, Annex B.

38. E.g. Public Assemblies Act 1979 (N.S.W.), s.5; Public Assemblies Act 1972 (SA), s.6; Public Assemblies Ordinance 1982 (A.C.T.), s.6 (now repealed).

39. Home Affairs Committee Report, op cit Vol.I, para 40.

40. Green Paper, op cit para 16.

41. "Rape group will hold protest" Sydney Morning Herald, 23 April 1983, p.2.

42. Ibid.

43. Matthew Odium, "168 arrested as women defy 'no march' order", Sydney Morning Herald, 26 April 1983, p.3.

44. This offence replaced s.7 ("offensive behaviour") and s.9 ("unseemly words") of the now repealed Summary Offences Act 1970 (11.S.W.).

45. Connolly v. Willis [1984] 1 NSWLR 373. The problems which the police encountered in two earlier prosecutions under s.5 are discussed by Gareth Symonds, "New Street Offence Laws: An Early Victory for Demonstrators" (1980) 5 LSB 60. At the time of writing the hearing of the Anzac Day Charges, in Castlereagh Magistrates Court, had been adjourned until July 1984.

46. Home Affairs Committee Report, op cit Vol.II, Appendix 1, Annex B.

47. There are important exceptions, e.g. s.52 Metropolitan Police Act 1839 (2 & 3 Vict. c.47).

48. "Uren to repeal the Public Assemblies Ordinance", Canberra Times, 26 March 1983, p.l.

48a. However, in police offences legislation, "public place" has been interpreted as meaning both open-air and in-door premises.

49. Draft Public Assemblies Ordinance 1984 (A.C.T.), s.6(6).

50. Ibid s.7.

51. Ibid s.6(b).

52. Ibid s.6(a).

53. Ibid s.10.

53a. Ibid s.10(2). It would be preferable if the Commissioner's power to impose terms and conditions were also subject to the "public interest" requirement provided by s.11.

54. Ibid s.10(3) and (4).

55. Ibid s.11(1).

56. Ibid s.11(2) (a).

57. Ibid s.11(2) (a) and s.16(2)(a).

58. If s.2 can be said to create a legal right to be enjoyed by members of the public, then a person whose right to participate in an assembly is interfered with, can bring proceedings for an injunction to prevent further interference, and under s.2 of Lord Cairn's Act (Chancery Amendment Act 1858) a Supreme Court could award damages either in addition to or in lieu of the injunction. However, the decision of the High Court in Wentworth v. Woollahra Municipal Council (1982) 56 ALJR 745 precludes a Supreme Court from awarding damages in relator proceedings in such a case. Note, "A further limitation on the scope of Lord Cairn's Act" (1983) 57 AU J 1. The effect of s.5 of the proposed Ordinance should also be considered.

59. Draft Public Assemblies Ordinance, s.11(2)(b).

60. A.C.T. House of Assembly Select Committee on the Public Assemblies Ordinance, The Proposed Public Assemblies Ordinance 1982 (1982) para 44.

61. Draft Public Assemblies Ordinance, s.13(1).

62. Ibid s.13(2).

63. Ibid s.13(3).

64. Ibid s.16.

65. Ibid *ss.6* (by implication) and 10(1).

66. Ibid s.14.

67. 2b1.91 s.15.

68. 72nd Report of the Senate Standing Committee on Regulations and Ordinances (April 1982), Appendix B - H.D. Logue's advice to the Secretary of the Department of the Capital Territory.

69. Ibid.

70. See n.58 above.

71. Forbutt v. Blake (1981) 51 FLR 465.

72. The three elements were outlined in Senate by the Attorney-General, Senator Gareth Evans: C.P.D. Senate, 29 March 1984, p.931-932.

73. This was discussed in chapter 2.

74. Report No.123 (1983).

75. E. v. Howell [1982] QB 416.

76. E. v. Chief Constable of Devon and Cornwall. ex parte C.E.G.B. [1982] QB 458.

77. Report No.123, op cit para 5.22.

78. Worcester v. Smith [1951] VLR 316,318 (O'Brien J.); all V. McIntyre (1966) 8 FLR 237, 244-245 (Kerr J.); Brutus V. Cozens [1973] AC 854, 862 (Lord Reid) and 865-866 (Viscount Dilhorne).

78a Worcester v. Smith [1951] VLR 316, 318.

78b. Police Act 1892-1981 (WA), s.52; Police Offences Act 1953-1981 (SA), s.59. See Geoffrey A. Flick, Civil Liberties in Australia (1981) 112.

79. This was the offence of which Klar was convicted in the case of R. v. Wright: ex parte Klar (1971) 1 SASR 103.

80. Riot Act 1714 (1 Geo. 1, st.2, c.5).

81. E.R.H. Ivamy, "The Right of Public Meetings" [1949] Current Legal Prob 183, 198-199.

82. E. Campbell & H. Whitmore, Freedom in Australia (1973 ed.) 166-167.

83. Criminal Code (Qld), s.s.61-64. Criminal Code (Tas), s.76. Criminal Code (WA), s.s.62-65 and see Police Act Amendment, Act No.2 1970 (WA), s.54A. Criminal Law Consolidation Act 1935-1969 (SA), s.244. Unlawful Assemblies and Processions Act 1958 (Vic), s.3.

Public Order (Protection of Persons and Property) Act 1971 (Cwth) ss.8, 17 - applies to NT, A.C.T. and other Commonwealth Premises. In New South Wales there is no comparable provision. N.B. In England and Wales the Riot Act 1714 was repealed after long disuse by the Criminal Law Act 1967, s.19(2).

84. As with other public order offences triable 'summarily, an accused may have difficulty in challenging a police officer's "reasonable apprehension", owing to the willingness commonly shown by magistrates to accept police evidence of apprehended disorder. R.A. Brown, "And hast

thou slain the jabberwock? The law relating to demonstrations in the A.C.T."- (1974) 5 FL Rev 107, 125; Williams, op cit 17-19.

85. Brown, op cit 126.

86. Public Order (Protection of Persons and Property) Act 1971 (Oath), s.23(1) and (2).

87. "Students, Police in Violent Clash", Canberra Times. 22 May 1971, p.1. 187 were charged following the demonstration: 2/3 were charged with obstruction under s.9 Public Order Act; 1/3 with failure to disperse under s.8(2). Those who pleaded guilty to the charge of failure to disperse were fined $50 each: "28 more students forfeited bail", Canberra Times, 26 May 1971, p.10; "Three fined $50 over protest", Canberra Times, 28 May 1971, p.6.

88. Brown, op cit 124-129; A. Hiller, "Law and Order under the Public Order Act 1971" (1973) 47 AU J 251, 254-155.

89. Brown, op cit 126.

90. Ibid 128.

91. Ibid 125.

92. Public Order (Protection of Persons and Property) Act 1971 (Cwth), s.8(4).

93. Field v. Metropolitan Police District Receiver [1907] 2 KB 835, 860 (Divisional Court).

94. Brown, op cit 128.

95. Campbell & Whitmore, op cit 176.

96. Ibid.

97. Although, as noted above, W.A.R. demonstrators participating peacefully in a prohibited assembly on Anzac Day 1983 in Sydney were arrested and charged with "causing serious affront and alarm".

98. See e.g. Public Assemblies Ordinance 1982 (A.C.T.), s.s 15, 18.

99. E.g. Police Act 1892-1981 (WA), s.54B.

1. Traffic Regulations (Old), R. 124(3) discussed by J.H. & P.H. "Processions in Queensland - 'Don't bother'" (1977) 2 LSB 327, 328-329.

2. For a comparison with the law in Britain, see Public Order Act 1936: s.3(1) power to give directions; e.3(2) and (3) prohibition orders. These provisions are currently under review by the British Government (British4Gvernment Green Paper, Review of the Public Order Act 1936 and related legislation Cmnd 789111980[). Note the public order test used in s. 3(1) - the powers of the Chief Officer of Police are exercisable where he/she has "reasonable grounds for apprehending ... serious public disorder" - and the control exercised by local councils and the Home Secretary. See the discussion of s. 3 in the Scarman Report on the Red Lion Square Disorders, op cit; the Home Affairs Report, kp cit vol, 1; Bevan, op cit s. 3 only applies in respect of a public 'procession', defined by Lord Goddard in Flockhart v. Robinson [1950] 2 KB 498, 502 as "a body of persons moving along a route". So s.' 3 does not apply to static demonstrations, nor to meetings, whether public or private. This is also currently under review following recent disorders many of which arose out of static demonstrations on the highway, or public meetings.

CHAPTER 6
CRIMINAL AND TORTIOUS LIABILITY

Introduction

179. Sir Henry Maine said that "freedom is secreted in the interstices of the law of crime and tort".[1] This chapter examines criminal and tortious liability for conduct which can occur in the course of an assembly, and which acts as an indirect control on the right of assembly.

180. But, before doing so, two preliminary observations are called for. First, the majority of public order offences are tried at the summary level, as has always been the case traditionally. The reason for this is the belief that after a disturbance justice should be seen to be done swiftly and effectively to punish those responsible,[2] and, that in respect of less serious offences, this can best be achieved by local magistrates.[3] Further, in the case of offences where the accused can elect to be tried either summarily or on indictment, the accused will more often elect to be tried summarily. The incentive for so doing is that the sentencing powers of magistrates are limited,[4] and that despite the possible attraction of a trial by jury, summary trial avoids the long delays which often precedea trial on indictment.

181. Secondly, the importance of the decision as to whether and for what to prosecute should be recognised. In all Australian jurisdictions, except the Australian Capital Territory, this decision is made by the police. But even in the Australian Capital Territory, where the final decision is made by the Director of Public Prosecutions or his officers, evidence given to the Australian Law Reform Commission revealed that in 80% of prosecutions, the original charge laid by the police is not

altered.[5] The choice of charge will often determine whether or not a conviction is secured in a particular case. For example, it may be easier to secure a conviction for a summary offence which places heavy reliance on a police officer's 'reasonable apprehension' of a situation (which is difficult to challenge in the absence of clear evidence to the contrary), rather than opting for an indictable offence, where there may be a greater chance of an accused pleading not guilty and, because of the complexity of the offence, of the court rejecting the prosecution case.[8] The choice of charge will also determine the penalties available to a court on a conviction. In the A.C.T., the penalties for similar offences under different statutory provisions can vary widely, and are badly in need of realignment according to the nature and seriousness of the offence.

182. Exercise of the discretion to prosecute was until recently largely unqualified, and evidence given to the Australian Law Reform Commission suggested that "charging decisions are based upon vaguely articulated and unpublished factors which are obscure and hesitant even for those involved in making the decision".[7] The Commission, reporting in 1980, recommended that policy guidelines should be issued to federal prosecutors (to whom the Commission's terms of reference were limited) drawing attention to matters which should be taken into account in exercising their discretion. These should include the following: the complexity of the offence and the strength of the prosecution case; the nature of the physical violence or the value of the property involved; the previous record of the accused, if any; the need to provide a deterrent against the commission of similar offences; and the sentencing power of the court and the probable sentence if the accused is convicted.[8]

183. On 16 December 1982, the then acting Attorney-General, Mr Neil Brown, honouring an undertaking made by the Attorney-General, Senator Peter Durack, then ill, tabled in Parliament a document titled Prosecution Policy of the Commonwealth.[8] This document, intended for

Commonwealth officers engaged in law enforcement, sets out the guidelines to be followed in making the decision whether or not to prosecute and the considerations upon which these decisions should be based. The first consideration is whether there is sufficient evidence to establish a prima facie case against the defendant.[10] Further, the prosecution should not normally proceed unless there is a reasonable Prospect of conviction. The second consideration is

> whether in the light of provable facts and the whole of the surrounding circumstances, the public interest requires the institution of the prosecution ... Regard must be had by those responsible for a prosecution decision to many factors. These include the seriousness of the offence, the youth, age or special infirmity of the offender, the degree of his culpability in connection with the offence, whether or not he is a first offender and the need to provide a deterrent to similar offenders. Obscurity or obsolescence of the law in question is a further possible consideration. The more minor the offence, the greater the attention that should be paid to mitigating circumstances. On the other hand, regard may properly be had to the possible prevalence of the offence. No one of these considerations is overriding; in a particular case all relevant considerations must be taken into account.[10]a

The document also lists other factors which should not influence the prosecution decision:

> A decision whether or not to prosecute, must clearly not be influenced by:
>
> (a) the offender's race, religion, sex, national origin or political associations, activities or beliefs;
>
> (b) a possible political advantage or disadvantage to the Government or any political party;
>
> (c) personal feelings concerning the offender or the victim; or
>
> (d) the possible effect of the decision on the personal or professional circumstances of the person responsible for the prosecution decision.lub

Finally, the document notes that the person responsible for formulating the charge should take care to select a charge that:

(a) adequately reflects the nature of the criminal conduct involved;

(b) can be supported by admissible evidence sufficient to sustain a conviction; and

(c) provides a basis for an appropriate sentence in all the circumstances of the case.[10]c

* * *

184. This chapter is divided into two parts: the first considers criminal and tortious liability arising out of the location of the assembly; the second considers criminal liability arising out of the conduct of the assembly. The two are not mutually exclusive or definitive as classifications, but such an arrangement aids the presentation of the relevant law.

The Location of the Assembly

Highways

The Right to Pass and Repass

185. A highway has been defined as a "road or way open to the public as of right for the purpose of passing and repassing". [11] The extent of the public's right to pass and repass has long been the subject of contention.[12] For example, the English Court of Appeal held that the ordinary and reasonable user of the highway did not extend, in Harrison v. The Duke of Rutland (1893),[13] to standing on a road protesting at a grouse shoot, or, in Hickman v. Maisey **(1900),[14]** to walking up and down watching racehorses training on adjoining

land. Both Harrison and Maisey were, therefore, trespassing on the soil of the highway which belonged to the owner of the adjoining land.

186. The basic position taken by the Courts is that stated in M'Ara v. Magistrates of Edinburgh (1913)[15] by the Lord President of the Court of Session, Lord Dunedin. He said that

> the primary and overruling object for which streets exist is passage. The streets are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets ... streets are for passage, and passage is paramount to everything else. That does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along. It is quite clear that citizens may meet in the streets and may stop and speak to each other. The whole thing is a question of degree .•.[16]

Brownlie lists some of the activities which do not constitute the primary purpose of passing and repassing and yet have been held to be within the concept of reasonable user)-[7] These include the distribution of leaflets, market research, carol singing, morris dancing, carnival parades, and flag selling, but do not include the selling of hot d6gs from a van)-[8]

187. It would appear, therefore, that at common law a procession, "a moving assemblage of individuals for a common purpose",[18] using the highway for the normal purpose of passage, is prima facie lawful, while a static public meeting on the highway may not be.

Trespass

188. The use of the highway for an improper purpose may constitute the tort of trespass[20] against the owner of the land abutting the highway, in whom, at common law, the soil of the highway is vested to the mid-way line, or against the local

authority, in whom the ownership of the highway may be vested by statute. In the A.C.T., all highways in the "City Area"[21] are owned by the Commonwealth. Although an action for trespass will lie without proof of damage, the likelihood of an action for trespass being brought in respect of the user of the highway seems small.

189. At common law, trespass is only a tort and not a crime.[22] However, in Kamara v. Director of Public Prosecutions (1973),[23] the House of Lords held that trespass or any other tort could, if intended, form the element of illegality necessary in conspiracy provided:

> (1) execution of the combination must invade the domain of the public, as, for instance, when the trespass involves the invasion of a building such as the embassy of a friendly country or a publicly owned building ... Alternatively,
>
> (2) a combination to trespass becomes indictable if the execution of the combination necessarily involves and is known and intended to involve the infliction on its victim of something more than purely nominal damage. This must necessarily be the case where the intention is to occupy the premises to the exclusion of the owner's right, either by expelling him altogether ... or otherwise effectively preventing him from enjoying his property. 24

190.- The House of Lords confirmed the appellants' conviction of conspiracy to trespass in respect of their agreement to occupy the premises of the High Commission of Sierra Leone in London.

191. Conspiracy to trespass would seem to be committed in the course of many 'sit-in' demonstrations, but probably not in the course of 'sit-down' demonstrations on the highway. Following the recommendations of the British Law Commission,[25] the law of conspiracy was substantially altered in England by the Criminal Law Act 1977 which appears to preclude prosecution for conspiracy to trespass.[26] However, a prosecution could still be possible in Australia.

Public Nuisance

192. The use of the highway for an improper purpose could also constitute a public nuisance at common law. A public nuisance was defined by Stephen as:

> an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects.[27]

193. Public nuisance is actionable both as a tort and as a misdemeanour .[28] But, as explained in chapter 2 of this Part, as a tort it is generally only actionable at the suit of the Attorney-General acting in the public interest, In relation to the highway, public nuisance is an unreasonable user of the highway which causes an obstruction.[28] This is a question of fact for the Court. In Z. N. Clarke (No. 2) (1964),[30] Clarke was charged with incitement to commit a public nuisance. During a demonstration against the visit of the King and Queen of Greece, Clarke directed a crowd of about 2000 people in an effort to avoid police cordons, with the result that the highway was obstructed. Clarke's conviction was quashed by the English Court of Criminal Appeal because the Deputy-Chairman of Quarter Sessions had failed to direct the jury to consider whether the user of the highway was reasonable.

Obstruction of the Highway

194. Closely related to public nuisance is the statutory offence of ,obstruction of the highway, which exists in all Australian jurisdictions,[32] and is one of the more common summary offences utilised by the police in respect of demonstrations on the highway. In the A.C.T., section 21 of the Traffic Ordinance 1937 provides that:

> Any person who, upon a public street -
> (a) negligently or wilfully obstructs, hinders or prevents the free passage of any person, vehicle (including a motor vehicle) bicycle or animal, shall be guilty of an offence.

The penalty is a fine not exceeding $40. 67 people were convicted of this offence in 1968 for 'sitting-in' outside the Lodge to protest against conscription. Each was fined $10.[33]

195. The High Court in Haywood v. Mumford (1908)[34] interpreted 'obstruction' as including:

> any continuous physical occupation of a portion of the ' street which appreciably diminishes the space available for passing and repassing, or which renders such passing or repassing less commodious, whether any person is in fact affected by it or not.[35]

196. The question is always one of degree, as the High Court emphasised in Schubert v. Lee (1946):[36]

> What is not permitted is a lessening in a substantial degree of the commodiousness of the use of the highway for legitimate purposes ... The extent of the unauthorised use of a highway or other place, its duration and the occasion of its use and the time must all be taken into consideration, and so too must the character of the place.[37]

197. It is no defence that there was a way round the obstruction, or that no person was actually impeded [38] But, in the A.C.T., under section 4 of the proposed Public Assemblies Ordinance 1984, a person would not be guilty of obstruction by reason only of his/her participation in an 'authorised' public assembly. [38]

198. Under section 21 of the Traffic Ordinance the obstruction may be negligent or wilful to constitute the offence. Most statutory provisions only make wilful obstruction an offence. In Arrowsmith v. Jenkins (1963),[38] Lord Parker C.J. interpreted 'wilful' in this context as meaning that

> [i]f anybody, by an exercise of freewill, does something which causes an obstruction, then an offence is committed.[40]

Mr Justice Bright suggested that this includes recklessness.[41]

199. Brown notes that even if no obstruction is caused, participants in a demonstration in the A.C.T. can *be* guilty of loitering in any street or public place if they refuse or neglect to move on when directed to do so by a police officer.[42] This was made an offence by section 5 of the Gaming and Betting Ordinance 1945 (A.C.T.).[43]

200. Obstruction, in relation to the passage of persons or vehicles, is also an offence under the Public Order (Protection of Persons and Property) Act 1971 (Cth.) .[44] Section 9 provides that a person who in the A.C.T. or Northern Territory, or on any Commonwealth land,- building or part of a building, while taking part inan assembly, engages in "unreasonable obstruction" (defined so as to include obstruction of or interference with "rights of passage along the public streets"), commits an offence punishable on Conviction by a fine not exceeding $200, or imprisonment for a term not exceeding three months, or both. Section 11(2)(a) is more specific and makes it an offence unreasonably to obstruct "the passage of persons or vehicles" into, out of, or on any Commonwealth land, building or part of a building in the A.C.T. or Northern Territory, or otherwise in relation to the use of such premises. The penalties are the same as for section 9. These sections taken together appear so wide as to extend to any obstruction of a person or vehicle in the A.C.T. or Northern Territory.

201. Over 100 people were charged with obstruction under section 9 following the anti-Apartheid, anti-Vietnam War demonstrations in Canberra on ¯21 May 1971, the "day of rage".[45]

Near Parliament

202. In the A.C.T. and Victoria there are special provisions for assemblies near Parliament. Section 3 of the Unlawful Assemblies Ordinance 1937 (A.C.T.) prohibits more than twenty persons assembling within ninety metres of Parliament House for an "unlawful purpose" which includes the purpose of making known a grievance, discussing public affairs or petitioning for changes in the law.[48] Participation in an unlawful meeting is an offence for which the police have a specific power of arrest, and punishable by a fine of up to $200 or imprisonment for six months. There is a similar provision in Victoria under section 3 of the Unlawful Assemblies and Processions Act 1958, prohibiting assemblies of more than 50 persons while Parliament is sitting.[47]

203. Remembering the large number of demonstrations which have taken place in recent years immediately outside Parliament House in Canberra, one would suspect that the offence under section 3 of the Unlawful Assemblies Ordinance is not often Prosecuted. For example, when, on 27 October 1982, approximately 1000 Wollongong and Newcastle steel and coal workers broke down the main doors of Parliament House, allowing 20 men to enter Kings' Hall where they stayed shouting and chanting for half an hour until persuaded to leave, only one man was arrested and he was charged with assault after a clash with police.[48]

Elsewhere

204. In the absence of statutory regulations an assembly may take place in other public places (to which there is a public right of access) provided it does not unreasonably interfere with the rights of others to a substantial degree, in which case it constitutes a public nuisance.[49] An exception is the foreshore where, according to an old English case,[50] there is

no right to hold a public meeting. Trespass to public land to which there is no public right of access, and to private land, is, of course, a tort.

205. However, most public places are subject to statutory regulations. For example, in London, regulations control the use of even traditional meeting places such as Trafalgar Square,[51] Hyde Park[52] and public commons.[53] In the A.C.T., regulation 21 of the Public Parks Regulations (made by the Minister under section 12 of the Public Parks Ordinance 1928 (A.C.T.)) provides:

> A person shall not without the permission in writing of the Minister or Trustee (proof whereof shall lie upon him) hold or take part in any public assembly or meeting of any kind, or preach at or address any such public assembly or meeting in a Public Park.

206.Contravention of this regulation is an offence punishable by a fine of up to $50. "Meeting" is defined in regulation 2 to include "agricultural or pastoral shows, exhibition races, athletic sports or other entertainment". "Public park" is defined in section 3 of the Ordinance as meaning "any land declared [by the Minister] in pursuance of this Ordinance to be a public park or recreation reserve". According to the Department of Territories and Local Government, declarations have been made in respect of some but not all public parks and recreation reserves. But where a declaration has been made, mere participation in an unauthorised meeting in a public park is an offence.

Trespass

207. Apart from statutory regulation of the use of public places, trespass to public and private land is made an offence by a number of provisions. The first and most important of these are

contained in the Public Order (Protection of Persons and Property) Act 1971 (Cwth). Under section 11(1) it is an offence to trespass without reasonable excuse on any land, building or part of a building[54] in the A.C.T. or the Northern Territory. This would seem to cover all highways and public places, excepting only water areas. The offence is punishable by a fine not exceeding $100 or imprisonment for a term not exceeding one month. 18 people were charged with this offence following an anti-Apartheid demonstration on 19 May 1971. Nine who pleaded guilty were fined $50 each.[55]

208. Section 12(1) makes trespass without reasonable excuse on Commonwealth premises an offence, but is otherwise in identical terms, as is section 20(1) which applies in respect of "protected premises", that is those premises occupied by diplomatic or international organisations, or the residences of their principal staff.

209. Secondly, under section 89 of the Crimes Act 1914 (Cwth) a person who trespasses without lawful excuse upon any "prohibited Commonwealth land", that is land on which a 'no trespassing' notice is posted, commits an offence punishable by a fine not exceeding $100.

210. Thirdly, section 38 of the Trespass on Commonwealth Lands Ordinance 1932 (ACT) provides that a person who trespasses without lawful excuse, or deposits a bicycle or other article, "upon any lawn or grassed area in any of the public streets in or immediately adjoining the Shopping Centres at City, Kingston and Griffith" commits an offence punishable by a fine not exceeding $20. Further, section 4(2) provides that any person who, without lawful excuse, trespasses or goes upon land upon which a 'no trespassing' notice is posted, or on which is built a dwelling house, or on "any garden, plantation or afforestation area belonging to, maintained by, or under the control of, the Commonwealth" also commits an offence punishable by a fine not exceeding $20.

211. Because 'trespass' is not defined in any of this legislation, it must assume its common law meaning. Trespass to land may be committed intentionally, negligently, and perhaps innocently, and proof of damage is not required.[58] The statutory defence of 'reasonable excuse' will presumably cover innocent trespass, but negligent trespass may not be covered if it would not have been committed by a reasonable man. Whether the defence of 'lawful excuse' covers 'innocent' trespass is uncertain.[57] However, in the Western Australian case of Wills v. Williams (1971),[58] a case on criminal trespass, Virtue S.P.J. said that in order to establish a lawful excuse the accused

> must show that his presence was not for any criminal purpose. If he does that his trespass is excused ... simply by the absence of wrong intention. This excuse is lawful because he is honest and therefore should not be treated as a criminal.[58]

212. The word 'trespass' is not used in another relevant provision under the Enclosed Lands Protection Ordinance 1943 (A.C.T.). Section 4(1) provides:

> Any person, who, without lawful excuse (proof whereof shall lie upon him), enters into the enclosed land of any Other person, without the consent of the owner or occupier or the person in charge of those lands, shall be guilty of an offence.
>
> Penalty $10.

213. There are exceptions for drovers, and in respect of roads on enclosed lands. "Enclosed lands" are defined as meaning any public or private lands enclosed by "a fence wall or other erection", or partly in this way and partly by a natural boundary.

214. The above account reveals an array of provisions available to the police, many of which will rarely be used.

The Conduct of the Assembly

215. There are many criminal offences which can be committed by those who participate in or disrupt assemblies. Some of these have already been referred to earlier in this chapter and in previous chapters. There follows a discussion of those offences more commonly charged in respect of conduct which has taken place in the course of an assembly in the A.C.T., together with a brief survey of less common offences.

More Common Offences

Breach of the Peace

216. Breach of the peace would be made a statutory offence by the proposed Public Assemblies Ordinance 1984 (A.C.T.). Section 19(1) provides that

> A person shall not, in or near a public assembly, engage in conduct that causes or provokes or is intended to cause or provoke a breach of the peace by any person.
>
> Penalty: $500.

217. The effect of this sub-section, inter alia, is that a person who, in or near a public assembly, engages in deliberate conduct (not inadvertent or accidental) that causes or provokes a breach of peace is guilty of an offence, notwithstanding that the person neither committed the breach of the peace nor intended that a breach of the peace should be the consequence of his/her conduct. This is in stark contrast to the long-established common law principle, exemplified by the decision in Beatty v. Gillbanks (1882)[60] that a person may not be convicted for doing a lawful act by reason only that the person knew that his/her lawful act might provoke another to do an unlawful act.61

218. The proposed power for a police officer to give directions where the conduct of a person in or near a public assembly is likely to cause or provoke a breach of the peace has already been discussed in the previous chapter. It was noted there that because of uncertainty over the meaning of 'breach of the peace', which is defined neither in the proposed Ordinance nor elsewhere, it would be preferable for the concept of a 'breach of the peace' to be abandoned in favour of a clearer and more certain statement of the proscribed conduct. The same applies to the use of 'breach Of the peace' in section 19(1), and again, drawing on the recommendations of the British Law Commission, 62 with the comments in the previous paragraph in mind, it is proposed that if the creation of a new statutory offence can be justified,[63] then section 19(1) should be amended to read as follows:

> A person shall not, in or near a public assembly, engage in conduct that causes or provokes another person of reasonable firmness present at the scene to fear violence to his/her person or property.

Obstruction of a Police Officer

219. Chapter 2 of this Part described how in Forbutt v. Blake (1981)[64] Connor A.C.J. held that disobedience of a police officer's command to cease a lawful activity could not constitute the offence of obstructing a police officer in the execution of his/her duty.

220. In the A.C.T., obstruction of a police officer in the execution of his/her duty is an offence under a number of different provisions,[65] which carry widely varying penalties. 66 The most recent provision, and that apparently now most commonly used by the police,[67] is section 64 of the Australian Federal Police Act 1979 (Cwth), which includes provision for the payment of compensation by the offender for any damage or injury sustained by the officer. Section 64 provides:

(1) A person shall not assault, resist, obstruct or hinder, or aid, incite or assist any other person to assault, resist, obstruct or hinder, a member [of the Australian Federal Police] in the execution of his duty.

Penalty -

(a) on conviction on indictment - imprisonment for 2 years; or

(b) on summary conviction - $2,000 or imprisonment for 12 months, or both.

(2) The court convicting a person of an offence against sub-section (1) may, in addition to the penalty provided by that sub-section, order the offender to pay such compensation as the court thinks fit for any damage or injury caused by the offender to the uniform, clothing or accoutrements of the member concerned or for medical or other expenses incurred in consequence of personal injury sustained by him by reason of the offence.

221. The decisions of the courts reveal that three components must be present to constitute the offence: intention, an obstruction, and a police officer acting in the execution of his/her duty. 68

222. First, it must be shown that there was a deliberate act by the accused with the intention of causing an obstruction. But it is not necessary to prove that the accused knew that the person he/she was obstructing was a police officer.[69]

223. Secondly, it must be shown that there was an 'obstruction'. In Hinchcliffe v. Sheldon (1955),[70] Lord Goddard C.J. defined this as meaning conduct "making it more difficult for the police to carry out their duties" [71] for example, the withholding or destruction of evidence, or an attempt to elude the police [72] A refusal to answer questions cannot, by itself, amount to obstruction,[73] but in the recent decision of Tankey v. Smith (1981)[74] in the A.C.T. Supreme Court, Blackburn C.J. held that a deliberate lie, in answer to a question from a police officer, amounted to obstruction.

224. Thirdly, it must be shown that a.pOlice officer was obstructed while acting in the execution of his/her duty. A police officer's primary duty is the maintenance of the Queen's peace. He/she also has a duty to prevent crime and protect life and property. In Wright v. McOualter (1970),[75] a police officer had the duty of protecting the United States Embassy in Canberra from instrusions, damage and breaches of the peace. The Commonwealth, by statute, had such a responsibility in respect of all diplomatic premises. A. student, who was demonstrating with others against the war in Vietnam, was ordered by the police officer to move from the lawn Outside the Embassy. He was convicted of obstructing a police officer for his refusal to do so. The police officer was clearly acting in the execution of his duty in trying to prevent a volatile ' situation getting out of control. It was in this respect that the case differed from Forbutt v. Blake (1981).[76] In the latter case, Connor A.C.J. found that the police officers were not acting in the execution of their duty in ordering the Women Against Rape demonstrators to cease .what was a lawful activity.

225. As to the power of arrest for obstruction of a police officer, at common law this may be justified on the ground that a breach of the peace has been committed or is reasonably apprehended [77] However, in the A.C.T., since 1983, the general statutory power has been sufficiently wide to enable arrest for obstruction of a police officer.[76]

Offensive Behaviour

226. Section 546A[79] of the Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.) provides that:

> A person shall not in, near or within the view or hearing of a person in a public place behave in a riotous, indecent, offensive or insulting manner.
>
> Penalty: $1,000.00

227. In Ball v. McIntyre (1966), [81] a student, Ball, was charged with behaving in an "offensive manner" under the now repealed[82] section 17(d) of the Police Offences Ordinance 1930 (A.C.T.), a provision similar to s.546A. In the course Of an anti-Vietnam War demonstration outside Parliament House, Ball had climbed the statue of King George V, hung a placard which said "I will not fight in Vietnam" from a part of the statue, and squatted at the foot of the statue on top of the pedestal for about 20 minutes, refusing to come down when requested to do so by the police. Kerr J., in the A.C.T. Supreme Court, discussed the meaning of "offensive" in section 17(d), and in doing so referred with approval to the meaning attributed to "offensive" by O'Brien J. in the Victorian case, Worcester v. ***Smith (1951):**

> Behaviour to be 'offensive' ... must, in my opinion, be such as is calculated to wound the feelings, arouse anger or resentment or disgust or rage in the mind of a reasonable person. The mere expression of political views, even when made in the proximity of the offices of those whose opinions or views are being attacked, does not in my opinion, amount to offensive behaviour.[83]

Kerr J. found that Ball's conduct was unpremeditated political behaviour, which would readily be recognised as such by the reasonable man. The reasonable man

> would doubtless think that the climbing on the pedestal and placing the placard on the statue was rather foolish and a misguided method of political protest, that it offended against the canons of good taste, that it was in that sense improper conduct, but I do not believe that the reasonable man seeing such conduct to be truly political conduct, would have his feelings wounded or anger, resentment, disgust or outrage roused.[84]

He therefore found Ball not guilty,

> in the confident belief that in this day in Australia we are mature enough to tolerate spontaneous politiCal protests of this kind. 85

228. 'Offensive Behaviour' is one of the more commonly employed charges in prosecuting conduct which has occurred in the course of an assembly. In the September Moratorium demonstration in Adelaide in 1970, of the 130 arrests, 20 involved charges of offensive behaviour or language.[86]

229. It is assumed that like the now repealed section 17(d) of the Police Offences Ordinance 1930, under s.546A "offensive or insulting" behaviour are disjunctive: although not mutually exclusive each can be prosecuted as a separate charge.[87] The British case, Brutus v Cozens (1973),8[8] concerned a charge of 'insulting' behaviour. A man interrupted a tennis match at Wimbledon by going on to the court, scattering leaflets and trying to give one to a player. He then sat down and had to be removed by the police. He was charged with insulting behaviour whereby a breach of the peace was likely to be occasioned, under section 5 of the Public Order Act 1936.[89] The House of Lords allowed an appeal against conviction on the ground that the appellant's behaviour was not insulting. The words 'threatening, abusive, insulting' must be given their ordinary meaning. Lord Reid said:

> Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide Or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. 90

Viscount Dilhorne expressed a similar view:

> Unless the context otherwise requires, words in a statute have to be given their ordinary natural meaning and there is, in this Act, in my opinion, nothing to indicate or suggest that the word "insulting" should be given any other than its natural meaning.[91]

Lord Reid went on to say of the appellant's conduct:

> The spectators may have been angry and justly so. The appellant's conduct was deplorable. Probably it ought to be punishable. But I cannot see how it insulted the spectators.[92]

In the most recently reported Australian decision on 'insulting' behaviour, E v Smith (1974),[93] the New South Wales Court of Criminal Appeal took the same approach.[94]

230. Lord Parker CJ., in Jordan v. Burgoyne (1963), emphasised that 'threatening', 'abusive' and 'insulting' are "all very strong words".[95] He stressed that the word 'insult' should be interpreted in the sense of "hit by words",[98] and not in the weaker sense of displeasing or annoying conduct.[97]

231. As to the intention required for an offence such as section 546A, Justice Bright, on the authority of Densley v. Martin (1943),[98] stated that intention is a necessary ingredient for the South Australian equivalent of section 546A,[99] although the intention may be imputed to the defendant if his/her conduct was deliberate and the offence was the natural and probable consequence of that conduct.[1]

232. In England, section 5 of the Public Order Act 1936 has been amended to include the offence of Incitement to Racial Hatred.[2] This is not an offence under Australian law, but the Human Rights Commission has recently published two occasional papers on incitement to racial hatred and Report No. 7 which consists of a proposal for amendments to the Racial Discrimination Act 1975 to cover incitement to racial hatred and racial defamation.[3] Such legislation is at present being considered by the Government.

Offences under the Public Order (Protection of Persons and Property) Act 1971 (Cwth)

233. This Act, which applies in the A.C.T., the Northern Territory and on Commonwealth premises, was intended "to clarify and simplify"[4] the law concerning public assemblies in areas of Commonwealth legislative responsibility, and to extend

special protection to the personnel and premises of diplomatic and consular missions and international organisations.[5] A number of provisions of the Act have already been referred to in this chapter.

234. Section 6 replaces and goes beyond the common law offence of unlawful assembly:[6]

> (1) Where persons taking part in an assembly that is in a Territory or is wholly or partly on Commonwealth premises conduct themselves, in the Territory or on the Commonwealth premises, in a way that gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property, each of those persons is guilty of an offence, punishable on conviction by a fine not exceeding Two hundred and fifty dollars or imprisonment for a term not exceeding three months, or both.
>
> (2) A person who, in a Territory or on Commonwealth premises, while taking part in an assembly, wilfully and without lawful excuse, does an act or thing by way of physical violence to another person or damage to property is guilty of an offence, punishable on conviction by a fine not exceeding One thousand dollars or imprisonment for a term not exceeding twelve months, or both.

An "assembly" is defined in section 3 as meaning:

> an assembly of not less than three persons who are assembled for a common purpose, whether or not other persons are assembled with them and whether at a particular place or moving, and includes the conduct in connexion with that common purpose of all or any of the persons in the assembly.

235. The section thus applies at both public meetings and processions on "reasonable apprehension" of violence or damage, a question of fact to be determined by the court. Section 15 is the equivalent provision for specially protected personnel and

premises. As with other sections of the Act there are no reported decisions of the courts which give guidance as to interpretation.

236. Section 7 applies (section 16 for specially protected personnel and premises), where there is actual violence or damage. Section 7 provides that:

> A person who, in a Territory or on Commonwealth premises, while taking part in an assembly, wilfully and without lawful excuse causes -
>
> (a) actual bodily harm to another person; or
>
> (b) damage, to an extent exceeding two hundred dollars, to property,
>
> is guilty of an indictable offence, punishable on conviction by imprisonment, in the case of causing actual bodily harm, for, a term not exceeding five years or, in the case of causing damage to property, for a term not exceeding three years.

237. The offences under sections 7 and 16 are the only indictable offences in the Act. As was the case with the offence of trespass mentioned above, it is not clear what constitutes a "lawful excuse".

238. Section 10 (section 19 for specially protected personnel and premises) makes it an offence to possess or use weapons, missiles and other objects while taking part in an assembly and without lawful excuse. 'Possession' is punishable by a fine not exceeding two hundred and fifty dollars, or, imprisonment for a term not exceeding three months, or both. For actual use the penalties are double. Brown suggests[7] that whether a thing constitutes a weapon or missile is really a question of the accused's intention, because so many things could be used as such. But the difficulty is that it may be almost impossible to deduce the accused's intention unless he/she has made an 'attempt'

to use the thing as a weapon or missile. Under section 7 of the Crimes Act 1914 (Cwth), an 'attempt' to commit any offence against any law of the Commonwealth or a Territory is itself an offence, punishable as if the offence had been committed.[8] Thus, possession of a weapon or missile may be punishable as if it had been actually used. Further, intention would appear to be a requirement for the offence of 'actual use', because a thing is probably not a weapon or missile unless it is intended to be.

239. Section 10'also'includes the possession and use of "destructive, noxious or repulsive" objects or substances. Destructive and noxious substances are probably fairly easily recognisable: Brown notes that a bag of concentrated weed killer has been held to be a "destructive substance" in Canberra Petty Sessions.[9] However, it is more difficult to determine whether something is "repulsive" - presumably, this will be treated objectively.

Malicious Damage

240. Malicious damage to property is a summary offence under the Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.),[10] and in relation to Commonwealth property- in a public place under the Roads and Public Places Ordinance 1937 (A.C.T.).[11] All Australian jurisdictions have numerous summary property offences of this sort.[12]

241. Where damage occurs during an assembly in the A.C.T., a prosecution is more likely to be brought under section 6 or 7 of the Public Order (Protection of Persons and Property) Act 1971 (Cwth) referred to above.

Less Common Offences

Incitement[13]

242. Incitement is the common law misdemeanour of inciting or soliciting others to commit an offence.[14] In the A.C.T. this has been superseded by section 7A of the Crimes Act 1914 (Cth) which provides that:

> If any person -
>
> (a) incites to, urges, aids or encourages; or
>
> (b) prints or publishes any writing which incites to, urges, aids, or encourages,
>
> the commission of offences against any law of the Commonwealth or of a Territory or the carrying on of any operations for or by the commission of such offences, he shall be guilty of an'offence.
>
> Penalty: Two hundred dollars or imprisonment for twelve months, or both.[15]

Conspiracy

243. At common law conspiracy is a misdemeanour committed when two or more persons agree to commit a criminal offence, pervert the course of justice, commit a tort (provided the execution of the agreement involves either the invasion of the "public domain"[16] or the infliction of injury or damage on its victim), defraud, corrupt public morals or outrage public decency. 17

244. Further, under section 86(1) of the Crimes Act 1914 (Cwth), it is an indictable offence, punishable by imprisonment for a term not exceeding three years, to conspire with another person:

> (a) to commit an offence against a law of the Commonwealth;
>
> (b) to prevent or defeat the execution or enforcement of a law of the Commonwealth;

(c) to effect a purpose that is unlawful under a law of the Commonwealth;

(d) to effect a lawful purpose by means that are unlawful under a law of the Commonwealth; or

(e) to defraud the Commonwealth or a public authority under the Commonwealth.

Sub-section (3) specifically defines "law of the Commonwealth" to include a law of a Territory.

Affray

245. Smith and Hogan define the common law offence of affray as

(1) unlawful fighting or unlawful violence used by one or more persons against another or others; or an unlawful display of force by one or more persons without actual violence;

(2) in a public place or, if on private premises, in the presence of at least one innocent person who was terrified; and

(3) in such a manner that a bystander of reasonably firm character might reasonably be expected to be terrified.[18]

246. In England, until the 1950s, the offence had been long in disuse, but a series of cases since have re-established affray as a useful public order offence [19] There have been no recent prosecutions in Australia.

247. As mentioned above, in the A.C.T. 'riotous or indecent' behaviour is also an offence under s.546A of the Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.).[20]

Misbehaviour at Public Meetings

248. Section 482(1) of the Crimes Act 1900 *(N.S.W.)* (in its application to the A.C.T.) provides that

> A person shall not, in any premises in which a public meeting is being held, behave in a manner that disrupts, or is likely to disrupt, the meeting.
>
> Penalty:$1000 or imprisonment for 6 months.

249. Although the word 'premises is not defined, it is presumed that this provision is intended for meetings held 'inside'. Section 482(2) gives power to the person presiding at the meeting to request any police officer present to remove a person who the person presiding reasonably believes "is behaving in a manner that is disrupting, or is likely to disrupt, the meeting", and the police officer may remove that person.

Unlawful Assembly, Rout. Riot

250. Smith and Hogan define the common law offence of 'unlawful assembly' as:

> (1) An assembly of three or more persons;
>
> (2) A common purpose (a) to commit a crime'of violence or (b) to achieve some other object, whether lawful or not, in such a way as to cause reasonable men to apprehend a breach of the peace.[21]

251. The common law offence of 'rout' is defined by the British Law Commission as

> a disturbance of the peace by three or more persons who assemble together with an intention to do something which, if executed will amount to riot and who actually make a move towards the execution of their common purpose, but do not complete it.[22]

252. The best known of these common law offences, 'riot', is defined by Hawkins as:

> a tumultuous disturbance of the peace by three persons or more, who assemble together of their own authority, with an intent mutually to assist one another against

> any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually execute the enterprise, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.[23]

253. By section. 25 of the Public Order (Protection of Persons and Property) Act 1971 (Cwth), these three common law offences no longer have effect in the A.C.T. They have been replaced by the statutory provisions discussed earlier.

Sedition

254. The common law offences of seditious libel and seditious words have been superseded in the A.C.T. by section 24D(1) of the Crimes Act 1914 (Cwth). This provides that

> Any person who writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence.
>
> Penalty: Imprisonment for three years.

255. 'Seditious intention' is defined in section 24A as an intention to effect one of a number of purposes. These include bringing the Sovereign into hatred or contempt, exciting disaffection against the Commonwealth Government, Constitution or either House of Federal Parliament, and promoting "feelings ofand hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth".

Conclusion

256. This chapter began with Sir Henry Maine's statement that "freedom is secreted in the interstices of the law of crime and tort". Having reviewed criminal and tortious liability with relevance for public meetings and demonstrations, and having seen in the previous two chapters the wide range of common law

and statutory preventive and control powers available to the police, it is difficult to see where such interstices exist. In the A.C.T. there is a wide range of offences proscribing much of the conduct which is common in public meetings and demonstrations.

257. The difficulty of finding this intersticial freedom highlights the importance of ensuring that the law adequately protects exercise of the right of assembly, so that it, 'fulfils its essential role in the proper functioning of our democracy.

Footnotes to Chapter 6

1. W.S. Holdsworth, A History of English Law (2nd ed 1937) x, 701, quoting Sir Henry Maine.

2. D.G.T. Williams, Keeping the Peace (1967) 17-19.

3. In Britain, however,, the partiality and objectivity of local magistrates has sometimes been questioned where heavy deterrent sentences are handed out in the immediate aftermath of a disturbance. It has been suggested that such summary trials should not be held too hastily (D.G.T. Williams, "Protest and Public Order" (1970) 28 Camb. L.J. 96, 100), and that if a defendant's conduct appears to merit a heavy penalty, then prosecutors should be encouraged to resort to trial on indictment. (D.G.T. Williams, Keeping the Peace (1967) 18.)

4. Six months is the maximum sentence of imprisonment which can be passed by a Magistrate.

5. Australian Law Reform Commission, Sentencing of Federal Offenders, Report No. 15 (1980) para 100.

6. E.g. under the Public Order (Protection of Persons and Property) Act 1971 (Cwth) a prosecution under s.6(1) may stand a better chance of succeeding than under s.7. Such considerations often lead to plea bargains.

7. Australian Law Reform Commission Report No. 15, op cit para 102.

8. Compare the guidelines issued by the U.S. Department of Justice for Federal Prosecutors quoted in the Australian Law Reform Commission Report No. 15 op cit para 108.

9. C.P.D. Senate 16 December 1982 p. 3642.

10. Prosecution Policy of the Commonwealth (1982) para. 16.

10a Ibid para. 17.

10b Ibid para 19.

10c Ibid para 22.

11. John Burke, Osborn's Concise Law Dictionary (6th ed. 1976) **164.**

12. E.g. A.L. Goodhart, "Public Meetings and Processions" (1973) 6 Camb. L.J. 151; E.C.S. Wade, "The Law of Public Meeting" (1938) 2 Mod. L.Rev 177; M. Supperstone, Brownlie's Law of Public Order and National Security (2nd ed 1981) 42 ff.

13. Harrison V. Duke of Rutland [1893] 1 QB 142.

14. Hickman v. Maisey [1900] 1 QB 752.

15. M'Ara v. Magistrates of Edinburgh 1913 S.C. 1059.

16. Ibid. 1073.

17. Brownlie, op cit 47.

18. Nagy v. Weston [1965] 1 All E.R. 78.

19. Isaacs J. in Melbourne Corporation v. Barry (1922) 31 CLR 174, 196.

20. Tresspass to land consists of the entering or remaining on land of another without lawful excuse. Geoffrey A. Flick,. Civil Liberties in Australia (1981) 93.

21. Defined in the City Area Leases Ordinance 1936 (A.C.T.), s.4; R.A. Brown, "'And hast thou slain the jabberwock?' The law relating to demonstrations in the A.C.T." (1974) 6 F.L, Rev. 107, 108-110.

22. Trespass may, of course, be a statutory offence. Eg'. Public Order (Protection of Persons and Property) Act 1971 (Cwth), s.11.

23. Kamara v D.P.P. [1974] A.C. 104, discussed by D.G.T. Williams, "Offences Against the State 1964-1973" [1974] Crim. L. Rev. 634, 638 & D.G.T. Williams, "Freedom of Assembly and Free Speech: Changes and Reforms in England" (1975) 1 N.S.W. L.J. 97, 105.

24. Kamara v. D.P.P. [1974] A.C.T. 104, 116 (Lord Hailsham).

25. British Law Commission, „Report on ConspirAcy and Criminal Law Reform Working Paper No. 76 (1976) para 5:17.

26. A.P. Bates, T.L. Buddin & D.J. Meure, Criminal Law (1979) 820; R. Card, Cross & Jones Introduction to Criminal Law (9th ed. 1980) 341 ff.

27. Stephen, Digest (9th ed.) art. 235 quoted by Brownlie, DR. cit 75; D. Cowley, "Public Nuisance: A 'Crime of Convenience'?" (1981) 125 Sol.˙ J. 407,

28. P. Wallington, "Injunctions and the 'Right to Demonstrate'" (1976) 35 Camb. L.J. 82, 97 ff.

29. Ibid 98; Brownlie, op cit 75-76; Flick op cit 96-98, Lowdens v. Keaveney [1903] 2 I.R. 82.

30. E. v. Clarke (No. 2) [1964] 2 Q.B. 315.

31. Incitement is the common law misdemeanour of inciting or soliciting others to commit an offence. It may be tried on indictment. Bates, Buddin & Meure, op cit 759 ff; Cross & Jones, op cit 338 ff.

32. Eg. Offences in Public Places Act 1979 (NSW), s.7; Police Offences Act 1953-1981 (S.A.), s.58; Police Offences Act 1958 (Vic.), s.7; Traffic Ordinance 1937 (A.C.T.), s.21.

33. "Obliging Police arrest 69" Canberra Times 20 May 1968 p.1: 69 were arrested, 67 convicted.

34. Haywood v. Mumford (1908) 7 CLR 133.

35. Ibid 138 (Griffith C.J.).

36. Schubert v. Lee (1946) 71 Q.L.R. 589.

37. Ibid 594: Nagy v. Weston [1965] 1 All E.R. 78, 80 (Parker C. J.).

38. Schubert v. Lee (1946) 71 C.L.R. 589.

38a. Discussed in Part II Chapter 3.

39. Arrowsmith v. Jenkins [1963] 2 QB 561, a case on Highways Act 1959 (Eng. & W.), s.121.

40. Ibid 567. Discussed by Mr Justice Bright, Report on the September Moratorium Demonstrations (1971) 16, and Brownlie, op cit 78-79.

41. Bright Report, loc cit.

42. Brown, op cit 116.

43. Brown refers to the unreported case of Police v. Merhar in which s.5 was utilised against a solitary picket outside the Israeli Embassy in Canberra.

44. Brown, op cit 133.

45. "Students, Police in Violent Clash" Canberra Times 22 May 1971 p.1.

46. Review by the Attorney-General of the Commonwealth and the Attorney-General for Western Australia of Laws in Relation to Public Assemblies (1979) 4.

47. In England, both Houses of Parliament give sessional orders to the Commissioner of the Metropolitan Police to ensure access to Parliament by members of the Commons and Lords is not obstructed. The Commissioner enforces these orders by giving directions under s.52 Metropolitan Police Act 1839 (2 & 3 Vict., c.47) S.N. Bailey, D.J. Harris & B.L. Jones, Civil Liberties Cases & Materials (1980)• 143-145.

48. "Workers Invade Kings' Hall" Canberra Times 27 October 1982 p.l.

49. Brown op cit 111.

50. To be precise a Welsh case: Llandudno **U.D.C.** V. Woods [1899] 2 Ch.705. See also Brighton Corporation v. XacXhAm (1908) 72 JP 318 (Ch.D.).

51. The Trafalgar Square Regulations 1952, S.I. 1952 No.776. Bailey, Harris & Jones, op cit 142; **R.** v. Cunninghame Graham and Burns (1888) 16 Cox CC 420; Ex parte Lewis (1888) 21 QBD 191. On Trafalgar Square and Hyde Park, see Brownlie, op cit 35; D.G.T. Williams, Keeping the Peace (1967) Ch.3.

52. Royal and Other Parks and Gardens Regulations 1977, S.I. 1977 No. 217; Bailey v. Williamson (1873) L.R. 8 QB 118; P. O'Higgins, Cases and Materials on Civil Liberties (1980) 198.

53. Bailey, Harris & Jones, op cit 140; De Morgan v. Metropolitan Board of Works (18'80) 5 QBD 155.

54. grown, op cit 132.

55. "Canberra Police clash with demonstrators" Canberra Times 20 May 1971 p.l.

56. J.G. Fleming, The Law of Torts (5th ed. 1977) 19; Brown, Qp cit 132; P.G. Heffey & H.J. Glasbeek, "Trespass: High Court verses Court of Appeal" (1966) 5 Melb. U. L. Rev. 158.

57. Brown, op cit 124.

58. Wills v. Williams [1971] W.A.R. 29.

59. **_aid** 3^2.

60. Beatty v. Gillbanks (1882) 15 Cox C.C. 138; (1882) 9 Q.B.D. 308.

61. A.V. Dicey, The Law of the Constitution (10th ed. 1965) 283.

62. British Law Commission Report No. 123, Offences Relating to Public Order (1983) e.g. para. 5.22.

63. Which is questionable given the existing wide range of common law and statutory offences. The views of the task force in the Attorney-General's Department, which is at present reviewing the Crimes Act 1900 (in its application to the A.C.T.), would be a useful guide.

64. Forbutt v. Blake (1981) 51 FLR 465.

65. eg. s.58 Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.).
s.56 Crimes Act 1914 (Cwth.)
s.9 Public Order (Protection of Persons and Property) Act 1971 (Cwth)
s.64 Australian Federal Police Act 1979 (Cwth.)
s.4(4) Unlawful Assemblies Ordinance 1937 (A.C.T.).

66. From $250 or 3 months on summary conviction (s.9 Public Order (Protection of Persons and Property) Act 1971 (Cwth)), to 2 years imprisonment on conviction on indictment (s.64 Australian Federal Police Act 1979 (Cwth.)).

67, This was the charge laid against the 14 Women Against Rape demonstrators arrested during the 1980 Anzac Day March. See Part 1 Chapter 2, and Forbutt v. Blake (1981) 51 F.L.K. 465. Before the Australian Federal Police Act 1979 was enacted, s.73 of the Police Offences Ordinance 1930 (A.C.T.) was most commonly used. Of the 49 people arrested after the anti-Springboks demonstration at Manuka Oval on 21 July 1971, 10 were charged with hindering police under s.73 including M.H.A. Ken Fry. .'[1]49 Arrests at Springboks Game" Canberra Times 22 July 1971 p.1.; [11]35 protesters in Court" Canberra Times 23 July 1971 p.6. However, s.73 was repealed by the Police Offences (Amendment) Ordinance 1983 (A.C.T.).

68. Flick, op cit 29-40; Brownlie, op cit Ch.5.

69. R. v. Reynhoudt (1962) 107 CLR 381; *Kenlin* v. Gardiner [1967] 2 QB 510.

70. Hinchcliffe v. Sheldon [1955] 3 All ER 406.

71. Ibid 408. But see the discussion of this in Brownlie, op cit 115-116.

72. Flick, op cit 37-40.

73. Rice v. Connolly [1966] 2 QB 414.

74. Tankey v. Smith (1981) 36 ACTR 19 &see Geoffrey A. Flick, "Lying to a Police Officer" [1982] N.Z. L.J. 64.

75. Wright v. McOualter (1979) 17 FLR 305.

76. Forbutt v. Blake (1981) 51 FLR 465.

77. Wershof v. Commissioner of Police for the Metropolis [1978] 3 All E.R. 540.

78. Prior to 1983 the statutory power of arrest in the A.C.T. was confined largely to s.8A Crimes Act 1900 (Cwth) (see: McIntosh v. Webster (1980) 32 ALR 603; Donaldson v..BrooMbY (1982) 40 ALR 553. The power of arrest was widened by an amendment to s.352 Crimes Act 1900 (N.S.W..) (in its application to the A.C.T.) by s.19 Crimes (Amendment) Ordinance 1983 (A.C.T.), substituting a new sub-section (1) of s.352.'

79. Added by s.20 of the Crimes (Amendment) Ordinance (No. 3) 1983 (A.C.T4).

80. There are similar provisions in other Australian jurisdictions except N.S.W. eg. Police Offences Act 1953-1981 (S.A.), s.7; Summary Offences Act 1966 (Vic.), s.17; Police Offences Act 1935 (Tas.), ss.12 & 13. With the repeal of the Summary Offences Act 1970 (N.S.W.) there is no comparable provision in N.S.W. - the Offences in Public Places Act 1979 ***(N.S.W.)***, s.5 applies only in respect of conduct causing serious alarm or affront.

81. Dail v. McIntyre (1966) 9 FLR 237.

82. Repealed by the Police Offences (Amendment) Ordinance 1983 (A.C.T.).

83. Worcester v. allh [1951] VLR 316, 318.

84. Ball v. McIntyre (1966) 9 FLR 244.

85. -aid 245.

86. Bright Report, op cit 67.

87. Ibid 23; E. Campbell & H. Whitmore, Freedom in Australia (1973 ed.) 168. However, the contrary view was expressed by Melford Stephenson J. in Vernon v. Padden [1973] 3 All ER 302.

88. Brutus v. Cozens [1973] A.C. 854.

439. This provision is similar to s.546A Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.) except that 'offensive' behaviour is not specifically included, and there is an additional requirement that the behaviour must have been "with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned".

On s.'5 see Brownlie, op cit 3 ff; Bailey, Harris & Jones, op cit. 151; D.G.T. Williams, Keeping the Peace (1967) Ch.7; D.G.T. Williams, 'Threats, Abuse, Insults' [1967] Crim. L. Rev. 385; R.R. Hopkins, "Section 5 of the Public Order Act Today" (1977) 127 New L.J. 976; A. Samuels, "Public Order" (1979) 123 Sol.J. 239; J. Marston, "The Public Order Act 1936: Section 5 - An Appraisal" The Law Society's Gazette 27 August 1980 p.808.

90. Brutus v. Cozens [1973] AC 854, 862.

91. **Ibid.** 865-866.

92. **Maid** 862.

93. 2. v **Smith** [1974] 2 NSWLR 586.

94. Ibid 588 (Street C.J.). And see the discussion in the Bright Report, op cit 25.

95. Jordan v. Burgoyne [1963] 2 QB 744, 749.

96. **2.121.d.**

97. Which could follow from the interpretation of 'insulting' in **R.** v. Smith [1974] 2 NSWLR 596. See Brownlie, op cit 8-9.

98. Densley v. Martin [1943] SASR 144.

99. Police Offences Act 1953-1980 s.7.

1. Bright Report, op cit 25; Brownlie, op cit 11; Parkin v. Norman [1982] 2 All E.R. 583, especially McCullough J. at p.587.

2. The amendment was first made by the Race Relations Act 1965, s.6, but this has now been replaced by the Race Relations Act 1976, s.70 which enacted a new s.5A to the Public Order Act 1936. Brownlie, op cit 15; British Government Green Paper, Review of the Public Order Act 1936 and related legislation Cmnd 7891 (1980) para. 104 ff.

3. Human Rights Commission Occasional Paper No.1 Incitement to Racial Hatred: Issues and Analysis; Occasional Paper No. 2 Incitement to Racial Hatred: The International Experience (October 1982).

4. So said the Attorney-General, Mr Hughes, introducing the Bill to Parliament on 16 March 1971: H. Reps., Deb. Vol. 71, 926 (16 March 1971), quoted by Brown, op cit 120.

5. Brown, op cit 107; Campbell & Whitmore, op cit 175 ff; A. Hiller, "Law and Order under the Public Order Act 1971" (1973) 47 A.L.J. 251.

6. Brown, op cit 122-123. Note that s.25 provides that the common law offences of unlawful assembly, rout and riot no longer have effect in the A.C.T.

7. Ibid 131.

8. S.427 Crimes Act (1900) (N.S.W.) (in its application to the A.C.T.) provides for an "attempt" verdict.

9. Brown, loc cit.

10. Especially s.541 but see s.530 ff, and s.546 (defacing premises).

11. Roads and Public Places Ordinance 1937 (A.C.T.), s.

12. Bates, Buddin and Meure, op cit 934.

13. See also 'attempts': Crimes Act 1914 (Cwth), s.7; Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.), s.427.

14. Cross & Jones, op cit 338; Bates, Buddin & Meure, op cit 759 ff.

15. There are also more specific provisions of the Act eg. s.25, and compare Incitement to Disaffection Act 1934 (Eng. & W.), s.1 & R. v Arrowsmith [1975] Q.B. 678.

16. Kamara v. D.P.P. [1974] AC 104 discussed above.

17. Cross & Jones, op cit 341; Bates, Buddin & Meure, op cit 793ff; Peter Brett & Louis Waller, Criminal Law (4th ed. 1978) Ch.8.

18. Smith .& Hogan, Criminal Law (4th ed. 1978) 757 quoted by the British Law Commission, Offences Against Public Order Working Paper No. 82 (1982) para 16. See also Brownlie, op cit Ch.7; Flick, op cit 105.

19. Eg. v. Sharp [1957] 1 QB 552; Button v. D.P.P. [1966] A.C. 591; Taylor v. D.P.P. [1973] AC964. The British Law Commission in Report No. 123, Offences Relating to Public Order (1983) recommended that a new statutory offence of affray be created (para. 2:14).

20. The Police Offences Ordinance 1930 (A.C.T.), s.12 was repealed by the Police Offences (Amendment) Ordinance 1983.

21. Smith & Hogan, op cit 750, quoted in the British Law Commission Working Paper No. 82, op cit 41; Brownlie, op cit 121 ff; D.G.T. Williams, Keeping the Peace (1967) Ch.10; Flick, op cit 105; R. v. Caird (1970) 54 Cr.App.R.499.

22. British Law Commission Working Paper No. 82, op cit 37. And see Brownlie, op cit 130; Williams, loc cit.

23. Pleas of the Crown, vol.1, c.65, ss.1-5 quoted by the British Law Commission Working Paper No. 82, op cit 27. And see Brownlie, op cit 131; Williams, loc cit.

24. The British Law Commission in Report No. 123, Offences Relating to Public Order (1983), recommended that the common law offence of rout be abolished, the offence of unlawful assembly be replaced by two separate statutory offences, one penalising group violence and the other group threats of violence, and the offence of riot be given statutory form to deal with mass violence.

PART III

THE RIGHT OF ASSEMBLY AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS'

Background

International Measures

258. The present international concern for human rights is the product of the horror at the atrocities committed in Nazi Germany during the Second World War, and the political conviction of the Allies that if the war was due to the conduct of totalitarian states who had denied their citizens human rights, "one important safeguard against the outbreak of war and for the preservation of peace was the protection of human rights") -

259. Towards the end of the War, the Allies determined to establish the United Nations organisation with the aim of maintaining international peace and fostering international co-operation. The U.N. Charter, adopted following the San Francisco Conference of April to June 1945, affirms the importance of human rights in the work of the U.N. The preamble states:

> We the peoples of the United Nations, determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... do hereby establish an international organisation to be known as the United Nations.

Among the purposes of the U.N., set out in Article 1, is the following:

> To achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex-language or religion.

Then, by Article 56, members of the U.N. pledge themselves to "take joint and separate action" in co-operation with the U.N. for achieving the purposes set out in Article 55, which include:

> universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as 'to race, sex, language or religion. -

260. Article 68 requires the Economic and Social Council of the U.N. (ECOSOC) "to setup Commissions in the economic and social fields and for the promotion of human rights". In pursuance of this requirement, ECOSOC established a Commission on Human Rights and, after initial discussions concerning membership, the Commission, (then comprising 18 government-appointed members) opened its first regular, session. in January 1947. The Commission's first task was to draft an International Bill of Rights. It was decided that this should comprise three parts: first, a declaration of ,human 'rights; secondly, a detailed binding human rights treaty; thirdly, implementation machinery. Drafting of the Universal Declaration of Human Rights began immediately and was completed on 18 June 1948. ECOSOC transmitted the draft Declaration to the General Assembly without alteration, and the draft was then subjected to detailed scrutiny and debate in the Third Committee of the Assembly, which finished its report on 6 December 1948 in time for the adoption of the Declaration by the General Assembly on 10 December 1948.[2]

261. The Universal Declaration of Human Rights does not seek to impose legal obligations on States. That it was intended as a manifesto, a detailed catalogue of rights, is clear from the proclamation clause:

> Now, therefore, the General Assembly proclaims' this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every

> organ of society, keeping this Declaration constantly in mind, shall strive for these rights and freedoms and. by. progressive measures, .national .and international, to secure their universal and effective recognition and observance', both among the peoples of Member States themselves and _among the peoples of territories under their jurisdiction.

But whilst only intended as a 'common standard', the Declaration has achieved such moral and political authority that it has become an international standard by which the conduct of governments is judged; it has inspired treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the 'rights' provisions of many national constitutions; and it has been cited in the decisions of both national and international courts. A number of writers agree that:

> the justiciable provision of the Declaration, including certainly, those enunciated in articles two to twenty-one inclusive [civil and political rights], have now acquired the force of law as part of the customary law of nations.[3]

Article 20(1) of the Universal Declaration proclaims. that

> Everyone has the right to freedom of Peaceful assembly and association.

262. The resolution of the General Assembly adopting the Universal Declaration, also directed that work should proceed on the second stage of the International Bill of Rights, the drafting of a detailed, binding human rights treaty. But while the drafting and adoption of the Universal Declaration had taken 18 months, this second stage took 18 years, until 1966. Initially there was difficulty in deciding whether both civil and political rights, and economic, social and cultural rights should be contained in one treaty, and it was not until 1952 that it was decided that, because of differences in the nature of the two groups of rights, there should be two separate covenants: an International Covenant on Civil and Political Rights and an International Covenant on Economic Social and Cultural Rights.4

2634 Further delays in the drafting and adoption of the Covenants Can be attributed to a number of factors. First, the Covenants were intended to carry legal obligations: governments were, therefore, more Cautious in their approach than they had been towards the Universal Declaration. Secondly,-by the mid-19508 the initial reaction to the Nazi atrocities had waned - protection of human rights was not of such pressing concern. Thirdly, international co-operation was at a low ebb in the 19508 due to the Cold War, the Suez Crisis and Korea. Fourthly, membership of the U.N. had expanded rapidly with decolonisation, and achieving a consensus was consequently more difficult.[5] :

264. -Both covenants draw heavily on the Universal Declaration for the basic rights but are more detailed and impose binding obligations on State Parties. The covenants were approved by the General Assembly on 16 December-1966. Each was to come into effect three months after the thirty-fifth instrument of ratification had been deposited with the Secretary-General of the United Nations. It was nearly ten years before this occurred. The International Covenant on Economic, Social and Cultural Rights took effect on 3 January 1976,, and the International Covenant on Civil and Political Rights on 23 March 1976. On 29 July 1983, 75 State Parties had ratified the latter 'cOvenant.[6] Australia ratified the first of the Covenants on 10 December 1975 and the second on 13 August 1980.

265. The third stage of the 'International Bill of Rights' conceived in 1947 was the establishment of implementation machinery. Under the International Covenant on Civil and Political Rights (ICCPR) there are three parts to this First, under Article 40, State Parties undertake "to submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights". The first report must be submitted within one year of the ICCPR entering into force for the State Party concerned, and thereafter at the request of the Human Rights Committee.

266. In 1981, the Committee decided that State Parties, should be requested to submit subsequent reports every five years after the consideration of their initial report.7 The Human Rights Committee is established under Article 28 of the ICCPR, and consists of 18 members elected by the State Parties who should serve in their personal capacities and not as government representatives.$ The Committee studies the Article 40 reports, may submit comments to the State Parties to which they may reply, and may transmit these comments plus the Article 40 reports to ECOSOC, which will in turn report to the General Assembly. By 29 July 1983, 61 Article 40 reports had been submitted to the Human Rights Committee, (including that of Australia which was submitted on 11 November 1981) and another 7 were overdue.[9]

267. Secondly, under Articles 41 and 42 there is a procedure for complaints, whereby one State Party can complain to another State Party that the latter is not giving effect to the provisions of the Covenant.- If the matter is not settled between the parties, there is provision for mediation by the Human Rights Committee, or failing that$_t$, for the appointment of an ad hoc Conciliation Commission, For this complaints procedure to operate, both parties must have made declarations that they recognise the competence of the Human Rights Committee under Article 41. On 29 July 1983, 14 States Parties (of which Australia is not one)'had made such declarations.[10]

268. Thirdly, there is an Optional Protocol to the 'cm, also approved by the General Assembly in 1966 yet, not operative until 23 March 1976,. which enables individuals, "claiming to be victims of violations of any of the rights set forth in the Covenant", and who have exhausted local remedies[11] to complain to the Human Rights Committee. Such Complaints can only be made where the State Party concerned has separately ratified the Optional Protocol, On 29 July 1983, the Committee had received 147 individual complaints, of which 64 had been declared inadmissible, or had been discontinued, suspended or withdrawn.13

AUSTRALIAN RATIFICATION OF THE ICCPR AND ITS EFFECT

Article 2 Obligations

269. Australia ratified the ICCPR on 13 August 1980. By ratifying, Australia undertook the following obligations, set out in Article 2:

> .1. Each State Party to the present Covenant: undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or Other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right. thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of that State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

270. A State is under a duty to execute the provisions of a treaty from the date on which the treaty takes effect, and deficiencies in a State's municipal law do not excuse the State

from failure to fulfil its obligations.[14] International law recognises that in many States, of which Australia is an example, the provisions of international treaties have no effect in municipal law without enabling legislation, and the Human Rights Committee, the supervisory body set up by Article 28 of the Covenant, has accepted that "the method used to integrate the provisions of the Covenant in domestic law is a matter for each party to decide in accordance with its legal system and practice" [15] Nevertheless, the Committee has stated that "no domestic system or practice could be invoked as a reason for failing to implement the Covenant" .16

271. Ramcharan notes[17] that members of the Human Rights Committee have shown particular interest]-[8] in whether a citizen is able to initiate legal proceedings directly invoking the provisions of the Covenant, and in how much weight the courts afford those provisions:

> There is a strong tendency in the Committee in favour of the view that the Covenant should be made directly applicable in internal law.[18]

272. The wording of Article 2 prompts two observations. First, in paragraph 1, the obligation is to all "individuals" (i.e. natural persons and not corporations or other legal entities[20]) "within its territory and subject to its jurisdiction". In the use of the limiting words "within its territory", specifically adopted on a separate vote at the General Assembly of the U.N., the Covenant differs from, for example, the European Convention of Human Rights in which the obligation, stated in Article 1, is to secure rights and freedoms "to everyone within their jurisdiction". [21] By using the words "within its territory" State Parties to the Covenant appear to avoid liability in respect, for example, of human rights violations perpetrated by corporations based in their country but also operating outside that State's jurisdiction, or by "quasi-governmental vigilante-type groups operating outside the State's borders" .22

273. Secondly, there is a difference between the obligation in Article 2 paragraph 1, and the obligations in Article 2 paragraphs 2 and 3. The former is described by the International Law Commission as an 'obligation of result', that is, an obligation to achieve a result, leaving the State free to do so by whatever means it chooses. By contrast, the latter are 'obligations of means' because certain action or conduct is prescribed. The 'means' need not, however, be precisely stated, as is the case with paragraphs 2 and 3.[23] The International Law Commission has indicated that in relation to paragraph 2, a State Party would normally be expected to employ legislative 'means' to give effect to rights recognised in the Covenant.[24]

Australia's Reservations and Declarations

274. When Australia ratified the Covenant, it lodged with its instrument of ratification a number of reservations and declarations.[25] The first of these, a 'reservation'[28] concerning Article 2 and Article 50 (which states "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions"), draws attention to Australia's constitution as a federation under which legislative, executive and judicial powers are distributed among federal and State authorities. Thus, the implementation of the provisions of the Covenant is stated to be the responsibility Of the "constitutionally appropriate authorities" [27] Nevertheless, Australia still "accepts that the provisions of the Covenant extend to all parts of Australia as a federal State without any limitation or exceptions". There is a patent ambiguity here which, as Gillian Triggs points out,[28] makes the effect of the reservation unclear.

275. Further, the reservation fails to acknowledge Federal Parliament's power to legislate under section 51(xxix) of the Commonwealth Constitution, the 'external affairs' power. Since Australia's ratification of the Cdvenant, there have been the decisions of the High Court in KoowartA v. Bjelke-Petersen

(1982)[29] and Commonwealth of Australia v. State of Tasmania (1983).[30] In Koowarta v. Bjelke-Petersen a majority of the High Court held that the Racial Discrimination Act 1975 (Cwth) was a valid exercise of the power to legislate under section 51(xxix), for the Act was intended to give effect to the Federal Government's obligations under the International Convention the Elimination of All Forms of Racial Discrimination 1965, which the Government ratified in 1975. Three of the judges[31] went further, intimating that they would have upheld the validity of the Act even without the Convention, on the grounds that the Act was passed in pursuance of Australia's

> international obligation to suppress all forms of racial discrimination because respect of human dignity and fundamental rights, and thus the norm of non-discrimination on the grounds of race, is now a part of customary international law, as both created and evidenced by State practice and as expounded by jurists and eminent publicists.[32]

276. In Commonwealth of Australia v. State of Tasmania, a majority of the High Court held that regulations passed pursuant to the National Parks Act (Cwth), and provisions of the World Heritage Act (Cwth), which sought to stop the construction of the Franklin dam, were valid on the ground, inter alia, that these were a valid exercise of Federal Parliament's external affairs power insofar as they sought to implement a treaty obligation (under the UNESCO 'Convention for the Protection of World Cultural and Natural Heritage').

277. On the authority of these cases, there are strong grounds for asserting that Federal Parliament has power to legislate in order to give effect to its obligations under the International Covenant. However, at the time of ratification in 1980, it should be said that there was doubt as to the scope of the 'external affairs' power.

278. The other reservations and declarations lodged with the instrument of ratification relate to prisoners' rights, the regulation of broadcasting, and other minor interpretative matters, none of which affect the right of assembly except,

tangentially, Australia's acknowledgement of the existence of current legislation, consistent with Article 20, which prohibits any propaganda for war.

279. Australia made more reservations and declarations on ratification than has any other State Party to date. Because, to quote Gillian Triggs, the reservations and declarations are "broadly stated, vague and unclear",[33] and appear to substantially modify the rights set out in the Covenant, there was the possibility that another State Party might exercise its right, under Article 20 Of the Vienna Convention on the Law of Treaties,[34] to object to the reservations. An objection to a reservation must be notified within twelve months of the instrument of ratification being lodged, meaning, in Australia's case, by 13 August 1981. But even though no objections have been lodged, a reservation can still be held to be invalid, thereby negating ratification, if it is incompatible with the purpose and objects of the treaty 35 This is unlikely if no other State Party has objected to a reservation.

280. The then Attorney-General, Senator Evans, announced on 10 December 1984 - Human Rights Day - that the Labor Government had notified the United Nations, on 20 October 1984, of its decision to remove all but three of the reservations and declarations lodged on ratification.[36]

Australia's Article 40 Report

281. By Article 40 of the International Covenant, State Parties undertake to submit reports "on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights". Reports must be submitted within one year of the Covenant entering into force for the State Party concerned, and thereafter whenever the Human Rights Committee, the body set up to monitor the implementation of the Covenant, so requests. The Committee has in fact decided

to request State Parties to submit subsequent reports every five years after the Committee's consideration of the initial repott.[37]

282. Reports are submitted through the.Secretary7General of the U.N. to the Human Rights Committee, which examines the reports. The Committee has agreed that the main purpose of the examination is to assist State Parties in the promotion and protection of the human rights recognised in the Covenant, To achieve this the Committee seeks "to develop a constructive dialogue with each State Farty[1t].[38].- A representative of the Government of the State Party whose report is being examined is invited to be present to answer questions from the Committee,

283. In accordance with Article 40 and the guidelines laid down by the Committee for the presentation of reports," Australia submitted its initial report in November 1981.[40] The Report, which was considered by the Human Rights Committee at meetings on 25 and 26 October and 2 November 1982, was apparently "well received", [41] although there were many comments and requests for further information.[42]

284. The Report itself is couched in general terms. For example, paragraph 26 states:

> Whilst the civil and political rights embodied in the Covenant are not guaranteed in a formal constitutional sense, a high level of acceptance, protection and observance of those rights in Australia is ensured by a system of representative and responsible 'government, statute law and common law, and independent judiciary and the freedom of the press.

Paragraph 60 summarises the 'thrust' of the comments in the introductory section by stating that

> in Australia it is believed that the law and practice are in conformity with the provisions of the Covenant. 43

In the second section of the Report which deals with specific articles of the Covenant, six paragraphs are dedicated to Article 21, which requires recognition of the right of peaceful assembly. [44] Paragraph 367 begins by stating that:

> Australia, as a democracy,. recognises the plurality of social views within society and considers it should not lightly encroach upon the expression or dissemination of ideas, whatever their nature and whether or not expressed in public.

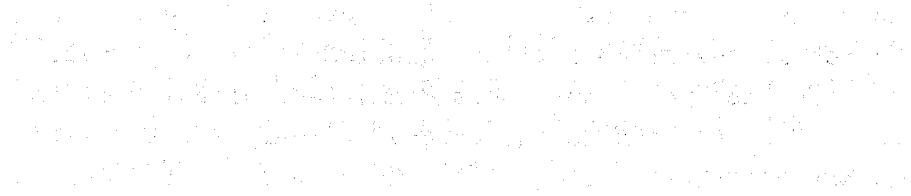
285. In the other paragraphs a brief survey is made of the controls and offences relevant to the right of peaceful assembly. It is implicit in this description that there is certainly no paramount 'right' of assembly in Australia, and the extent of any 'freedom' of assembly is unclear.

286. Whilst recognising that the International Covenant has no effect in Australian municipal law without enabling legislation,[45] the Report refers to two initiatives taken by the Federal Government "designed to implement the Covenant on a continuing basis". [46] The first is the establishment of the Meeting of Ministers on Human Rights. This comprises the Attorneys-General for the States, the Northern Territory and the Commonwealth, who meet periodically to discuss human rights matters. The second is the establishment of the Human Rights Commission, by the Human Rights Commission Act 1981 (Cwth), which came into effect On 10 December 1981.[47]

The Optional Protocol

287. On ratification of the Covenant in 1981, the then Liberal/ National Party Government was not prepared to commit Australia to ratification of the Optional Protocol. The Optional Protocol, described earlier, provides a right of individual petition to the Human Rights Committee, alleging violation of the rights set out in the Covenant. Only a relatively small number of State Parties - 29- have ratified the Optional Protocol, no doubt for dislike of international focus on

specific allegations of rights violations in their countries. However, the then Attorney-General, Senator Evans, has stated that the Labor Government is considering ratification.[48]



Interpretation of the Covenant

288. Before examining the permissible limitations on freedom of assembly in the following pages, it is appropriate to add a general note on the interpretation of the ICCPR. Like any instrument the ICCPR must be interpreted in good faith, in accordance with the ordinary meaning of the words in their context, and in the light of the dominant object and purpose of the ICCPR.[49] Article 5(1) specifically states:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

In particular, limitation clauses must be strictly and narrowly construed.

289. There appear to be three principal sources to which reference can be made as an aid to the interpretation of the provisions of the ICCPR where the meaning is unclear. First, there is the application of the ICCPR by the Human Rights Committee, both in its examination of Article 40 reports, and in its adjudication on individual petitions under the Optional Protocol. But the Committee has only been operating since 1977, and its approach to the examination of Article 40 reports is, as. mentioned earlier, one of "constructive dialogue" rather than hardline criticism. With regard to the Optional Protocol, the 'case-law' of the Committee's decisions is still fairly scanty: between 1977 and 29 July 1983, 147 petitions had been received, of which 64 had been declared inadmissible or had been discontinued, suspended or withdrawn.[50]

290. Secondly, there are the 'travaux preparatoires', the records of the work of drafting the ICCPR and the discussions which took place both in the Human Rights Commission and the U.N. General Assembly.[51] Recourse to the 'travaux

preparatoires' can help clarify the interpretation of particular words and provisions of the ICCPR where the language is obscure or there is some ambiguity.

291. Thirdly, reference can also be made to the interpretation of the European Convention of Human Rights by its executive organ, the European Commission on Human Rights, and, especially, by its judicial organ, the European Court of Human Rights. The European Convention has proved to be probably the most successful human rights treaty measured in terms of its achievement in protecting rights, and, in its thirty years of operation, its organs have established a substantial body of precedent. Because both the ICCPR and the European Convention have as their standard the Universal Declaration of Human Rights, there are many similarities in the wording of the ICCPR and the Convention. The law of the European Convention is therefore a useful, though unofficial, aid to the interpretation of provisions of the ICCPR.

292. With these sources in mind, the next section considers the interpretation of Article 21 of the ICCPR.

ARTICLE 21

293. Article 21 of the ICCPR states:

> The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

294. First, the right guaranteed is the right of 'peaceful' assembly. It is clear from the travaux preparatoires that 'peaceful' was intended to refer exclusively to the conditions under which an assembly is held, that is "without uproar,

disturbance or the use of arms%[52] It was not intended to refer to the object for which an assembly is held, nor to the opinions which may be expressed in the course of an assembly.

295. Secondly, the Article permits fairly wide-ranging restrictions similar to those which may also apply in respect of the right to express one's religion or beliefs (Article 18(3)), the right to freedom of expression (Article 19), and the right to freedom of association (Article 22).

In Conformity with the Law

296. The restrictions permitted are those imposed "in conformity with the law". All articles which permit restrictions specify that they must be ."prescribed by" or "in accordance with" or -"in conformity with" the law. Maurice Cranston points out that such a requirement can only ever be of limited significance because there is no assurance that what is "lawful" is necessarily just.[53] In the Sunday Times case,[54] the European Court of Human Rights examined the British common law of contempt to see whether it was "prescribed by law". The court attached no importance to the fact that the law of contempt was prescribed by the common law rather than by legislation.[55] In the Court's opinion there were two requirements that flowed from the expression "prescribed by law":

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules - applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. 56

297. The applicants contended that the principle of law formulated by the House Of Lords in this case was novel, and that they therefore could not have an adequate indication of its existence. The European Court rejected this argument on the ground that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that their action (publication of an article on the Thalidomide disaster) might "fall foul of the principle".[57]

298. The European Court in the Sunday Times case were concerned with the interpretation of the words "prescribed by law". The expression used in Article 21 of the ICCPR is "in conformity' with the law". The latter would appear to be a less onerous requirement. If a restriction is "prescribed by law" it must be actually laid down by law, whereas a restriction "in conformity with the law" need only comply with the law, and presumably need not itself be prescribed. This suggests that for the latter, knowledge on the part of the citizen will not be considered of primary importance.

"Necessary in a Democratic Society"

299. Any restrictions must also be "necessary in a democratic society". The test should be an objective one[58] of two parts., The onus should be on the State Party to show, first, that it had sufficient reason for imposing restrictions; secondly, that the particular restrictions imposed were proportionate to the end to be achieved.

300. The European Court discussed the word 'necessary' in the Sunday Times case:

> Whilst the adjective 'necessary' ... is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable', and that it implies the existence of a 'pressing social need1.59

301. But who decides what is necessary in a democracy ?[60] For the ICCPR it is the Human Rights Committee. But then the Human Rights Committee leaves "a certain degree of discretion to the responsible national authorities [11_61] In a decision adopted by the Human Rights Committee in the case of Hertzberg, 62 a petition by a Finnish citizen under the Optional Protocol, the Committee was asked to determine whether censorship of a television programme which presented material on homosexuality, was a permitted restriction of freedom of expression (Article' 19) on the ground that it was necessary for protection "of public health or morals". Since the standard of public morality varied considerably from one country to another, the Committee reasoned that "a certain degree of discretion must be accorded to the responsible national authorities". However, the Committee declined even to examine the censored programmes, instead giving its approval generally to the existence of broadcasting corporation policy claiming to protect public health or morals. By doing so,. the Committee declined to apply the second part of the test - in this case the need for the particular restriction (the censorship) to be 'necessary' for the protection of public health or morals.[63]

302. The approach taken by the European Court of Human Rights is illustrated by the Bandyside case.[64] Richard Handyside, the publisher of "The Little Red Schoolbook" which contained information on sex and other matters for young people, was convicted of possessing obscene books for publication for gain contrary to the Obscene Publications Acts (Eng. and W.). He petitioned the European Commission on the ground, inter alia, that his right to freedom of expression had been violated. The European Court, to which the case was referred, posed the question whether Handyside's conviction and the seizure and destruction of the books, were "necessary in a democratic society . . for the protection of morals".

303. The Court accepted that; different views prevailed about demands for the protection of morals between one State Party and another, and, therefore, allowed to the State Parties a 'margin. of appreciation' about what was necessary in a democratic society for the protection of morals [65] However,. the court stressed that this did not give the State Parties an unlimited 'power' of appreciation: "the domestic margin of appreciation - goes hand in hand with European supervision".[6] To this extent the European Court's approach differs from, and is preferable to that adopted by the Human Rights Committee in the Hertzberg case.

304. The European Court's judgment in the Sunday. Times case[67] makes it clear that the 'margin of appreciation' allowed to a State Party differs according to the justification claimed for . the restriction. In that case, the restriction on freedom of expression was justified by the British Government on the ground that it was necessary. "for maintaining the authority and impartiality of the judiciary" .[68] The ,Court noted that while demands for the protection of morals vary between one State Party and another,

> [p]recisely the same cannot be said of the far more . objective notion of the "authority" of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area ... 'Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.[69]

[30]5 If this decision were to be followed in the interpretation of the provisions of the ICCPR, then the margin of appreciation allowed to State Parties could vary according to the justification claimed for a restriction.

306. The question whether the particular restrictions are proportionate to the end to be achieved (the second part of the test) was considered by the European Commission in two recent decisions on admissibility, which concerned the right to freedom of peaceful assembly (Article 11 of the European Convention).[70] But in both cases the applicants' argument

that the particular restrictions were disproportionate to the end to be achieved was rejected. Nevertheless, in one of the cases, the Commission clearly acknowledged that

> the principle of proportionality is one of the factors to be taken into account when assessing whether a measure of interference is unecessary".[71]

Grounds on which Restrictions may be Justified

307. Under Article 21 of the ICCPR restrictions on the right of peaceful assembly can be justified on the grounds that they are in the interests of

(i) national security
(ii) public safety
(iii) public order (ordre public)
(iv) the protection of Public health or morals
(v) the protection of the rights and freedoms of others.

Looking at each of these in turn:

(i) National Security

308. None of the Articles which permit limitations on rights on the grounds of 'national security' (Articles 12(3), 14(1), 19(3), 21, 22) provide any explanation of what the term means. In an essay on permissible limitations on rights in the ICCPR, Alexandre Kiss suggests that use of the word 'national' implies that the concern must affect the whole community.[72] He concludes that

> "national security" in the Covenant means the protection of territorial integrity and political independence against foreign force or threats of force. It would probably- justify limitations on particular rights of individuals or groups where the restrictions were necessary to meet the threat or use of external force. It does not require a state of war

> or national emergency, but permits continuing peacetime limitations, for example, those necessary to prevent 'espionage or to protect military secrets.[7-5]

(ii) Public Safety

309. Like 'national Security', the 'public safety' ground is included in a number of Articles (Articles 18, 21, 22) but nowhere explained. Kiss concludes that the public safety ground would permit restrictions on rights

> if their exercise involves danger to the safety of, persons, to their life, bodily integrity or health. The need to protect 'public safety' could justify restrictions resulting from police rules and security regulations tending to the protection of the safety of individuals in transportation and vehicular traffic; for consumer protection, for ameliorating labour conditions etc.[74]

(iii) Public Order (Ordre Public)

310. The French term 'ordre public' was used in addition to the English term 'public order' (which means absence of disorder), because it was thought that the English term was not broad enough. Egon Schwelb says that 'ordre public' has a similar meaning to 'public policy' and cites as an illustration of the breadth of the 'ordre public' limitation, the hypothetical example of the South African policy of Apartheid, a public policy by which freedom of expression, the tight of peaceful assembly and the right to freedom of association could justifiably be limited were South Africa to ratify the Covenant.[75]Alexandre Kiss, however, avoids a definition, describing the term as

> a concept that is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances.[76]

He says that for the purposes of the ICCPR,

> "ordre public" permits limitations on particular human rights where these limitations are necessary for that accepted level of public welfare and social organisation. [77]

He gives as examples:

> prescriptions for peace and good order; safety; public health; aesthetic and moral considerations. and economic order (consumer protection, etc.):[78]

Although the United Kingdom's proposal, at the time of the drafting of the Article, to replace the words "public order" (ordre public)" with "the prevention of crime or disorder" was rejected,[79] this latter formula was used in the European Convention. [80]

(iv) The Protection of Public Health and Morals

311. Again, there was little discussion of these terms in the drafting of the ICCPR. Alexandre Kiss notes that

> some concrete problems which were explicitly raised - such as the prevention of epidemics - fall clearly within the scope of this [the public health] limitation, while others, such as the control of prostitution, might come within other grounds for restriction, such as "public morals" [81]

312. The European Commission of Human Rights has interpreted 'public health' broadly to include, for example, measures taken to prevent cattle diseases. [82] Kiss suggests that

> public morals alludes to principles which are not always legally enforceable but which are accepted by a great majority of the citizens as general guidelines for their individual and collective behaviour.[83]

313. The European Court of Human Rights, in the Handyside case[84] mentioned earlier, was unable to find any uniform European conception of 'Public morals' and, therefore, allowed to the State Parties a 'margin of appreciation' about what was necessary for the protection of morals, thereby recognising the relative and changeable nature of morality. .

(v) The Protection of the Rights and Freedoms of Others

314. To what extent are restrictions on the right of peaceful assembly justifiable in order to protect, for example, the right of citizens who are not participating in a demonstration to go about their everyday business without undue interference? In such a case some allowance should be made for the rights and freedoms of others, but this should not detract from the primacy of the right sought to be exercised. In the Sunday Times case,[85] the European Court of Human Rights rejected an approach by the House of Lords which had attempted to balance conflicting interests. The European Court stressed that:

> The Court is not faced with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.[88]

It is to be hoped that this approach will also be adopted in the interpretation of the provisions of the ICCPR, stressing the paramount importance of the rights sought to be exercised and interpreting permitted restrictions narrowly, rather than attempting to balance conflicting rights and freedoms.

315. The above discussion has concerned the permitted restrictions on the right of peaceful assembly. But what if a restriction imposed on the exercise of the tight of assembly also affects the exercise of other rights? For example, most assemblies involve not only the right of assembly but also the right to freedom of expression. While a restriction may be thought to be justifiable in relation to the right of assembly, will that same restriction be justifiable in relation to the right to freedom of expression or vice-versa? In most instances because the permissible restrictions on related rights under the Covenant (for example, the right to freedom of thought, conscience and religion (Article 18), the right to freedom of expression (Article 19), the right of peaceful assembly (Article 21), the right to freedom of association (Article 22)) are similar, it seems likely that what is regarded as a justifiable restriction on one right, for example, a restriction of the

right of peaceful assembly in the interests of national security or public order, will also be regarded as a justifiable restriction on a related right, for example, on the right to freedom of expression, again in the interests of national security or public order. Even if, in this example, the restriction on the right to freedom of expression is not justifiable in the interests of national security or public order, it might be justifiable on one of the other permissible grounds, for example that it is protecting the rights and freedoms of others.

316. However, this was not the approach adopted by the European Commission of Human Rights in the two recent decisions on admissibility mentioned earlier.[87] Applications had been made to the Commission alleging violations of both Article 10 (the right to freedom of expression) and Article 11 (the right to freedom of assembly) of the European Convention. In both applications, the allegations arose out of a ban on demonstrations because the Government feared serious disorder. The approach adopted by the European Commission was to determine which right was primarily involved and to treat that right as predominating over the other, the alleged violation of which was not further considered:

> The allegation concerning Article 10 may be considered as subsidiary in relation to that concerning the right of peaceful assembly. The problem of freedom of expression cannot in this case be separated from that of freedom of assembly, as guaranteed by Article 11, and it is the latter freedom which is primarily involved in this issue. In the circumstances of the present case, it is accordingly not necessary to consider Article 10.[88]

317. Such an approach can be criticised on the ground that to decline to consider an alleged violation of a right considered subsidiary on particular facts, is to deny an applicant a full hearing of his complaint.

318. Where a complaint alleges a violation of more than one right, it would be preferable to consider each alleged violation without making a determination as to which right is dominant or subsidiary on the particular facts. Because the alleged' violations will usually be in respect of related rights permitting similar restrictions, the justification for a restriction on one right will usually also apply to the same' restriction on a related right, and, if not, the-restriction-on.. the second right may be permissible on one of the other grounds.

Derogation in Time of Public Emergency

319. Article 4 of the ICCPR authorises State Parties to take measures derogating from their obligations under the ICCPR "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", provided that the emergency measures do not go beyond what is "strictly. required by the exigencies of the situation", that such measures are not inconsistent with the State Party's other obligations under international law, and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. No derogation is permitted'from the protection afforded by certain articles,[09] but Article 21 is not included amongst these. A State Party which takes such emergency measures must immediately inform the other State Parties of the provisions from which it has derogated and of the reasons by which it was actuated to do so.[90]

320. There have been several recent decisions of the Human Rights Committee concerning Article 4•[91] In one of these, the Landinelli case,[92] several Uruguayan citizens petitioned the Committee under the Optional Protocol claiming a violation of Article 25 of the ICCPR, on the ground that they had been deprived of their political rights for a period of 15 years. Uruguay attempted to justify the violation by referring to its notice of derogation sent to other State Parties, stating that it had temporarily derogated from some political rights. The

Committee rejected this justification on the grounds that no attempt had been made to indicate the nature and scope of the actual measures, or to show that such measures were strictly necessary. Further, even if there were a public emergency justifying a derogation from the provisions of the ICCPR, the Committee emphasised that such a derogation should be of the shortest possible duration, and it did not see how depriving persons of all political rights for 15 years could possibly be considered 'necessary'.

321. Article 4 of the ICCPR is similar[93] to Article 15 of the European Convention which has been the subject of -a number of important decisions of the European Court. In the Lawless case,[94] Lawless, a member of the I.R.A., was detained without trial in the Republic of Ireland under a special statutory power for a period of five months. The Government of the Republic of Ireland claimed that the right to derogate under Article 15 of the Convention, excused the violation of Article 5 (the right to liberty and security of person) and Article 6 (the right to a fair trial). The European Court agreed with the President of the Commission, Professor Waldock's assessment of Article 15:

> The question of whether or not to employ exceptional powers under Article 15 involves problems of appreciation and timing for a Government which may be most difficult, and especially in a democracy ... [The Commission] recognises that the Government has to balance the ills involved in a temporary restriction of fundamental rights against even worse consequences then for the people and perhaps larger dislocations then of fundamental rights and freedoms, if it is to put the situation right again ... Article 15 has to be read in the context of the rather special subject matter with which it deals: the responsibilities of a Government for maintaining law and order in a time of war or other public emergency threatening the life of the nation. -The concept of a margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations Of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public has itself in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.95

322.

Thus, the European Commission and, Court allow State Parties a 'margin of appreciation' in determining whether the conditions for the derogation are fulfilled, and whether the exceptional,. measures do not go beyond what is Strictly required by the exigencies of the situation. This approach was reaffirmed in - the case of Ireland v. United Kingdom,[98] when the European Court emphasised that the margin Of appreciation does not allow State Parties an unlimited power: it is always accompanied by European supervision. 97

323. Under both Article 4 of the ICCPR and Article 15 of the European Convention, the public emergency must be one which "threatens the life of the nation'. In the Lawless case, the Court Said that the emergency must "affect the whole population and constitute a threat to the organised life of the community . of Which the State is composed".[98] However, in the case of Ireland v. United Kingdom, the European Court, by accepting that the Situation in Northern Ireland justified a derogation under Article 15, seems to have acknowledged that a regional emergency arising from secessionist claims can justify a derogation.[99]

Buman Rights of Those Aiming at the Destruction of Human Rights

324. Article 5(1) of the ICCPR (see p.1) and Article 17 of the European Convention copy the wording of Article 30 of the Universal Declaration. Article 5(1) precludes anyone, including a State, from using the rights guaranteed in the Covenant to destroy the ICCPR itself .[1] Beddard comments about the European Convention that where a State derogates from the Convention, Article 17 (Article 5(1) ICCPR) should take:.'priority over Article 15 (Article 4 ICCPR) and the derogation should be invalid if the purpose of the derogation appears to lead to a destruction of the rights and freedoms protected by the Covenant.2

Footnotes to part III

1. J. G. Starke, "Human Rights and International Law" in Eugene Kamenka and Alice Erh-Soon Tay (ed.$), Human Rights (1978) 113, 118.

2. John P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character" in B. G. Ramcharan (ed.), Human Rights Thirty Years after the Universal Declaration (1979) 21.

3. Ibid 29; A. H. Robertson, Human Rights in the World (1972) 28; Keith D. Suter, Protecting Human Rights (1978) 23; Starke, op cit 122; Paul Sieghart, The International Law of Human Rights (1983) 53ff.

4. Robertson, op cit 29.
5. Suter, op cit 23.

6. Report of the Human Rights Committee (1983) G.A.O.R. 38th Session, Suppl.No.40, U.N.Doc. A/38/40, Annex V.

7. Report of the Human Rights Committee (1981) G.A.O.R. 36th Session, Suppl.No.40, U.N.Doc. A/36/40, Annex V.

8. Report of the Human Rights Committee (1983), op cit Annex II. A. H. Robertson, "Implementation System: International Measures" in Louis Henkin (ed.), The International Bill of Rights (1981) 332, 338.

9. Report of the Human Rights Committee (1983), op cit Annex III

10. Ibid Annex I.

11. A. Trindade, "Exhaustion of local remedies under the U.N. Covenant on Civil and Political Rights and its Optional Protocol" (1979) 28 Int. & Comp. L.O. 734; Ton J. M. Zuijdwijk, "The Right to Petition the United Nations Because of Alleged Violations of Human Rights" (1981) 59 Can. B. Rev. 103.

12. Report of the Human Rights Committee (1983), op cit Annex 1.

13. Ibid 91.

14. B. G. Ramcharan, "The Emerging Jurisprudence of the Human Rights Committee" (1980) 6 Dalhousie L. J. 7, 12.

15. Report of the Human Rights Committee (1978), G.A.O.R. 33rd Session, Suppl.No.40, U.N.Doc. A/33/40 para.117, quoted by Ramcharan loc cit.

16. Report of the Human Rights Committee (1978), loc cit.

17. Ramcharan, op cit 13.

18. In the course of examining Article 40 reports.

19. Ramcharan, op cit 14.

20. Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations" in Louis Henkin The InternationalBill of Rights (1981) 72, 73.

21. Egon Schwelb, "Some Aspects of the International Covenants on Human Rights of December 1966" in A. Eide & A. Schou (ed.$), International Protection of Human Rights (1968) 103, 109,

22. Matthew Lippman, "Human Rights Revisited: The Protection of Human Rights under the International Covenant on Civil and Political Rights" (1980) 10 Calif. Western L. Rev. 450, 476.

23. Ramcharan, op cit 15-1.9; 0. Schachter, "The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights" (1979)¯ 73 Am.J.Int.L, 462,

24. Ramcharan, op cit 19,

25. Gillian Triggs, "Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?" (1982) 31 Int. & •omp.L.O. 278; Gillian Triggs, "Australian Reservations and Declarations with respect to the International Covenant on Civil and Political Rights" (1981) 55 ALJ 699.

26. Whether or not it constitutes a 'reservation' as defined. in Article 2(1)(d) of the Vienna Convention on the Law of Treaties is questionable. Triggs, Int. & Comp.J,.Q., 'op cit 280. .Triggs, (AU, op cit 700) prefers to refer to it as an 'interpretative declaration'.

27. This reservation accords with the agreement between the Commonwealth and the States on the ratification and implementation of treaties. Triggs, Int. & Comp.L.Q., op cit 278.

28. Triggs, ALJ, op cit 699-700.

29. Koowarta v. Bjelke-Petersen (1982) 56 ALJR 625. For comment on the case: P. H. Lane, "The Federal Parliament's External Affairs Power: Koowarta's Case" (1982) 56 AU J 519.

30. Commonwealth of Australia v. State of Tasmania (1983) 46 ALR 625.

31. Stephen, Mason and Murphy J. J.

32. Koowarta v. Bjelke-Petersen (1982) 56 ALJR 625, 647 (Stephen J.).

33. Triggs, Int. & Comp.L.Q., op cit 279; Triggs, AU, op it 700.

34. Generally, see Ian Brownlie, Principles of Public International Law (3rd ed. 1979) Ch XXV; P. H. Imbert, "Reservations and Human Rights Conventions" (1981) 6 Human Rights Rev. 28.

35. Article 19 of the Vienna Convention on the Law of Treaties.

36. Press Release by the Attorney-General, 10 December 1984.

37. Report of the Human Rights Committee (1981) G.A.O.R. 36th Session, Suppl.No.40, U.N.Doc. A/36/40, Annex V, para.2.

38. Report of the Human Rights Committee (1977) G.A.O.R. 32nd Session, Supp1.No.44, U.N.Doc. A/32/44, Annex IV. See B. G. Ramcharan, "The. Emerging Jurisprudence of the Human Rights Committee" (1980) 6 Dalhousie L. 11, 7, 8ff; B. G. Ramcharan, "Implementing the International Covenants" in B. G. Ramcharan (ed.), Thirty Years After the Universal Declaration (1979) 159, 175ff.; D. D. Fischer, "Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee" (1982) 76 Am.J.Int.L. 142, 144ff.

39. Report of the Human Rights Committee (1981), op cit. Annex VI.

40. International Covenant on Civil and Political Rights: Report by Australia to the Human Rights Committee pursuant to Article 40(11(a) (November 1981).

41. Department of Foreign Affairs Backgrounder, "Australia's First Report to the Human Rights Committee", (No.357) 3 November 1982 p.7.

42. These meetings are reported in the Report of the Human Rights Committee (1983) op cit, 2739.

43. A similar statement was made by the United Kingdom in its initial report: 0. Schachter, "The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights" (1979) 73 Am.J.Int.L.462, 463.

44. Australia's Article 40 Report, op cit paras. 367-372.

45. However, where a statute is intended to give effect to an international treaty, a court may refer to the provisions of the treaty in order to resolve an ambiguity in the language of the statute. D. & R. Henderson v. Collector of Customs for N.S.W. (1974) 48 ALJR 132, 135 (Mason J.); Yager v. **R** (1976) 139 CLR 28, ,43-44 (Mason J.). For the approach of the English courts to the European Convention see The Eschersheim [1976] 1 All E.R.920, 924 (Lord Diplock) and eg. Colin Warbrick, "European Convention on Human Rights and English Law" (1980) 130 New LJ 852.

46. Australia's Article 40 Report, op cit para.60.

47. For information on the Commission's functions, powers, and activities, see the Commission's Annual Reports.

48. Press Release by the Attorney-General, 12 April 1984 (No.47/84).

49. Louis Henkin, "Introduction" to Louis Henkin (ed.), International Bill of Rights (1981) 1, 24-27. Article 31 Vienna Convention of the Law on Treaties.

50. Report of the Human Rights Committee (1983) G.A.O.R. 38th Session, Suppl.No.40, U.N.Doc. A/38/40, 91.

51. Article 32 Vienna Convention on the Law of Treaties.

52. Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms" in Henkin, op cit 209, 231 quoting Edwardo Jimenez de Arechaga (Uruguay) U.N.Doc. A/C.3/SR 61.

53. Maurice Cranston, What are Human Rights? (1973) 80.

54. The Sunday Times case, Eur. Court H.R., judgment of 26 April 1979, Series A No.30.

55. Ibid 30 para.47.

56. **Ibid** 31 para.49.

57. **Ibid** 32-33 para.52. Christine Gray, "European Convention on Human Rights - Freedom of Expression and the Thalidomide Case" (1979) 39 Camb. LJ 242, 243.

58. Ralph Beddard, Human Rights in Europe (2nd ed. 1980) 121.

59. The Sunday Times case, Eur. Court H.R., judgment of 26 April 1979, Series A No.30, 35-36 para.59. Gray, op cit 244.

60. Cranston, log cit.

61. The Mertzberg case (R 14/61) Report of the Human Rights Committee (1982), Annex XIV, 165 para.10.3. Also cited in a note on "Freedom of Expression" (1982) 28 The Review of the ICJ 45.

62. Ibid.

63. Review of the I.C.J., op cit 46.

64. The Handyside case, Eur. Court H.R., judgment of 7 December 1976, Series A No.24.

65. Ibid 22 para.48.

66. Ibid 23 para.49.

67. The Sunday Times case, Eur. Court H.R., judgment of 26 April 1979, Series A No.30.

68. Article 19(2) European Convention of Human Rights.

69. The Sunday Times case, Eur. Court H.R., judgment of 26 April 1979, Series A No.30, 36-37 para.59. Gray, _op cit 244-245; Grayson McCouch, "Implementing the European Convention on Human Rights in the United Kingdom" (1982) 18 Stan. J. Int. L. 147, 164.

70. Rassemblement Jurassien and Unite Jurasienne v. Switzerland, 8191/78, Eur. Comm. H.R., 17 D. & R. 93; Christians Against Racism and Facism v. the United Kingdom, 8440/78, Eur. Comm. H.R., 21 D. & R. 138.

71. Rassemblement Jurassien case, 17 D. & R. 93, 121.

72. Alexandre Charles Kiss, "Permissible Limitations on Rights" in Henkin (ed.), op cit 290, 296.

73. Ibid 297.

74. Ibid 298.

75. Egon Schwelb, "Some Aspects of the International Covenants on Human Rights of December 1966" in A. Eide & A. Schou (ed.$), International Protection of Human Rights (1968) 103, 115. Schwelb cites discussion on the interpretation of 'ordre public' in the Human Rights Commission and in the Third Committee of the General Assembly. This example is also cited by Lippman, op cit 474.

76. Kiss, op cit 302.

77. Ibid.

78. Ibid.

79. Schwelb, loc cit, says that

The delegations responsible for this formula were not willing to admit to their public that freedom of the press, of assembly and association are limited by whatever public policy prevails in a State Party and one chose therefore the presumably less embarassing French term.

80. E.g. the Klass case, Eur. Court H.R., judgment of 6 September 1978, Series A No.28.

81. Kiss, op cit 303.

82. Ibid.

83. Ibid 304.

84. The Handyside case, Eur. Court H.R., judgment of 7 December 1979, Series A No.24.

85. The Sunday Times case, Eur. Court H.R., judgment of 26 April 1979, Series A No.30.

86. Ibid 41 para.65.

87. Above n.70.

88. Rassemblement Jurassien case, 17 D. & R. 93, 118.

89. ICCPR, Article 4(2).

90. ICCPR, Article 4(3).

91. The Landinelli case (R.8/34); the Balgar de Martejo case (R.15/64); the Suarz de Guerrero case (R.11/45) discussed in the Review of the I.C.J., op cit 46-48.

92. Ibid.

93. There are some differences. Schwelb, op cit 116.

94. The Lawless case, Eur. Court. H.R., judgment of 1 July 1961, Series A No.3.

95. Quoted by Beddard, op cit 123.

96. Ireland v. United Kingdom, Eur. Court H.R., judgment of 18 January 1978, Series A No.25. And see the Greek cases, 12 Y.B.

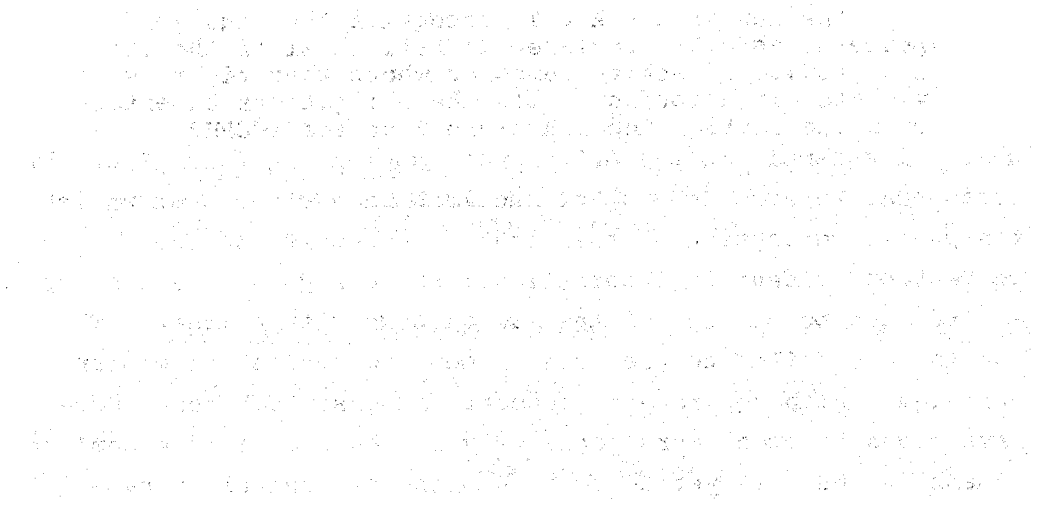
97. Ireland v. United Kingdom, Eur. Court H.R., judgment of 18 January 1978, Series A No.25, 78-79 para.207; Beddard, op cit 126; Colin Warbrick, "The Protection of Human Rights in National Emergencies" in F. E. Dowrick *(ed.)*, Human Rights - Problems. Perspectives & Texts (1979) 89, 95 ff.

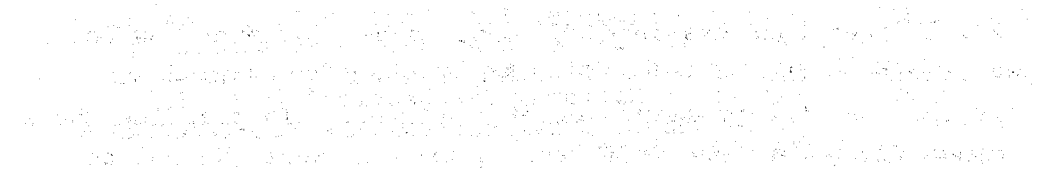
98. The Lawless case, Eur. Court H.R., judgment of 1 July 1961 Series A No.3, 56 para.28.

99. Warbrick, op cit 96-97.

1. E.g. Retimag S.A. V. Federal Republic of Germany 4 YB 384 (decision of the European Commission); Schwelb, cit 117; Beddard, op cit 127-128.

2. Beddard, op ,cit 127.





FART IV CONCLUSION

325. To conclude this Occasional Paper an answer must be sought to the question:

> Does the law in the A.C.T. recognise the right of peaceful assembly declared in Article 21 of the ICCPR and provide effective remedies where that right is violated in accordance with the obligations undertaken by State Parties under Article 2 of the ICCPR?

Such an answer will necessarily involve first, a brief summary of the present law, and, secondly, a comparison of the present law with the standard required by the ICCPR. Finally, if the law does not meet the required standard, what should be done?

The Present State of the Law

326. The present state of the law as it 'affects the right of peaceful assembly in the A.C.T. was examined in Part II of this Occasional Paper. In chapter one it became clear that whilst the public perception of the right of assembly and the perception evident in international human rights treaties are in accord, the perception of the law accords with neither. The courts have failed to keep the common law abreast of modern thinking. Although recent judgments suggest that some judges have begun to speak more positively at least of a 'freedom' of assembly, there is yet to be an English or Australian case in which the majority of a court give primacy to recognition and protection of the 'right' or even ¯a 'freedom' of assembly.

327. Chapter four examined the wide range of common law powers available to the police and others for the prevention of disorder and the preservation of the peace. In practice these common law powers are infrequently used because the police

prefer to rely on statutory prevention and control pOwers which appear definitive and more accessible. These statutory powers were examined in chapter five, including the 'notification' system proposed for the A.C.T. provided for in the draft Public Assemblies Ordinance 1984. However, whilst the proposed notification system is an improvement on the model contained in the now repealed Public Assemblies Ordinance 1982 (A.C.T.)', the draft Ordinance still has a number of significant defects requiring rectification'. These defects were drawn to the attention of the responsible Minister, the Minister for Territories and Local Government, in a submission from the Human Rights Commission, a copy of which is included as Appendix 2.

328. The wide range of criminal offences examined in chapter four act as an indirect control on the right of assembly by proscribing certain conduct which may occur in the course of an assembly. It is unfortunate that in the A.C.T. particular conduct may be an .offence under several different enactments, and that wide inconsistencies exist between penalties for similar offences under both Commonwealth and A.C.T. legislation. A comprehensive review of the relevant Criminal Law is badly needed.

Does the law meet the Standard Required by the International Covenant on Civil and Political Rights?

Is the right of assembly recognised'?

329. Article [21] states that the right of peaceful assembly shall be recognised. But what does it mean to say that this right "shall be recognised"? The best guide is Article 2 which sets out the obligations of State Parties. First, under Article 2(1), State Parties are required "to respect and ensure" to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR. Secondly, under Article 2(3), State Parties undertake to ensure that any

person whose rights under the ICCPR are violated shall have an effective and enforceable remedy which shall be determined by a competent authority provided for by the legal system.

330. Applying these provisions, first, does the law "respect and ensure" the right of peaceful assembly in the A.P.T.,? As the law stands at present the answer to this question is 'No'. Clearly, the courts do not "respect and ensure" the 'right' of peaceful assembly in the A.C.T.. Recent cases indicate that some judges may be prepared to recognise the existence of a 'freedom' of assembly, but even so the primacy of a 'freedom' of assembly in any particular situation is yet to be acknowledged. However, if the proposed Public Assemblies Ordinance is enacted, the objects of which are stated in section 2 as:

> (a) to recognise the right of peaceful assembly in accordance with Article 21 of the Covenant and
>
> (b) in conformity with that Article, to ensure, to the greatest extent practicable, that personsin the Territory may exercise the right to participate in public assemblies Subject only to such restrictions as are necessary in the interests of public order and safety or to protect the rights and freedoms of Other persons

then the courts will be required to recognise the right of peaceful assembly, subject only to the permitted limitations. Furthermore, the provision of a 'notification' system is not in itself incompatible with the right of peaceful assembly according to the European Commission of Human Rights. In the Rassemblement Jurassien case, the Commission found that

> A requirement for authorisation of meetings in public does not, as such, constitute an interference with the tight to
>
> freedom of assembly.'

331. Secondly, as to whether there is an effective and enforceable remedy, as the law stands at present the answer is 'Yes' there are certain remedies, but the question is whether they are effective. Common law actions in trespass for assault and unlawful detention

may be available if a person's right to liberty and security of person has been violated. Furthermore,

if a denial Of the right of peaceful assembly occurs as a result of the Commissioner of the Australian Federal Police misusing his/her powers, 'then an application can be made to the court for a prerogative order. But no special remedy exists for denial of the right of peaceful assembly. If the draft Public Assemblies Ordinance is enacted in its present form the situation remains unchanged for while the object of the Ordinance is declared to be to recognise the right of peaceful assembly, no specific remedy is provided for its denial. Nevertheless, it is remotely possible that such a declaration read in conjunction with section 5(1) (which provides that "it shall be lawful for a person to participate in a public assembly that is not an authorised public assembly" could form the basis of an action claiming that a person's legal right to participate in a public assembly has been denied.[2] It is arguable that a specific remedy for denial of the right of peaceful assembly, given legislative form and thereby positively asserted, would provide a more effective remedy. This might take the form of an action for an injunction, declaration or damages for unlawful interference (for example by the police or others) with exercise of the tight of peaceful assembly.

(b) Do the permitted restrictions on the right of assembly - accord with those permitted under the ICCPR?

332. Article 21 states that:

> No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals, the protection of the rights and freedoms of others.

333. Bearing in mind the interpretation of this sentence, considered earlier in Part III, first, it is clear that the restrictions permitted on the right of peaceful assembly in the A.C.T., if such a right were recognised, would be "in conformity with the law". The rule of law, as applied by the courts,

dictates that a person's liberty may only be interfered with as prescribed by the law. The restrictions detailed in this Occasional Paper are all prescribed by law. Secondly, as to whether the restrictions permitted "are necessary in a democratic society", if a challenge were to be made to those restrictions before an international body, that body would allow the municipal authorities a degree of discretion to take account of the particular features of the society. This degree of discretion would probably permit the restrictions which would be imposed by the proposed Public Assemblies Ordinance provided present defects, to which attention is drawn in Appendix 2, are remedied. As to other restrictions, it is unlikely that these would be criticised by an international body given their fairly moderate nature judged by both national3 and international standards, and the fairly closely defined situations in which the restrictions can be utilised.[4]

334. Thirdly, tie restrictions must be justifiable on at least one of the five specified grounds. It seems likely that the proposed ordinance could be justified on these grounds provided, again that present defects, to which attention is drawn in Appendix 2, are remedied. The fairly moderate nature of most other restrictions permitted in the A.C.T., makes it probable that in a particular situation these too could be justified on at least one of the five grounds, wide AS they are.[5]

If the law does not meet the required standard what should be done?

335. To the extent that the law in the A.C.T. does not at present meet the standard required by the ICCPR then, insofar as 'recognition' of the right of peaceful assembly is concerned, what should be done to bring the law into line with the standard? Under Article 2(2) Australia is obliged "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such

legislative or other measures as may be necessary to give effect" to the right of peaceful assembly recognised in Article 21. As mentioned in Part III, the International Law Commission has indicated that a State Party would normally be expected to employ 'legislative' means to give effect to rights recognised in the Covenant.[6]

336. Indeed, legislative reform seems the most realistic option. The other options - the development of the common law, or the entrenchment of a Bill of Rights in the Commonwealth Constitution - seem extremely improbable at present.[7] Legislative reform could take the form either of a federal Bill of Rights statute or a Public Assemblies Act (preferably not an Ordinance), in each case recognising the right of peaceful assembly and providing specific remedies for its denial. The pros and cons of a Bill of Rights statute, its content and form, are beyond the scope of this Occasional Paper. The less controversial alternative - a Public Assemblies Act - would not be difficult to draft given existing models, albeit models clearly in need of modification, including, preferably, the provision of a specific remedy for violation of the right of peaceful assembly.

337. As a matter of principle, proposed legislation of this nature should take the form of an Act. Legislation on human rights should be subjected to the full rigour of parliamentary scrutiny and debate. This is not achieved with delegated legislation, notwithstanding that delegated legislation must be laid before both Houses of Federal Parliament, may be the subject of a report by the Senate Standing Committee on Regulations and Ordinances, and may be disallowed by motion of either House. As Senator Ryan said in the debate on her motion to disallow the Public Assemblies Ordinance 1982, the responsible Minister should proceed

> by an Act of Parliament SO that we, as Senators, will have an opportunity to be involved in the debate rather than only, as in the case of delegated legislation, having the power simply to allow or disallow.8

Another lesson learned from the now repealed Public Assemblies Ordinance 1982 is the importance of clarity. That Ordinance was so complex and convoluted as to be virtually unintelligible.[9] There is a great need for legislation, especially that which affects the exercise of rights and freedoms and which is likely to be in common use, to be clear, certain, and readily intelligible.

338. Finally, it should not be forgotten that, despite the small size of the A.C.T., A.C.T. legislation is often treated as a model for legislation in other Australian jurisdictions. Furthermore, A.C.T. legislation, being ultimately under the control of Federal Parliament,[10] tends to be seen, both nationally and internationally, as evidence of the federal . Government's commitment to meeting Australia's international obligations where meeting those obligations can be achieved through legislation, and A.C.T. legislation is a product of Government initiative. The Government's initiative on the right of peaceful assembly - a right the exercise of which, like the right to freedom of expression, is essential to the proper functioning of our democratic system of government - therefore, assumes great prominence as a reflection of the extent to which the Government is prepared to put its human rights policy into practice.

Footnotes to Part IV

1. Rassemblement Jurassien case, 17 D & R 93, 93

2. Part II., chapter 3, n. 58

3. Compare eg the law-in Queensland

4. With regard to whether the restrictions are proportionate to the end to be achieved.

5. It is noticeable that under section 2(b) of the proposed Public Assemblies Ordinance 1984 fewer grounds on which restrictions may be justified are specified than those listed in Article 21.

6. Part III, n. 24

7. Common law development is, of course, on a case by case basis and, therefore, dependent on a particular matter being at issue before the court. Furthermore, the record of the High Court in such cases as Victoria Park Racing and Recreation Grounds Co Ltd v.Taylor (1837) 58 CLR 479 and, more recently Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583 and McInnis v E (1979) 143 CLR 575, suggests that it Would not be prepared to give positive recognition to such a right. Such a development also raises the question of the desirability of judicial lawmaking, especially where there is aneed:to define precisely the limitations permitted on the exercise of a right. (See eg. Sir Robert Megarty in Malone v Commissioner of Police for the Metropolis [19.79] 1 Ch 344, 380.)

   With regard to the entrenchment of a Bill of Rights in the Commonweatlh Constitution, since only 5 of 20 proposed amendments totbe Constitution have, so far, succeeded, it seems unlikely that such a contrOversial amendment would be approved.

8. C.P.D. Senate 28 April 1982, p. 1455 - 1456.

9. A.C,T. House of Assembly Select Committee on the Public Assemblies Ordinance, The Proposed Public Assemblies Ordinance 1982 (1982) para 26:

   > the complexity of some of the procedures laid down under the Ordinance ... would present a major obstacle to the exercise of the right of free public assembly in the A.C.T.

10. Commonwealth Constitution, s.52(i)

SUMMARY OF RECOMMENDATIONS

A. Recommendations specific to the proposed A.C.T. Public Assemblies Ordinance

(i) The proposed legislation should take the form of an Act of Parliament rather than an Ordinance, so that the legislation is subject to the full force of Parliamentary debate and scrutiny,(paras. 112, 337)

(ii) The immunity afforded by s. 4 of the Ordinance is limited as prosecutions under the Public Order (Protection of Persons and Property) Act 1971 (Cwth) are still available. This problem could be overcome if recommendation (i) above is accepted. (para 154)

(iii) S. 4 of the Ordinance provides that a person who takes part in an authorized public assembly has a defence against prosecution under A.C,T. laws if he proves that the ,assembly was held substantially in accordance with particulars ..notified to the Commissioner of Police andwith terms and conditions laid down by the Commissioner. The ¯onus should be reversed, and the prosecution required to prove that the defendant did not so act. (pare 155)

(iv) S. 11 requires the Commissioner of Police, in considering an application to hold a public assembly, to take into account the public interest, and in particular the ° likelihood of serious public disorderafety of persons, damage to property etc. The reference to "likelihood" in s.11 should be replaced by "strong probability". (para 149)'

(v) S. 13 gives the Court power to prohibit the holding of a public assembly. No sanction is provided for non-compliance, although presumably participants in such an assembly would be in contempt of court. The matter should be clarified. (para 151)

(vi) S. 19 uses the term "breach of the peace." It would be preferable if the term "breach of the peace" was abandoned in favour of a Clear and more certain statementof the proscribed conduct. (para 161)

(vii) s. 19 use of the phrase "offensive and insulting" should be amended as suggested in para 162. (paras 162-5)

B General recommendations

(i) The law of binding-over needs to be reviewed, (para 95)

(ii) penalties for conduct associated with public assembly vary depending on under what A.C.T. statutory provisions a charge is brought. Penalties under the various A.C.'T. legislation should be reviewed and rationalized (para 181)

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Statistics on Demonstrations in the A.C.T.

The following table gives a rough guide to the number of demonstrations which have occurred in the A.C.T. in recent years, as recorded by the Police. There is no indication of what constitutes a 'demonstration'.

Period .	Number of Demon-Strations	Notes
July 1970-June 1971 ,	49,	7,000 participants. 211 arrests at anti-war and anti-Apartheid demonstrations in May 1971.
July 1971-June 1972	51	7,000 participants. 49 arrests during ACT v. Springboks Match on 21 July 1971.
July 1972-June 1973	45	9,000 participants. 18 arrests at Aboriginal land rights demonstration on 23 July 1972.
July 1973-June 1974	36	6,500 participants. No arrests..
July 1974-June 1975	No figure recorded	
July 1975-June 1976	No'figure recorded	
July 1976-June 1977	78	
July 1977-June 1978	35	10,000 participants.
July 1978-June 1979	No figure recorded	5,400 participants.
19 Oct 1979-31 Dec 1979	15	The Australian Federal Police was established on 19 Oct 1979.
Jan 1980-Dec 1980	62	11,875 participants. 7 arrestsl at 2 demonstrations when minimal violence occurred.

Period	Number of Demon-strations	Notes
Jan 1981-Dec 1981	59	8,554 participants. 89 arrests at 4 demonstrations when violence occurred. The majority of arrests were made during the Women Against Rape demonstration held during the Anzac Day Ceremony. All charges were subsequently dismissed.
Jan 1982-Dec 1982	49	15,710 participants. One arrest at one demonstration when violence occurred.
Jan 1983-Dec 1983	67	14,747 participants. No arrests. One demonstration involved violence, another minimal violence.

Sources:

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Footnote:

1. This figure does not tally with the 14 charged, c o nvicted and later acquitted on appeal following the Women Against Rape demonstration held during the Anzac Day Ceremony in 1980.

APPENDIX 2 (a)

24 July 1984

The Secretary,
Department of Territories and
Local Government,
G.P.O. Box 158,
CANBERRA. A.C.T. 2601

ATTENTION: R. Jones

Proposed Public Assemblies Ordinance

Thank you for your letter of 27 April enclosing a copy of the proposed Ordinance.

Having considered the Ordinance, the Commission has asked me to sendyou a copy of its comments. A copy has also been sent to the Chairman of the A.C.T. House of Assembly.

(P.H. Bailey)
Deputy Chairman

COMMENTS BY THE HUMAN RIGHTS COMMISSION ON THE PROPOSED PUBLIC ASSEMBLIES ORDINANCE 1984 (A.C.T.1

A. Ordinance or Act?

The Commission believes, as a matter of principle, that proposed legislation which so fundamentally affects human rights should be subject to the full rigour of parliamentary scrutiny and debate. If the A.C.T. is granted self-government this will occur. Currently, however, A.C.T. Ordinance's, being delegated legislation made by the Governor-General on the advice of the Minister for Territories and Local Government, are not subjected to such parliamentary scrutiny and debate... This is notwithstanding that delegated legislation must be laid before both Houses of Federal Parliament, may be the subject of a Report by the Senate Standing Committee on Regulations and Ordinances, and may be disallowed by notion of either Houte. As Senator Ryan said in the debate on her motion to disallow the Public Assemblies Ordinance 1982, the Minister should proceed

> by an Act of Parliament so that we, as Senators, will have an opportunity from the beginning to be involved in the debate rather than only, as in the case Of delegated legislation, having the power simply to allow or disallow. ,
>
> (C.P.D. Senate 22 April 1982, p.1455-1456)

2. Relevant also is the point at paragraph 18 below that the operation Of the provisions may not be as intended if they are promulgated by Ordinance rather than Act of Parliament.

B. The Notification System

To what public assemblies do the provisions of the proposed ordinance apply?

3. A "public assembly" is defined in section 3 as

> an assembly of not less than 3 persons who are assembled for a common purpose in a public place, whether or not other persons are assembled with them and whether the assembly is at a particular place or moving.

4. This definition follows that in the New South Wales and South Australian Acts (the Public Assemblies Act 1979 (N.S.W.) s.3; the Public Assemblies Act 1972 (S.A.) s.3) insofar as it includes both public processions on a street, road or other thoroughfare, and public meetings held in any place to which the public have free access. However, the definition of "public place" in section 3 gives the draft Ordinance wider application. "Public place" is defined as

any street, road, public park within the meaning of the Public Parks Ordinance 1928, reserve or other place which the public are entitled to use or which is open to, or used by the public, whether on payment of money or otherwise.

5. It would appear, therefore, that this would include a public assembly held on private premises, but, applying the ejusdem generis rule of construction, perhaps only such private premises as are 'open-air'. However, in police offences legislation "public place" has been interpreted as meaning both open-air and in-door premises. It would be preferable for "other place" to read "other open place" to make it clear, presuming that this is what is intended, that meetings held indoors in halls or similar premises are not included in the definition.

6. Not less than three persons are required to constitute a public assembly. Why three persons? It hardly appears necessary for the Ordinance to become operative for so small an assembly. And the limitations imposed by the Ordinance hardly appears justified in terms of Article 21 of the ICCPR. For example, Article 21 permits, inter alia, restrictions which are necessary in a democratic society in the interests of public order, but an assembly of three persons is hardly likely to pose a threat to public order. Indeed, other offences such as conspiracy, sedition or assault would be more appropriate in such circumstances. It would seem preferable to define 'public assembly" by reference to a larger number of persons, for example, 12 persons. This would bring the proposed Ordinance (and in particular the power to give directions under section 19(2)) into line with the power of dispersal contained in section 8 of the Public Order (Protection of Persons and Property) Act 1971 (Commonwealth) which arises "where there is an assembly consisting of not less than twelve persons".

Obtaining Authorisation for an Assembly

7. To obtain authorisation for an assembly, the organiser is required to give the Commissioner (of the Australian Federal Police) notice of a proposed public assembly (section 6). Section 7 requires that the notice must specify the name and address of the organiser, the name of the organisation or body represented (if any), the date, time, place, proposed route, expected number of participants, purpose for which the assembly is to be held, and "(viii) such other particulars as are prescribed". Given the wide range of particulars already prescribed the Commission sees no need for sub-paragraph (viii), which is potentially open to abuse, and recommends that **it** be deleted,

8. If the Commissioner does not within 3 days of receiving the notice inform the organiser that **he/she opposes** the assembly, then the assembly will be considered to be authorised (section 6(b)). Within these time limits, the Commissioner can

inform the organiser that he/she does not oppose the assembly, either unconditionally (section 6(a)) or subject to certain terms and conditions (section 10).

9. If the organiser does not accept the terms and conditions, he/she can apply to the Supreme Court of the A.C.T. for a review (section 10(3)), and the Court has a wide power to affirm, set aside or vary the terms and conditions (section 10(4)). Regrettably, the preparation of the organiser's case for a review is made more difficult by the omission of a requirement for the Commissioner to notify the organiser of the .reasons for only approving the proposed assembly subject to certain terms and conditions. Similarly, there is no requirement for the Commissioner to give reasons for opposing a proposed assembly. The Commission recommends that the Commissioner should be required to notify the organiser of the reasons for his/her opposing the proposed assembly or for only approving the assembly subject to terms and conditions.

10. The Commissioner can also, within 3 days, inform the organiser that he/she opposes the assembly, if the Commissioner is of the opinion that it would not be in the "public interest" for the assembly to be held (section 11(1)). In forming this opinion the Commissioner is required (by section 11(2)) to have regard to -

> (a) the objects of this Ordinance specified in section 2 and, in particular, the right of peaceful assembly referred to in paragraph 2(a); . .

Section 2 states that the objects of the Ordinance are

> (a) to recognise the right of peaceful assembly in accordance with Article 21 of the Covenant [on Civil and Political Rights] ...
>
> (b) in conformity with the Article, to ensure to the greatest extent that is practicable, that persons in the Territory may exercise the right to participate in public assemblies subject only to such restrictions as are necessary in the interests of public order and safety or to protect the rights and freedoms of .other persons,
>
> and this Ordinance shall be Construed accordingly.

11. The inclusion of such an objects clause is novel, and welcome, even if the effect is limited. It will mean that both the Commissioner (section 11(2)) and the Court (section 16(2)) must have regard to the objects clause in determining the "public interest" and the Court will also use the clause in clarifying any ambiguities that arise in interpreting the provisions of the Ordinance. Other applications may, it is to be hoped, emerge in practice.

12. In forming an opinion as to the "public interest" the Commissioner is also required (by section 11(2)) to have regard to:

(b) any likelihood that if the relevant public assembly were to be held -

(i) serious public disorder would be occasioned;
(ii) the safety of any person would be placed in jeopardy;
(iii) damage to property would be occasioned; or
(iv) the assembly would cause an obstruction that would, in the circumstances, be of unreasonable size or duration.

13. Requiring the Commissioner to have regard to "any likelihood" of the matters referred to in paragraphs (i) to (iv), could unduly restrict exercise of the right of assembly. It would be preferable for the Commissioner to be required to have regard to "whether there is a strong probability". The wording of paragraph (b)(ii) and (iii) also seems unnecessarily wide, and it would be preferable if some other test were used, for example that used in section 6 of the Public Order (Protection of Persons and Property) Act 1971 (Commonwealth), whether "unlawful physical violence to persons or unlawful damage to property" would be occasioned.

14. Further, given the existence of paragraph (b)(i) and an amended paragraph (b)(ii) and (b)(iii), then paragraph (b)(iv) goes beyond what is strictly necessary to protect the rights and freedoms of others which appears to be the only other ground under Article 21 which could be used to justify a restriction based on paragraph (b)(iv). Presumably, the objective of paragraph (b)(iv) is to prevent undue interference with the freedom of movement of Others by, for example, a demonstration totally obstructing a city centre. This could be achieved by redrafting paragraph (b)(iv) as follows "the assembly would unduly restrict the freedom of movement of others".

15. In addition to informing the organiser that he/she opposes the proposed assembly, under section 13 the Commissioner can also apply to the Court for an order prohibiting it (section 13(1)) but before doing so he/she must confer with the organiser and consider the organiser's representations (section 13(2)). On the Commissioner's application to the Court, the Court may, in its discretion, prohibit the assembly or impose terms and conditions in relation to its conduct (section 13(3)). In making such an order, the Court, like the Commissioner, is required to consider the public interest (section 16(1)), and in doing so have regard to the same matters as the Commissioner (section 16(2) - which requires amendment like section 11(2), discussed above) at paragraph 11.

16. There are two anomalies about section 13. First, the Commissioner can only apply to the Court for a prohibition order where notice is served on the Commission "not less than 7 days" before the date of the proposed assembly (section 13(1)). Thus, the Commissioner cannot apply for a prohibition order where less. than 7 days notice is given, or where no notice is given. Second, if the Court does make a prohibition order, no penalty

is specified for non-compliance (section 13(3)). PresuMably demonstrators failing to comply would be in contempt of court. If the court is to have the role of punishing those who fail to comply with the prohibition order, it would be preferable, , for the sake of Certainty and clarity rather than punishing offenders for contempt, if the legislation were to provide a specific penalty.

17. It seems unfair, however, that by voluntarily applying for a permit, the organisers of an assembly place themselves at risk of having the assembly prohibited by a court which otherwise would have been unlikely to have played a role. This may also prove a disincentive to the organisers giving notification. Instead of giving the court power to prohibit a proposed assembly, it would be preferable to limit the court's role to one of reviewing decisions made by the Commissioner to oppose a proposed assembly or only to approve a proposed assembly subject to certain terms and conditions being complied with. In each case (and not only if terms and conditions are specified as in the draft Ordinance) the organiser would be entitled to apply to the court for a review, and the court would be empowered to affirm, vary or set aside the Commissioner's decision.

18. The inducement for organisers to seek authorisation for a proposed assembly is the immunity afforded by section 4 fOr participants in an authorised assembly, provided it complies' with any terms and conditions which may have been imposed:

> a person who participates in the assembly is not, by reason only of that participation, guilty of an offence against this Ordinance or against any law of the Territory relating to the movement or free passage of traffic or pedestrians or the obstruction of a person or vehicle in a public place.

However, this section only gives immunity in respect of offences under A.C.T. Ordinances (e.g. obstruction of traffic etc' under section 21 of the Traffic Ordinance 1927) and not Commonwealth Acts which without specific authority, cannot be overridden by a Territory Ordinance. To remove the uncertainty, it may . accordingly be desirable that this legislation take the form of an Act of Parliament rather than an Ordinance.

19. Furthermore, the immunity provided by section 4 which would operate as a defence to a prosecution, only applies if the public assembly has been held "substantially in accordance" with the particulars specified in the notification served on the Commissioner and any terms and conditions which may have been: imposed. The onus appears to be on an accused to satisfy the court of compliance, an onus which may prove a heavy one if a large number of people participated in the assembly. Placing -

such an onus on an individual participant, now accused of an otfence, also seems unduly burdensome, since that individual participant, unless an organiser of the assembly, will have had no control over the conduct of the assembly. It would be preferable to put the onus on the prosecutor to satisfy the

court that the accused. (and only the accused - not other participants) did not act "Substantially in accordance" with the particulars of the notification or any terms and conditions imposed. Only then, in the case of an authorised assembly, would the accused lose the immunity conferred by section 4.

20. Failure to seek authorisation is not an offence. Indeed, section 5 provides:

> (1) Subject to sub-section (2),.it shall be lawful for a person to participate in a public assembly that is not an authorised public assembly.
>
> (2) Sub-section (1) does not operate so as to constitute a defence to a prosecution of a person for an offence against any law in force in the Territory consisting of an act or omission occurring in the course of participation by that person in a public assembly that is not an authorised public as'sembly.

The net effect of section 5 appears to be that participation in an unauthorised public assembly is lawful provided no offence is committed, for if an offence is committed, the lawful participation in the authorised public assembly cannot constitute a defence to prosecution. Section 5(1) is of a declaratory nature, and no specific remedy is provided for interference. However, a common law action of trespass for assault or unlawful detention may be available if a person's right to liberty and security of person has been violated simultaneously, for example if a police officer unlawfully arrests and detains a person taking part in a demonstration.

Imposition of Terms and Conditions by the Commissioner

21. The Commissioner's power to make his approval of a proposed assembly subject to terms and conditions (section 10(1)) has already been referred to above.' This power is subject to the qualification that the Commissioner is not entitled to specify terms and conditions "compliance with which would have the effect of altering substantially the nature of the assembly to which the notice relates" (section 10(2)). However, notwithstanding this qualification, it would be preferable if the Commissioner's power to impose terms and conditions were also subject to the "public interest" requirement provided by section 11.. This would have the effect of bringing the Commissioner's power. to impose terms and conditions into line with that of the court Under section 13(3). such an amendment could be achieved OY

1. inserting a new section 10(2) which might be drafted along the following lines:

> The Commissioner, in exercising the power to specify terms and conditions referred tomn sub-Section (1)i shall have regard to the public interest as more particularly described in section 11(2).

2. Renumbering other sub-sections of section 10 accordingly.

3. Amending section 11(2) along the following lines:

> In forming an opinion as to the public interest for the purposes of section 10(2) and sub-section (1) of this section, the Commissioner shall have regard to ...

C. Breach of the Peace

22. Breach of the peace would be made a statutory offence by the proposed Ordinance. Section 19(1) provides that

> A person shall not, in or near a public assembly, engage in conduct that causes or provokes or is intended to cause or provoke a breach of the peace by any person.
>
> Penalty: $500

The effect of this sub-section, inter alio, is that a person who, in or near a public assembly, engages in deliberate conduct (not inadvertent or accidental) that causes or provokes a breach of peace is guilty of an offence, notwithstanding that the person neither committed the breach of the peace nor intended that a breach of the peace should be the consequence of **his/her** conduct, This is in stark, contrast to the long-established common law principle exemplified by the decision in Beatty v.'Gillbanks ((1882)-15 Cox C.C. 138;· (1882) 9 Q.B.D.308) that a person may not be convicted for doing a lawful act by reason· only that the person knew that his/her lawful act might provoke another to do an unlawful act.

23. Further, it is unfortunate that the concept of a 'breach of the peace' is employed in this offence. ,'Breach of the peace' is not defined in the proposed Ordinance; nor is-it defined elsewhere It retains a common law concept the meaning of which is uncleAr. It Would be preferable if the concept of a 'breach of the peace' were abandoned in favour Of a clearer and more certain statement of the proscribed conduct... The British Law Commission, in their Report No 123 Offences Relating to Public Order (1983), discussing one of the two proposed - statutory offences to replace the common law offence of unlawful assembly, stated, in paragraph 2 6, that

> The desire for clarity and reconsideration of possible unsatisfactory concepts have also led us to abandon the concept of "breach of the peace" common to both the existing law and the Working Paper proposals.

> Although its meaning has to some degree been settled by recent authority [the Court of Appeal decision in E. v. Howell J19821.Q-B.41,6] some uncertainty remains [as a result of the decision of a differently constituted Court of Appeal a few months later in **E.** v. Chief Constable of Devon and Cornwall.. ex Parte C.E.G.B. [1982] Q.B.458]. and the concept therefore seems unsatisfactory for use as a principal element in any new statutory offence.

24. Section 19(1) is unsatisfactory in its present form. The need for **a** new statutory offence is also unclear, given the range of existing offences under the Public Order (Protection of Persons and Property) Act 1971 (Commonwealth) and elsewhere. New statutory offences should not be created without first establishing clear justification for so doing. The views of the task force in the Attorney-General's Department which is at present reviewing the Crimes Act 1900 (N.S.W.) (in its application to the A.C.T.) would be a useful guide.

25. Tf the 'creation of such a:statutOry offence can justified, it is proposed that, **be** drawing on the recommendations of the British Law Commission (e.g para 5.22)$_t$ the offence should be drafted along the ,following lines;

> A person shall not, in or near a public assembly, engage in conduct that causes or provokes a person of reasonable firmness present at the scene to fear violence to any person or property.

Power to Give Directions

D. **26.** **A** new power to give directions is provided by the proposed Ordinance. Section 19(2) states that

where -

(a) the conduct of a person in or near a public assembly is such that a reasonable person would, in all the circumstances, have found to be offensive or insulting; and

(b) a police officer of or above the rank of Sergeant has reasonable grounds for believing that -

(i) another person has found that conduct to be offensive or insulting; and

(ii) the conduct is likely to cause or provoke a breach of the peace,

the police officer may direct the first-mentioned person to leave the vicinity of the public assembly.

The penalty for contravening such a direction is a fine not exceeding $500.

27. Tnere are three elements to the power to give directions under section 19(2). First, the conduct must be such that a reasonable person would find it offensive or insulting - an objective test. Second, the police officer must have reasonable grounds for believing that another person found the conduct offensive or insulting. Third, the police officer must also have reasonable grounds for believing that the conduct is likely to cause or provoke a breach of the peace.

28. For the reasons stated above (paragraph 23), the concept of a 'breach of the peace' Should be abandoned in favour of a clearer and more certain statement of the proscribed conduct. Drawing once again On the British Law Commission's recommendations (e.g.. Tiara 5 22), it is proposed that section 19(2)(b)(ii) be redrafted along the following lines:

> the conduct is likely to cause a person of reasonable firmness present at the .scene to fear 'violence to any person or property.

However, even if these amendments were made, the question arises whether such a power to give directions, where only one person need be offended or insulted, is a permissible restriction under Article 21.

29. First, it should be cleat what the words "offensive and insulting" mean in this context. For example, political protest, even if foolish or misguided, would not normally constitute offensive or insulting behaviour. : In the Victorian case of Worcester v. Smith [1951] VLK 316. 318 (O'Brien J.) said that

> Behaviour to be 'offensive' must, in my opinion. be such as is calculated to wound the feelings, arouse anger or resentment or disgust or rage in the mind of a reasonable person. The mere expression of political views, even when made in the proximity of the offices of those whose opinions or Views are being attacked, does not in my opinion amount to offensive behaviour.

See also pall v.1.1cIntyre (1966) 8F.L.R 237, 244-245 (Kerr J.); Brutus v. Cozens [1973] A.C.854, 862 (Lord Reid) and 865-866 (Viscount Dilborne).)

30. Second, there is a question whether the restriction permitted by Article 21 would cover the offending or insulting of only one person, even where there are reasonable grounds for believing that the conduct is likely to cause or provoke a breach of the peace. Presumably a police direction to disperse could be justified only where there is a real danger of violence to a person or property. This would be achieved by the amendment to section

19(2)(b)(ii) proposed above.

E. Delegation

31. Section 20 would enable the Commissioner of the Australian Federal Police to delegate the powers conferred on the Commissioner by the Ordinance to a police officer of or above the rank of Sergeant. The Commission believes that the delegation of such important powers should only be permitted to officers of the rank of Deputy or Assistant Commissioner.

F. Other Matters

Section 6

32. Paragraph (a) should be amended to ensure that the notice is "served" on the organiser. This could be achieved by deleting the word "informed" and replacing it by the words "served on".

G. Does the Draft Ordinance Meet the Standard Required by the _ism/

33.. As a 'State Party', Australia has undertaken to meet the standards required by the ICCPR, and the Commission is required to review Commonwealth legislation to determine whether it is consistent with those standards? The following paragraphs summarise the Commission's preliminary conclusions on these matters.

(a) Is the Right of Assembly Recognised?

34. Article 21 states that the right of peaceful assembly shall be recognised. But what does it mean to say that this right -"shall be recognised"? The best guide seems to be Article 2 which sets out the obligation of 'State Parties under the ICCPR. First, under Article 2(1), State Parties are required "to respect and ensure" to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR. Second, under Article 2(3), State Parties undertake to ensure that any person whose rights under the ICCPR are violated shall have an effective and enforceable remedy which shall be determined by a competent authority , provided for by the legal system.

35. Applying these provisions, first, does the proposed Public Assemblies Ordinance "respect And ensure" the right of peaceful assembly in the A.C.T.? The answer appears to be for as a result of section 2 the courts will be obliged to recognise the right of peaceful assembly, subject only to the permitted limitations. Furthermore,- if the view of the European Commission of Human Rights in the case of .Rassemblement Jurassien and Unite Juriassienne v. -Switzerland (8191/78, Eur.Comm.H.R., (1979) 17 D. & R. 93, 93) is adopted, then a 'notification system' per se would not be incompatible with the right of peaceful assembly. It would be necessary to ensure that its provisions otherwise comply with the statement of rights in the international instrument.

36. Second, as to whether there is an enforceable remedy for a person whose right of peaceful assembly is violated, the answer is probably 'yes'. For while no specific remedy is provided by the proposed Ordinance, common law actions for assault and unlawful detention will be available if a person's rignt to liberty and security of person is violated, for example, by a police officer unlawfully arresting and detaining a person taking part in a demonstration. Furthermore, if a violation of the right of peaceful assembly occurs as a result of the Commissioner of the Australian Federal Police misusing his/her powers, then application may be made to the court for a prerogative order.

(b) Do the Permitted Restrictions on the Right of Assembly Accord with those Permitted Under the ICCPR?

37. Article 21 states that

> No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

38. First, if the reference to "in conformity with the law" in this context refers to the domestic law, it is clear that restrictions imposed on the right of peaceful assembly in the A.C.T. would be "in conformity with the law". The rule of law, as applied by the courts, dictates that a person's liberty may only be interfered with as prescribed by the law.

39. Second, as to whether the restrictions permitted by the proposed Ordinance "are necessary in a democratic society", if a challenge were to be made to those restrictions before an international body, that body would allow the municipal authorities a degree of discretion to take account of the particular features of the society.[1] This degree of discretion wauletion would probably permit the restrictions imposed by the Ordinance, if amended as suggested.

40. Third, the restrictions must be justifiable on at least one of the grounds specified in Article 21. It seems likely that the proposed restrictions, if so amended, could be justified on these grounds.[2]

41. Thus, it appears that the restrictions provided by the proposed Ordinance, if so amended, would be likely to comply with Article 21.

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1 A fuller discussion of this is contained in the Commission's forthcoming Occasional Paper on "The Right of Peaceful Assembly in the A.C.T.".

2 Ibid. N.B. It is noticeable that under section 2(b) of the proposed Ordinance fewer grounds on which restrictions may be justified are specified than those listed in Article 21.

H. Conclusion

42. The most significant improvement in the draft Ordinance over the now repealed Public Assemblies Ordinance 1982 (A.C.T.) is the omission of the controversial provisions relating to 'limited participation assemblies' with all the complexities that those provisions involved. As a result, the draft Ordinance is more intelligible than its predecessor but there are still a number of important defects that require correction. These have been identified in the text above, and are summarised in section I below.

43. Finally, it should not be forgotten that, despite the small size of the A.C.T. legislation is often treated as a model for legislation in other Australian jurisdictions. Furthermore, A.C.T. legislation, being ultimately under the control of Federal Parliament, tends to be seen nationally and internationally as evidence of the Federal Government's commitment to meeting Australia's international obligations, where meeting those obligations can be achieved through legislation, and A.C.T. legislation is a product of Government initiative. The Commonwealth's proposals relating to the right of peaceful assembly - a right the exercise of which, like the right to freedom of expression, is essential to the proper functioning of our democratic system of government - therefore assume great prominence as a reflection of the extent to which it is prepared to put its human rights policy into practice.

I. Bummary of Recommendations

(1) The proposed legislation should take the form of an Act of Federal Parliament rather than an A.C.T. Ordinance (paragraph 1)-

(2) Section 3: definition of "public place": for "other place" substitute "other open place" (paragraph 5).

(3) Section 3: definition of "public assembly": for "not less than 3 persons" substitute "not less than 12 persons" (paragraph 6).

(4) -Section 4: the immunity afforded by this section is limited unless the legislation takes the form of an Act of Parliament (paragraph 18).

(5) Section 1: the onus should be placed on the prosecutor to satisfy the court that the accused did not act - - "substantially in accordance" with the particulars of the notification or any terms and conditions imposed. Only then, in the case of an authorised assembly, should the accused lose the immunity conferred by s.4 (paragraph 19).

(6) Section 6(a): for the word "informed" substitute "served on" (paragraph 32).

(7) Section 7: delete paragraph (c)(viii) (paragraph 7).

(8) Section 10: the Commissioner should be required to notify the organiser of a proposed assembly of the reasons for his/her opposing the assembly or for only approving the assembly subject to terms and conditions (paragraph 9).

(9) Sections 10 and 11: the Commissioner's power to impose terms and conditions should also be subject to the "public interest" requirement provided by p.11 (paragraph 21). This could be achieved by

(a) inserting a new s.10(2) along the following lines:

"The Commissioner, in exercising the power to specify terms and conditions referred to in subsection (1), shall have regard to the public interest as more particularly described in section 11(2)",

(b) renumbering the other subsections of s.10 accordingly;

(c) amending s.11(2) along the following lines:

"In forming an opinion as to the public interest for the purposes of section 10(2) and subsection (1) of this section, the Commissioner shall have regard to

(10) Section 11(2)(b) and section 16(21(b): for "any' likelihood" substitute "whether there is a strong probability" (paragraph 13). Delete paragraph (b)(ii) and (iii) and substitute a new paragraph (b)(ii):

"unlawful physical violence to persons or unlawful damage to property".

Delete paragraph (b)(iv) and substitute as a new paragraph (b) (iii):

"the assembly would unduly restrict the freedom o movement of others" (paragraph 14).

(11) Section 13: the court's role should be limited to one of reviewing decisions made by the Commissioner to oppose a proposed assembly or only to approve a 'proposed assembly subject to terms and conditions (paragraph 17).

In the event that this recommendation is not accepted, an appropriate penalty should be specified for non-compliance with a prohibition order (paragraph 16).

(12) Section 19(1): In order to avoid the ambiguities in 'breach of the peace' and to ensure a reasonable degree of intent, substitute for this subsection

> "A person shall not, in or near a public assembly, engage in conduct that causes or provokes a person of reasonable firmness present at the scene to fear violence to any person or property" (paragraphs 22-25).

(13) Section 19(2): delete paragraph (b)(ii) for a provision on the following lines:

> "the conduct is likely 'to cause a person of reasonable firmness present at the scene to fear violence to any person or property" (paragraph 28).

(14) „Section 20(1): delete "or above the rank of Sergeant." and substitute "of the rank of Assistant or Deputy Commissioner" (paragraph -31)

July 1984

COPY OF PROPOSED PUBLIC ASSEMBLIES ORDINANCE

AUSTRALIAN CAPITAL TERRITORY

Public Assemblies Ordinance 1984

No. of 1984

I. THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council. hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910.*

Dated 1984.

Governor-General

By His Excellency's Command,

Minister of State for Territories
and Local Government

An Ordinance relating to assemblies in public places

Short title

1. This Ordinance may be cited as the *Public Assemblies Ordinance 1984)*

Objects

2. The objects of this Ordinance are—

(a) to recognize the right of peaceful assembly in accordance with Article 21 of the Covenant, a copy of the English text of which Article is set out in the Schedule: and

(b) in conformity with that Article, to ensure, to the greatest extent practicable, that persons in the Territory may exercise the right to participate in public assemblies subject only to such restrictions as are necessary in the interests of public order and safety or to protect the rights and freedoms of other persons,

and this Ordinance shall be construed accordingly.

Ord. 18/84 Cat. 1No. —Recommended retail price 6Gc 60 ,27.3.198-t

Interpretation

3. In this Ordinance, unless the contrary intention appears—

"authorized public assembly" means a public assembly that is, in pursuance of section 6, to be taken to be authorized for the purposes of this Ordinance;

"Commissioner" means the Commissioner of Police of the Australian Federal Police;

"court" means the Supreme Court;

Covenant" means the International Covenant on Civil and Political Rights a copy of the English text of which is set out in Schedule 1 to the *Human Rights Commission Act 1981;*

"notification" means a notification of a proposed public assembly referred to in section 7;

"organizer", in relation to a public assembly, means the person designated in the relevant notification as the organizer of that assembly;

"public assembly" means an assembly of not less than 3 persons who are assembled for a common purpose in a public place, whether or not other persons are assembled with them and whether the assembly is at a particular place or moving;

"public place" means any street, road, public park within the meaning of the *Public Parks Ordinance 1928*, reserve or other place which the public are entitled to use or which is open to, or used by, the public, whether on payment of money or otherwise.

Legal immunity for participant in authorized public assembly

4. Where an authorized public assembly is held substantially in accordance with the particulars specified in the relevant notification (except insofar as any of those particulars are inconsistent with any term or condition referred to in whichever of paragraphs (a), (b) and (c) is applicable) and—

(a) the terms and conditions, if any, specified in the notice in writing from the Commissioner informing the organizer that the Commissioner does not oppose the holding of the assembly;

(b) the terms and conditions referred to in paragraph (a) as varied by the court by an order made under sub-section 10 (4); or

(c) the terms and conditions specified in an order of the court under this Ordinance as applicable to the holding of the assembly,

as the case requires, a person who participates in the assembly is not, by reason only of that participation, guilty of an offence against this Ordinance or against any law of the Territory relating to the movement or free passage of traffic or pedestrians or the obstruction of a person or vehicle in a public place.

Lawfulness of participation in public assemblies

5. (1) Subject to sub-section (2), it shall be lawful for a person to participate in a public assembly that is not an authorized public assembly.

(2) Sub-section (I) does not operate so as to constitute a defence to a prosecution of a person for an offence against any law in force in the Territory consisting of an act or omission occurring in the course of participation by that person in a public assembly that is not an authorized public assembly.

Authorized public assembly

6. A public assembly shall be taken to be authorized for the purposes of this Ordinance if a notification in relation to that assembly, being a notification that complies with the requirements specified in section 7, was served on the Commissioner in accordance with section 9 and—

(a) the Commissioner has, by notice in writing, informed the organizer of the assembly that he does not oppose the holding of the assembly;

(b) if the notification was served on the Commissioner not less than 7 days before the date on which the assembly is held—the Commissioner did not, within 3 days after the date on which the notification was served on him, inform the organizer in writing that he opposed the holding of the assembly;

(c) if the notification was served on the Commissioner not less than 7 days before the date on which the assembly is held—the court has not made an order under section 13 prohibiting the holding of the assembly; or

(d) if the notification was served on the Commissioner less than 7 days before the date on which the assembly is held—the court has made an order under section 14 authorizing the holding of the assembly and that order has not been revoked by an order made under section 15.

Requirements for notification

(a) be in writing;

(b) be signed by the person designated in the notification as the organizer of the relevant public assembly; and

(c) contain the following particulars:

(i) the name and residential or business address of the organizer;

(ii) the name of the organization or body, if any on behalf of which the notification is served;

(iii) the date on which it is proposed that the assembly be held;

(iv) the time and place at which it is expected that persons will assemble to participate in the assembly and the time at which it is estimated that the assembly will disband;

(v) the proposed route, if any, to be taken by the assembly, and details of any places at which and times during which it is proposed that the assembly will stop;

(vi) the expected number of participants;

(vii) the purpose for which the assembly is to be held;

(viii) such other particulars as are prescribed.

False or misleading information

8. A person shall not, in a notification, knowingly furnish information that is false or misleading in a material particular.

Penalty: $1,000.

Service of document

9. (1) A document to be served on the Commissioner under this Ordinance may be served by delivering it to him personally or by leaving it at —

(a) the office of the Commissioner; or

(b) any police station in the Territory,

with any police officer of or above the rank of Sergeant.

(2) A document to be served on the organizer of a public assembly under this Ordinance may be served by delivering it to him personally or by leaving it at the address of the organizer specified in the relevant notification with a person apparently resident or employed at that place and apparently over the age of 16 years.

Imposition of terms and conditions by Commissioner

10. (1) Subject to sub-section (2), the Commissioner may, in a notice in writing for the purposes of paragraph 6 (a), specify terms and conditions subject to compliance with which he does not oppose the holding of the assembly.

(2) The Commissioner is not entitled to specify, in a notice referred to in sub-section- (1), terms and conditions compliance with which would have the effect of altering substantially the nature of the assembly to which the notice relates.

(3) An organizer of a public assembly may apply to the court for a review of any terms and conditions specified in a notice referred to in sub-section (1) in relation to the assembly.

(4) On an application under sub-section (3), the court may, in its discretion, by order, affirm, vary or set aside the terms and conditions under review, and the court may, in an order setting aside terms and conditions, specify other terms and conditions as applicable to the holding of the relevant assembly in substitution for the terms and conditions set aside.

Matters to be taken into consideration by Commissioner

11. (1) The Commissioner shall not oppose the holding of a public assembly unless he is of the opinion that it would not be in the public interest for the assembly to be held.

(2) In forming an opinion for the purposes of sub-section (1). the Commissioner shall have regard to—

(a) the objects of this Ordinance specified in section 2 and, in particular, the right of peaceful assembly referred to in paragraph 2 (a); and

(b) any likelihood that if the relevant assembly were toe held-

(i) serious public disorder would be occasioned;

(ii) the safety of any person would be placed in jeopardy;

(iii) damage to property would be occasioned; or

(iv) the assembly would cause an obstruction that would in the circumstances, be of unreasonable size or duration.

Withdrawal of objection by Commissioner

12. Where—

(a) the Commissioner has informed the organizer of a public assembly in writing that he opposes the holding of the assembly; and

(b) at any time before the date specified in the relevant notification as the date on which it is proposed that the assembly be held, the Commissioner, having taken into consideration any matters put by the organizer at a conference held in pursuance of paragraph 13 (2) (c) or in any written representations made to him by the organizer or for any other reason, ceases to oppose the holding of the assembly,

the Commissioner shall forthwith, by notice in writing, inform the organizer that he does not oppose the holding of the assembly.

Application to court by Commissioner

13. (1) Subject to sub section (2), where a notification was served on the Commissioner not less than 7 days before the date specified in the notification as the date on which it is proposed that the relevant public assembly be held, the Commissioner may apply to the court for an order prohibiting the holding of the assembly.

(2) The Commissioner is not entitled to apply for an order referred to in sub-section (1) in relation to a proposed public assembly unless—

(a) within 3 days after the date on which the relevant notification was served on him, by notice in writing served on the organizer of the assembly, he informed the organizer that he opposed the holding of the assembly;

(b) in the notice referred to in paragraph (a), he-

(i) furnished the reasons for his opposition to the holding of the assembly; and

(ii) invited the organizer to confer at a specified time and place with him or with a police officer nominated by him with respect to the proposed assembly or to make written representations to him with respect to the proposed assembly within a specified time;

(c) he, or the nominated police officer, made himself available so to confer at the time and place so specified; and

(d) he has taken into consideration any matters put by the organizer at a conference held in pursuance of paragraph (c) or in any written representations made to him by the organizer.

(3) On an application under sub-section (1), the court may. in its discretion, by order —

(a) prohibit the holding of the public assembly to which the application relates; or

(b) specify terms and conditions as applicable to the holding of the public assembly to which the application relates.

Application to court by organizer

14. (1) Where-

(a) a notification was served on the Commissioner less than 7 days before the date specified in the notification as the date on which it is proposed that the relevant public assembly be held; and

(b) the Commissioner has informed the organizer in writing that he opposes, or has not informed the organizer in writing that he does not oppose, the holding of the assembly,

the organizer may apply to the court for an order authorizing the holding of the assembly.

(2) On an application under this section, the court may, in its discretion, by order, authorize the holding of the public assembly to which the application relates subject to such terms and conditions, if any, as are specified in the order.

Revocation of order authorizing assembly

15. (1) Where the court has made an order under sub-section 14 (2) authorizing the holding of a public assembly, the Commissioner may apply to the court for an order revoking the first-mentioned order on the ground that —

(a) further information in relation to the proposed assembly has come into his possession after the date on which the first-mentioned order was made; and

(b) having regard to that information, he is of the opinion that it would not be in the public interest for the assembly to be held.

(2) On an application under sub section (1), the court may in its discretion, by order—

(a) revoke the previous order to which the application relates; or

(b) specify terms and conditions (including terms and conditions varying, in addition to or in substitution for any terms and conditions specified in the previous order to which the application relates) as applicable to the holding of the assembly to which the application relates.

Regard for public interest

16. (1) In determining an application under section 13, 14 or 15, the court shall consider whether it would not be in the public interest for the public assembly to which the application relates to be held.

(2) For the purposes of sub-section (1), the court shall have regard to—

(a) the objects of this Ordinance specified in section 2 and, in particular, the right of peaceful assembly referred to in paragraph 2 (a); and

(b) any likelihood that if the relevant assembly were to be held-

(i) serious public disorder would be occasioned;

(ii) the safety of any person would be placed in jeopardy;

(in) damage to property would be occasioned; or

(iv) the assembly would cause an obstruction that would, in the circumstances, be of unreasonable size or duration.

Jurisdiction of court

17. Jurisdiction to hear and determine applications under this Ordinance is vested in the court.

Parties to applications

18. (1) The Commissioner shall be the respondent to an application to the court under this Ordinance made by the organizer of a public assembly.

(2) The organizer of a public assembly shall be the respondent to an application to the court under this Ordinance made by the Commissioner in relation to that assembly.

Breaches of the peace

19. (1) A person shall not, in or near a public assembly, engage in conduct that causes or provokes or is intended to cause or provoke a breach of the peace by any person.

Penalty: $500.

(2) Where—

(a) the conduct of a person in or near a public assembly is such that a reasonable person would, in all the circumstances, have found to be offensive or insulting; and

(b) a police officer of or above the rank of Sergeant has reasonable grounds for believing that-

(i) another person has found that conduct to be offensive or insulting; and

(ii) the conduct is likely to cause or provoke a breach of the peace,

the police officer may direct the first-mentioned person to leave the vicinity of the public assembly.

(3) A person who contravenes a direction given to him under sub-section (2) is guilty of an offence punishable, on conviction, by a fine not exceeding $500.

(4) Nothing in this section affects the power of any court to require a person to enter into a recognizance, with or without sureties, to keep the peace or to be of good behaviour.

Delegation

20. (1) The Commissioner may. either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to a police officer of or above the rank of Sergeant any of his powers under this Ordinance, other than this power of delegation.

(2) A power so delegated, when exercised by the delegate shall, for the purposes of this Ordinance, be deemed to have been exercised by the Commissioner.

(3) A delegation under this section does not prevent the exercise of a power by the Commissioner.

Regulations

21. The Minister may make regulations, not inconsistent with this Ordinance, prescribing all matters which by this Ordinance are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

SCHEDULE

Section 2

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order *(ordre public)*. the protection of public health or morals or the protection of the rights and freedoms of others.

NOTE

1. Notified in the

Commonwealth of Australia Gazette on 1984.

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