

HUMAN RIGHTS COMMISSION

REPORT NO. 21

CIVIL DISOBEDIENCE AND THE USE
OF ARREST AS PUNISHMENT:
SOME HUMAN RIGHTS ISSUES

November 1986

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Canberra 1986

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HUMAN RIGHTS COMMISSION

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6 November 1986.

The Hon. Lionel Bowen, M.P.,
Deputy Prime Minister and Attorney-General,
Parliament House,
CANBERRA A.C.T. 2600

Dear Attorney-General,

Pursuant to section 9(1)(c) of the Human Rights^A Commission Act 1981, we present this report to you following the Human Rights Commission's examination of Guidelines for 'Civil Disobedience • Prosecutions issued by the Director of Public Prosecutions under the Director of Public Prosecutions Act 1983.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Roma', on a small rectangular piece of paper.

Chairman
for and on behalf of the
Human Rights Commission.

Members of the Human Rights Commission

Chairman

The Hon. Dame Roma Mitchell, D.B.E.

Deputy Chairman

Mr P. H. Bailey, O.B.E.

Members

Associate Professor M. J. Aroney, O.B.E.
Mr M. Einfeld, Q.C. (Appointed 13 March 1986)
Mrs N. C. Ford Mrs E. Geia Ms E. Hastings

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(vi)

FUNCTIONS OF THE COMMISSION

Section 9 of the Human Rights Commission Act 1981 (Cwlth) reads:

9.(1) The functions of the Commission are -

- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
- (b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and -
 - (i) where the Commission considers it appropriate to do so - endeavour to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters - to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;
- (c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
- (d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
- (e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;
- (f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;

- (g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
 - (h) to perform -
 - (i) any functions conferred on the Commission by any other enactment;
 - (ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and
 - (iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the Gazette, to be complementary to other functions of the Commission; and
 - (j) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The Commission shall not -
- (a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or
 - (b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).
- (3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organisations.

I. INTRODUCTION

This report is concerned with the human rights implications of Guidelines issued by the Commonwealth Director of Public Prosecutions for 'Civil Disobedience' prosecutions. The Director of Public Prosecutions is appointed under the Director of Public Prosecutions Act 1983 (Cwlth). Section 11 of that Act authorises the Director to furnish written Guidelines to the Commissioner of Police of the Australian Federal Police and to certain other officials involved with the investigation and prosecution of offences against the laws of the Commonwealth. Pursuant to his power under s.11, the Director issued Guidelines on 8 January 1986 entitled *Guidelines for 'Civil Disobedience' Prosecutions*. These Guidelines relate to prosecutions under s.23 of the Public Order (Protection of Persons and Property) Act 1971 (Cwlth) which requires that proceedings for summary prosecutions and for the commitment of persons for trial on indictment for certain offences under that Act shall be instituted only with the consent in writing of the Director. Section 23 goes on, in sub-section (3), to say that even though the consent of the Director is required to prosecute for certain offences against that Act, nevertheless persons may be charged, arrested and remanded as long as no further steps in their prosecution are taken without the Director's consent.

2. The Guidelines are reproduced in Appendix 1. In the Guidelines, the Director observes that it has never been the law that whenever an offence has been committed, a prosecution must be brought. In emphasising the existence of a discretion whether or not to prosecute, the Director states, in paragraph 8, that:

In some cases the decision to effect an arrest will provide an immediate solution for the problem at hand. It takes the offender away from the scene of confrontation, for at least as long as it takes for bail to be granted and satisfied. During that period there is a deprivation of liberty, and on occasions that may be a sufficient penalty for the conduct in question. In this regard section 22 of the Act entitles a constable to effect an arrest either because proceedings by summons would not be effective or

because the arrest is necessary to prevent persistence in, or repetition of, offences against the Act.

3. It is with paragraph 8 of the Guidelines that this report is particularly concerned. Two issues of concern arise in relation to human rights: the possibilities of arbitrary detention and the inference that anyone other than a Court may determine what is a sufficient penalty. To this end, the report deals with the relationship between paragraph 8 and Articles 9, 14, 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR) which are reproduced in full in Appendix 2. Article 9 prohibits arbitrary arrest or detention and entitles anyone arrested or detained on a criminal charge to be brought promptly before a judicial officer so that the lawfulness of the detention may be tested. Article 14 deals, amongst other things, with criminal trials. Articles 19 and 21 deal, respectively, with the right to freedom of expression and the right to freedom of assembly.

II. THE ISSUES

4. The principal issue with which this report is concerned is whether paragraph 8 of the Guidelines and, in particular, that passage in it which states that the deprivation of liberty resulting from an arrest may in itself be a sufficient penalty for the person concerned, is inconsistent with Article 9 of the ICCPR. The question is whether such an arrest, coupled with a decision not to prosecute because there has been 'sufficient penalty', is tantamount to arbitrary arrest or detention and inconsistent with the underlying concept in Article 9 that arrest is intimately linked with the subsequent judicial process requiring proof of guilt according to law, along with the presumption of innocence until that occurs.

5. The Commission does not argue in this report against the existence of a discretion as to whether or not to prosecute. Nor does it argue against the proposition which is, indeed, enshrined in s.22(b) of the Public Order (Protection of Persons and Property) Act, that arrest may be necessary in certain cases to prevent the commission or the repetition of offences. What it is concerned with is the problem of inconsistency with Articles 9 and 14 of the ICCPR, arising from usurping the prerogative of the Courts to impose punishment.

6. Furthermore, paragraph 8 gives rise to the temptation to use arrest as an extra-judicial punishment. If the temptation is not resisted, inconsistencies could result in relation to the right to freedom of assembly, protected by Article 21 of the ICCPR and the right to freedom of expression guaranteed by Article 19.

ARREST, PUNISHMENT AND HUMAN RIGHTS

7. Article 9 of the ICCPR creates a close nexus between arrest on a criminal charge and the subsequent trial of the person arrested. Thus, Article 9(3) requires that arrested persons are to be brought promptly before a judicial officer and entitles them to a trial within a reasonable time. This is not inconsistent with the existence of a discretion to refrain from prosecuting arrested persons in appropriate cases. The discretion to refrain from prosecution may no doubt be exercised in a number of contexts, particularly where the available evidence seems inconsistent with obtaining a conviction, but has nothing to do with the concept of punishment. However, Article 9 emphasises the intimate link between arrest and trial. The purpose of arrest is to bring alleged offenders to trial, not to punish them: c.f. Williams v. The Queen (1986) 60 A.L.J.R. 636 at pages 641-642 per Mason and Brennan J.J. Furthermore, the power to arrest in order to prevent the repetition of offences, found in s.22(b) of the Public Order (Protection of Persons and Property) Act is completely consistent with the notion that an offence punishable by summary conviction or an indictment has been committed and that, in the normal course of events, the matter will proceed to a hearing.

8. The jurisprudence on arrest and detention emphasises this essential link between arrest and the requirement to test its lawfulness in subsequent legal proceedings. Thus, dealing with an analogous provision in the European Convention on Human Rights, in the Lawless case (No. 3) 1 E.H.R.R. 15, at page 27, the European Court of Human Rights said the (comparable):

...clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority...

The Court went on to emphasise that its analysis was fully in harmony with the purpose of the European Convention,

...to protect the freedom and security of the individual against arbitrary detention or arrest...

9. Turning to Article 14 of the ICCPR, it is clear that it enshrines the notion of punishment as something which can only follow proof of guilt according to law in accordance with a trial conducted consistently with the other requirements of that article.

In other words, the notion of punishment is one which comes at the very end of the criminal process that begins with arrest.

To treat, as the Guidelines do, arrest as tantamount to punishment in certain cases, is to confuse the beginning of the process of criminal justice with its ultimate objective, to punish the guilty whilst letting the innocent go free. And where there is a likelihood that the guilt of an arrested person will, under the Guidelines, not be tested in the Courts, there is every risk that the innocent will be punished with the guilty and their human rights denied.

10. Furthermore, if the arresting officer need not address his or her mind at the time of arrest, in every case, to ensuring that an arrest is made only when there is a reasonable chance of conviction, then there is scope for arbitrariness in an arrest, the legality of which will never be tested in the Courts. Arbitrary arrest becomes more likely. The rights of freedom of expression and freedom of assembly that are in question on such occasions may be jeopardised by such arrests and as a result, inconsistencies with Articles 19 and 21 of the ICCPR may also arise.

11. In short, the consequence of the Guidelines may be that the police and other officials will usurp the function of the judiciary, treating arrest as a punishment in itself in certain cases. At the same time, this usurpation of the role of the judiciary is itself inconsistent with Articles 9 and 14 of the ICCPR.

IV. RESPONSE BY THE DIRECTOR OF PUBLIC PROSECUTIONS

12. The Commission's concerns were taken up with the Director of Public Prosecutions by letter dated 28 August 1986 (Appendix 3). The Director replied on 30 October 1986 (Appendix 4) commenting, so far as is directly relevant, as follows:

I apprehend that the Guidelines have been taken out of context. They were clearly not intended to offend against Article 9, nor to abrogate or affect the duties of a police officer in relation to his discretion to arrest an offender and then to bring that offender before a justice.

Paragraph 8 in particular is directed not to the decision to arrest, but to the decision whether to consent to a prosecution under section 23(2) of the Public Order (Protection of Persons and Property) Act 1971.

13. Notwithstanding that paragraph 8 may be intended to be directed to the decision whether to prosecute rather than the decision to arrest, the Guidelines are expressed to be 'directed to the Commissioner of Police of the Australian Federal Police' as well as certain others and to be 'for the use and guidance of AFP officers ...' (Guidelines, paragraph 1).

14. In these circumstances, paragraph 8 is open to the inference by police that there is official sanction by the Director of Public Prosecutions for effecting arrest of a protester, not only 'to provide an immediate solution for the problem at hand', but also to penalise the person concerned for his or her conduct.

15. Moreover, to the extent that the Guidelines are also intended for 'the use and guidance of ... all persons involved in the prosecution of offences against Commonwealth law', they introduce the notion that an official may determine whether there has been sufficient 'punishment' of the alleged offender by virtue of his or her arrest.

16. The concepts described in paragraphs 14 and 15 are clearly inconsistent with long established law and practice in Australia and with Article 14 of the ICCPR. They are unacceptable, therefore, in terms both of Australian jurisprudence and of human rights.

V. CONCLUSIONS AND RECOMMENDATIONS

17. Having considered the human rights implications of paragraph 8 of the *Guidelines for 'Civil Disobedience' Prosecutions*, the Commission is of the opinion that it is inconsistent with Articles 9 and 14 of the International Covenant on Civil and Political Rights and has the potential to lead to infringements of Articles 19 and 21 of the ICCPR. Accordingly, the Commission recommends that the Guidelines be revised to achieve consistency with the ICCPR and to eliminate the notion that arrest can, in any circumstances, be treated as a punishment.

Director of Public Prosecutions Act 1983
Guidelines for 'Civil Disobedience' Prosecutions

These guidelines are issued under Section 11 of the Director of Public Prosecutions Act 1983 and are directed to the Commissioner of Police of the Australian Federal Police, the Deputy Directors of Public Prosecutions in Melbourne, Sydney, Canberra, Brisbane and Perth and the Directors of Legal Services in Adelaide, Hobart and Darwin. They have been prepared following consultation with the Australian Federal Police and the Attorney-General's Department, and are for the use and guidance of AFP officers and all persons involved in the prosecution of offences against Commonwealth law.

2. The Bill for the Public Order (Protection of Persons and Property) Act 1971 ('the Act') was introduced into the House of Representatives by the then Attorney-General, Mr. T.E.F. Hughes Q.C., on 16 March 1971. The objects of the Bill were stated to be '....to clarify, to simplify and, in important respects, to mitigate the severity of, the law concerning assemblies of persons in areas of Commonwealth legislative responsibility'. See H. R. Deb., Vol. 71, 926.

3. The Act requires that proceedings for the commitment of a person for trial on indictment or summary prosecution for an offence against the Act are only to be instituted with the written consent of the DPP or persons authorised by the DPP. See s.23 (2) of the Act. Furthermore, any prosecution for a federal offence can be terminated by the DPP - Director of Public Prosecutions Act 1983, section 9. The purpose of these

guidelines is to address the issues that should be considered when deciding whether to commence or continue with prosecution under the Act, or otherwise for offences involving civil disobedience, including without limitation those arising out of demonstrations, street marches, pickets and sit-ins.

4. It has never been the law that whenever an offence is committed a prosecution must be brought with respect to it. Police officers often exercise a discretion in deciding whether to lay charges against persons who may have committed an offence. Similarly prosecutors may, on occasions, form the view that it would not be in the public interest for a matter to be pursued, notwithstanding the probability that if the prosecution was continued the offender would be convicted by the court.

This idea of selective law enforcement has not escaped judicial notice and comment. In Wright v McQualter (1970) 17 F.L.R. 305 it was said:

'Such a selective approach to law-enforcement is a well-known phenomenon, and not only in the field of demonstrations. It is sometimes criticized on the ground that the police, especially junior police, should not substitute their view of policy for that of the legislature. It is argued that the police should arrest and prosecute all who are believed by them to be wrongdoers. It is common knowledge, however, that this does not happen and that in many kinds of situation, for various reasons, the police, including constables, elect not to proceed against persons they believe to be wrongdoers. In the United States, where this subject has received much attention, there is a strongly held view that if the police are to exercise discretion of this kind it should be pursuant to rules laid down as a matter of policy at senior levels in the police force. Whatever may be the advantages and disadvantages of the top-level police formulation of policy, in this field of selective law-enforcement, for general application the fact is that selective law-enforcement does occur and the present case is an example of its operation in a prudent manner.'

5. The law in relation to the matters referred to in paragraph 3 has in the past been enforced in a selective manner. It appears that this practice is based upon police experience and the likelihood that to do otherwise would have an exacerbating

effect. History indicates that to prosecute people for relatively minor offences that arise from the expression of strongly held moral convictions or ideological beliefs may be fruitless. Indeed such action may well result in endemic bitterness and the 'martyrdom' of those prosecuted. Reference is made to Roger Fulford, 'Votes for Women' on the English suffragettes, Norman Mailer, 'Armies of the Night' on the American experience and Frank Brennan, 'Too Much Law, Too Little Order' on the Australia situation and Queensland street marches in particular.

6. In deciding whether to commence, consent to or continue with a prosecution regard should be had to the general prosecution policy statement and also to special factors relating to civil disobedience offences which are referred to in paragraph 5.

7. Occasionally a policeman may consider that there is no alternative to arresting a person even though the person's actions have been essentially non-violent in nature. By way of illustration, in 1984 a large group of protesters gathered at the H.M.A.S Stirling Base in Western Australia. AFP officers spent a great deal of time pushing back those protesters who wished to breach the perimeter fence. In these circumstance it was understandable that those protesters who did eventually force their entry onto the base were arrested.

8. In some cases the decision to effect an arrest will provide an immediate solution for the problem at hand. It takes the offender away from the scene of confrontation, for at least as long as it takes for bail to be granted and satisfied. During that period there is a deprivation of liberty, and on occasions that may be a sufficient penalty for the conduct in question. In this regard section 22 of the Act entitles a constable to effect an arrest either because proceedings by summons would not be effective or because the arrest is necessary to prevent persistence in, or repetition of, offences against the Act.

9. In all cases arising under the Act the DPP and those officers authorised under s.23(2) of the Act retain a discretion whether to consent to the institution of proceedings for an offence against the Act. The facts that a justified arrest has been effected and there is evidence which, in the opinion of the DPP or the authorised officer, could result in the conviction of the offender are but part of the circumstances to be taken into account: see paragraph 6. In all cases it is desirable for the prosecutor to consult with the arresting officer. If a decision is made not to prosecute the offender the AFP should be notified, orally if time is of the essence, and, in any event, in writing outlining the reasons for the decision.

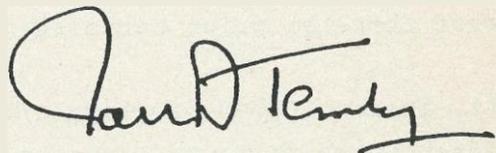
10. In relation to other prosecutions which fall within the responsibility of the Office of DPP and which arise out of civil disobedience activities, DPP officers should consider whether the prosecution should be taken over and discontinued pursuant to s.9 of the DPP Act 1983. What are here contemplated are charges such as hindering police, trespasses and infractions of traffic laws, in so far as these matters fall within the responsibility of the Office of DPP. It is important that the reasons for any decision of this type be fully documented and that there be prior consultation with the AFP.

11. In conclusion, nothing that is said above deals with offences which cause actual and manifest harm or damage to persons or property. In such cases the normal prosecution process should be followed. It would Only be in the most exceptional circumstances that in such a case a decision would be made either not to consent to the institution of proceedings or to discontinue such proceedings.

12. Further, there will be some cases where proceedings should be instituted or continued even though the matter is one of civil disobedience and no harm or damage has been caused to persons or property. Each case will need to be examined in light of the circumstances surrounding the offence. Of

particular relevance will be the frequency with which the individual concerned has broken the law, either in the course of a particular protest or as a type of 'professional agitator'.

13. In the event that a person who is convicted under the Act or otherwise in respect of a civil disobedience offence fails to pay a fine or costs, the normal procedures concerning the issue and execution of a warrant of commitment should, upon instructions and in the absence of special considerations, be followed. In individual cases it may be undesirable to pursue the enforcement of a court order because of the circumstances of the offender, or more particularly the plight of others who may also be affected e.g. the offender may be the sole parent of a dependent child who would not be able to look after him or herself if the offender were incarcerated. An option which should be considered, where such a course of action is available, is to seek a warrant of distress rather than a warrant Of commitment.

A handwritten signature in black ink, appearing to read "Paul Tenby". The signature is written in a cursive style with a large initial 'P' and a long horizontal stroke at the end.

Canberra

January 1986

DIRECTOR OF PUBLIC PROSECUTIONS

INTERNATIONAL COVENANT ON CIVIL

AND POLITICAL RIGHTS. ARTICLES 9, 14, 19 & 21.

ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons of his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

ARTICLE 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in

the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.

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 will 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.

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.

Our Ref

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28 August 1986

Mr Ian Temby, QC
Director of Public Prosecutions
PO Box E370
Queen Victoria Terrace
CANBERRA ACT 2600

Dear Mr Temby,

The Human Rights Commission, at its recent meeting, gave consideration to your guidelines for 'Civil Disobedience' Prosecutions.

The Commission is particularly concerned with the human rights implications in paragraph 8 of the Guidelines, in which it is said, inter alid, that:

"In some cases the decision to effect an arrest will provide an immediate solution for the problem at hand. It takes the offender away from the scene of confrontation, for at least as long as it takes for bail to be granted and satisfied. During that period there is a deprivation of liberty, and on occasions that may be a sufficient penalty for the conduct in question."

It seems to the Commission that the policy outlined raises issues under Article 9 of the International Covenant on Civil and Political Rights in that it may amount to arbitrary arrest and detention. Article 9 is consistent with the traditional common law position that the purpose of arrest on a criminal charge is to bring the person arrested promptly before a magistrate or a judge for a speedy trial. Punishment is the prerogative of the courts alone. Further, the Guidelines state that one of the purposes of arrest is to remove the "offender" from the scene of confrontation. This not only prejudices that

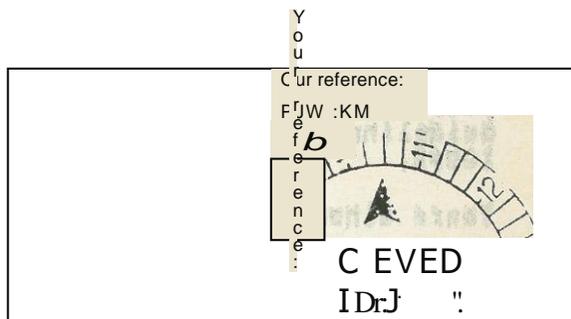
the person is an offender but may also be an arbitrary interference with the right of peaceful protest guaranteed by Articles 19 and 21 of the ICCPR.

The Commission would welcome your comments on these matters and would be pleased to cooperate with you in ensuring that the Guidelines are consistent with Australia's obligations under ICC PR.

Yours sincerely,

A handwritten signature in cursive script, reading "Roma Mitchell", on a light-colored rectangular background.

Chairman



30 October 1986

The Hon. Dame Roma Mitchell D.B.E.,
Chairman,
Human Rights Commission,
G.P.O. Box 629,
CANBERRA. A.C.T. 2601

Dear Dame Roma,

I refer to your letter of 28 August 1986 and regret the delay in replying to your concerns about the Guidelines for Civil Disobedience Prosecutions.

You refer in particular to paragraph 8 of the Guidelines, and you indicate that the "policy" therein stated raises issues in relation to Article 9 of the International Covenant of Civil and Political Rights, in that it may amount to - or, presumably, sanction - arbitrary arrest and detention.

I apprehend that the Guidelines have been taken out of context. They were clearly not intended to offend against Article 9, nor to abrogate or affect the duties of a police officer in relation to his discretion to arrest an offender and then to bring that offender before a justice. Paragraph 8 in particular is directed not to the decision to arrest, but to the decision whether to consent to a prosecution under section 23(2) of the Public Order (Protection of Persons and Property) Act 1971.

It is of profound importance that the person arrested must be brought before a justice without delay. A mandatory judicial involvement surely carries the consequence that there cannot be the executive abuse which is encompassed by the notion of arbitrary arrest and detention.

As you appreciate the whole question of balancing the right to peaceful protest and assembly against the rights of persons to pass freely upon public property raises difficult and often delicate competing public interest considerations. The Guidelines were very much intended to strike a proper balance in this area. I must confess that I thought they tended towards the enlightened end of the spectrum.

In conclusion I should perhaps mention that in many prosecutions arising under this legislation the decision to decline to consent is made after receiving representations from those who are the subject of the prosecutions. It is perhaps

ironic that the principal purpose behind the Guidelines was to remove the arbitrary way in which decisions were previously made. The A.F.P. Association has been most critical that the Guidelines represent a softening of attitudes against these types of offenders.

If the Commission has any further concerns about this matter then I suggest that we should discuss them at an early date. I would be happy to consider any suggested amendments that the Commission might have in mind to overcome its concerns.

Yours faithfully,

A handwritten signature in black ink on a light-colored, textured paper. The signature is written in a cursive style and reads "Paul Henry". The first letter 'P' is large and loops around the first few letters. The signature ends with a long, sweeping horizontal stroke that extends to the right.

Paul Henry

