

THE PROTECTION OF DIPLOMATIC PERSONNEL AND PREMISES
COMMENTARY

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A. General

The Legal Issues

An examination of the area of diplomatic protection in conjunction with rights of peaceful protest and of the relevant legal issues, requires attention to be paid to certain basic criteria. These include, in particular, the special duties vested in Australia, as the receiving State, by international Conventions, adopted by Commonwealth legislation, to protect diplomats and various other internationally protected persons. Like duties exist to protect the premises of diplomatic Missions and other protected premises.

Thus the Vienna Convention on Diplomatic Relations, set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967, provides that the receiving State is under a special duty to take all appropriate steps to protect the premises of the Mission against any intrusion or damage and to prevent any disturbance of the peace of the Mission or impairment of its dignity. (1) The Convention declares that the premises of the Mission shall be inviolable. (2) It likewise provides that the person of a diplomatic agent shall be inviolable. (3) The receiving State is required to treat him with due respect and to take all appropriate steps to prevent any attack on his person, freedom or dignity. (4) The Diplomatic Privileges and Immunities Act 1967 states (inter alia) that various Articles of the Convention, including those referred to above, shall have the force of law in Australia and in every Territory of the Commonwealth. (5)

It maybe noted that a diplomatic agent is defined in the Convention to mean the head of the Mission or a member of the diplomatic staff of the Mission.(6) The term, 'Mission', is defined in the Diplomatic Privileges and Immunities Act 1967 to mean a diplomatic mission.(7) A somewhat clearer definition is to be found in another Commonwealth Act, the Public Order (Protection of Persons and Property) Act 1971. That Act defines a diplomatic mission to mean a permanent diplomatic mission, accredited to Australia by another country.(8)

The great majority of Australians who have occasion to meet official representatives of foreign governments with offices in Australia, as those who wish to obtain a visa when about to travel abroad, attend at consular posts situated within the States of the Commonwealth and the Northern Territory. Accordingly, it is appropriate to refer to some legal rules concerning protection of consulates and consular officers.

Consulates and consular officers in Australia are covered by the Consular Privileges and Immunities Act 1972, which adopts various Articles of the Vienna Convention on Consular Relations. The Convention is set out in the Schedule to the above Act. A consular post is defined in the Convention to mean any consulate-general, consulate, vice-consulate or consular agency. (9) A special duty is placed on the receiving State to take all appropriate steps to protect consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.(10)

Consular officers are defined so as to include any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions.(11) Again, the receiving State, being the Commonwealth of Australia, is required to treat consular officers with due respect and to take all appropriate steps to prevent any attack on their person, freedom or dignity.(12) The Consular Privileges and Immunities Act 1972 states (inter alia) that the provisions of various Articles of the above Convention specified in the Act have the force of law in Australia and in every Territory of the Commonwealth. (13)

It is clear that some forms of peaceful protest can operate within the law, though the protest occurs in relation to a diplomatic Mission and its personnel. A peaceful demonstration by people holding placards or banners at a reasonable distance from a foreign Embassy or Consulate is not likely to infringe the legal rules, unless the wording of the inscriptions or the language of the protesters or their behaviour is offensive or disorderly in terms of the law. Such situations have been the subject of comments by Australian judges which provide guidance along the lines above-mentioned.

Thus, in Wright v. McOualter, decided in the Supreme Court of the Australian Capital Territory(14), Kerr J. expressed doubt whether a peaceful gathering on the lawn, outside the United States Mission in Canberra, of persons shouting slogans and carrying placards such as 'Get out of Vietnam', 'What about the parents of Vietnamese children', could reasonably amount to impairing the dignity of the Mission, within the meaning of the Vienna Convention on Diplomatic Relations.(15) However, the

court held that the police had a duty to protect the premises of the Embassy from intrusion or damage and to prevent breaches of the peace. Accordingly, the police action ultimately taken against a demonstrator who refused to leave after he had been requested to do so, was held to have been in the execution of police duties.

The court emphasised that the police had to act to deal with the risk of an intrusion into or damage to the Embassy.(16) The judgement cites the Vienna Convention on Diplomatic Relations and the special duty to protect the premises of the Mission under the Convention, as adopted in Australia by the Diplomatic Privileges and Immunities Act 1967.(17)

The court also referred to the remarks of Lord Chief Justice Parker in Reg v.. Foley, Chandler and Randle(18), that the invasion of private property, still more if it is a foreign Embassy, had to stop. Those who wished to demonstrate their political beliefs had to do so in some other way. ' Lord Chief Justice Parker also affirmed that diplomatic relations between civilised states cannot continue unless there is respect for the Embassies of foreign States..(19)

The obligations of the Commonwealth to protect the premises of diplomatic Missions, pursuant to the Vienna Convention on Diplomatic Relations and the Diplomatic Privileges and Immunities Act 1967, were reaffirmed by Fox J., sitting on the Supreme Court of the Australian Capital Territory, in The Queen v. Turnbull: Ex parte Petroff.(20) It was held in that case that the criminal law operating in the Australian Capital Terri-

tory, and in particular certain provisions of the New South Wales Crimes Act 1900 then applied in the Territory(21), were applicable to acts committed on Embassy premises. Accordingly, the courts of the Territory had jurisdiction deal with charges of offences under the Crimes Act with respect to being in possession or throwing gelignite near the U.S.S.R. Chancery in Canberra, with intent to damage the Chancery.

Fox J. pointed out that it would be difficult for the Commonwealth to perform its obligations under the Vienna Convention on Diplomatic Relations, if such charges were to be treated as being beyond the cognizance of the courts. He noted that the accused were not entitled to any diplomatic immunity and there was no question of a breach of the principle of inviolability of the premises. (22)

Peaceful protest must be distinguished from acts of violence. Hope J.A. of the New South Wales Court of Appeal, in a publication entitled "The Right of Peaceful Assembly", written when the author was a member of the New South Wales Bar, said that there can be no right to hold a violent demonstration.(23) It is the right of peaceful assembly which is affirmed in the International Covenant on Civil and Political Rights. That Covenant is set out in the First Schedule to the Human Rights Commission, Act 1981 (Cth). The same Covenant is also to be found in the Schedule to the Australian Bill of Rights Bill 1985.

Article 21 of the above Covenant, which sets out the right of peaceful assembly, also allows restrictions to be imposed on the exercise of that right. Such restrictions must be

prescribed by law and necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Further, Article 19 of the Covenant, which provides (inter alia) for rights to freedom of expression, states that the exercise of those rights carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, provided by law, which are necessary for respect of the rights or reputations of others, or for the protection of national security, or public order, or public health, or morals.

A relevant Act of the Commonwealth Parliament is the Public Order (Protection of Persons and Property) Act 1971. Part III of that Act contains provisions relating to Diplomatic and Consular Premises and Personnel and International Organisations. It refers to the special duty of protection imposed on Australia, as the receiving State, by international law, with respect to such premises and personnel.(25)

Various offences that may be committed with respect to diplomatic and other protected persons and premises are to be found in the above Act. These may be offences committed by an individual, such as assaulting, harassing or Unreasonably obstructing a protected person,(26) or offences committed by persons taking part in an assembly, that is in relation to protected premises or a protected person.(27) Offences by members of an assembly include acts causing violence or conduct giving rise to a reasonable apprehension of violence.(28) The Act also contains Offences of trespassing on protected premises without reasonable excuse.(29) These provisions Are discussed in detail in the literature on the Act.(30)

A particularly important piece of Commonwealth legislation with respect to protection of diplomatic agents and some other representatives of foreign States is to be found in the Crimes (Internationally Protected Persons) Act 1976, which appreciably extends the range of officials entitled to special protection. That Act gives approval to ratification by Australia of the Convention on the prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. (31) The Convention is set out in the Schedule to the Act.

Pursuant to the Convention, internationally protected persons include Heads of State, Heads of Government, Ministers for Foreign Affairs and members of their families who accompany them. (32) The Governor-General is specifically included in the definition of an internationally protected person, in relation to Australia, under the Act. (33) The Act provides that an expression that is used in the Act and in the Convention has the same meaning in the Act as in the Convention, except so far as the contrary intention appears. (34)

The Convention further provides that the definition of an internationally protected person includes any representative or official of a State who is entitled in certain circumstances, pursuant to international law, to special protection from any attack on his person, freedom or dignity. (35) Members of such a person's family, forming part of his household, are also included in the definition of an internationally protected person. (36) The above definition of representatives or officials entitled to special protection includes diplomatic agents within the meaning of the Vienna Convention on Diplomatic

Relations. This was confirmed by the Federal Court of Australia in Duff -v. The Queen, a case which concerned an attack on the liberty of Colonel Singh, the military, naval and air adviser to the Indian High Commission in Canberra and upon his wife. (37)

The Crimes (Internationally Protected Persons) Act contains various offences, including Murder, kidnapping or the commission of any other attack upon the person or liberty of an internationally protected person.(38) The penalties provided range from imprisonment for life for murder, kidnapping or for an attack causing death, to imprisonment for up to seven years, for an attack which does not cause death or grievous bodily harm.

(39) The Act also contains an offence Of committing a violent attack Upon the official premises, private accommodation or means of transport of an internationally protected person, being an attack likely to endanger his person Or liberty. The penalty provided for the last-mentioned Offence is imprisonment up to fourteen years. (40)

Thus substantial penalties, in some cases exceeding that available under previous Commonwealth legislation, are now provided for offences against internationally protected persons These penalties follow upon the terms of the Convention, set out in the Schedule to the Act, which calls upon each State Party to Make such Crimes punishable by appropriate penalties which take into account their grave nature.(41)

It should be noted that the Human Rights Commission, following its Review of the Crimes Legislation of the Commonwealth, reported that it did not identify any provisions of the Crimes (Internationally Protected Persons) Act 1976 that infringed or were inconsistent with any human rights.(42) Accordingly, the Commission made no recommendations for amendment of the Act.

The provisions and effect of the Crimes (Internationally Protected Persons) Act are discussed in more detail in the literature cited.(43)

Footnotes

1. Article 22.
2. Ibid.
3. Article 29.
4. Ibid.
5. Section 7(1).
6. Article 1.
7. Section 4(1).
8. Section 4.
9. Article 1.
10. Article 31, headed "Inviolability Of The Consular Premises"
11. Article 1.
12. Article 40.
13. Section 5(1).
14. (1970) 17 F.L.R. 305.
15. Supra at 321. %See also supra at 313, 314.
16. Supra at 321.
17. Supra at 307-308. See also supra at 313, 321.
18. (1967) 52 Cr. App. R. 123, at p. 127.
19. Ibid.
20. (1971) 17 F.L.R. 438. See Also The Queen v. Turnbull; EX parte Daskaloff, supra.
21. Sections 204, 249.
22. (1971) 17 F.L.R. 438, at pp. 444-445.
23. R.M. Hope Q.C., *The Right Of Peaceful Assembly*, (1968) at p.10. Published by the Council for Civil Liberties, Sydney
24. Ibid.
25. Section 14.
26. Section 18.

27. Sections 15, 16, 17.
28. Ibid.
29. Section 20.
30. E.g. see A. Hiller, *Public Order And the Law*, (Sydney, Law Book Co.) 1983.
31. Section 7.
32. Article 1. See also n. 34 *infra*.
33. Section 3(2).
34. Section 3(3).
35. Article 1.
36. Ibid.
37. (1979) 39 F.L.R. 315, at p. 352.
38. Section 8(1), (2).
39. Section 8.
40. Section 8(3).
41. Article 2.
42. Human Rights Commission, Report No. 5, *Review of Crimes Act 1914 and Other Crimes Legislation of the Commonwealth*, (Australian Government Publishing Service Canberra) 1983, p. 15.
43. E.g. see no. 30 *supra*.

B. Commentary on Mark Harrison's Paper

Mark Harrison's paper provides a useful and interesting survey of the law concerning protection of diplomatic personnel and premises, in conjunction with the right of peaceful protest. It discusses relevant provisions of international Conventions and Commonwealth legislation and cites judgements of courts in Australia and elsewhere, including the International Court of Justice, as well as other sources in the area covered.

The paper deals with the notion of inviolability of diplomatic premises and personnel, as set out in the Vienna Conventions and in Acts of the Commonwealth Parliament. The historical development of customary laws leading up to the present formal system of legal rules is mentioned in the Introduction. Consideration is given to some forms of peaceful demonstration, acceptable within the legal system, though held outside a diplomatic Mission.

I agree with Mark that a peaceful demonstration with respect to a diplomatic Mission and its personnel may be lawful, such as a peaceful and non-offensive expression of views outside and at a reasonable distance from an Embassy. It may be noted that the need to provide for a spontaneous demonstration outside an Embassy, following upon news of an act to be carried out by the State represented by the Embassy, such as an impending execution believed to be unjustified, has been one of the reasons given for having statutory provision for peaceful public assemblies, which may take place at short notice.(1)

The law with respect to various forms of non-peaceful protest is looked at. Reference is made to the substantial development of the earlier rules, with respect to inviolability of internationally protected persons, by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; including Diplomatic Agents, adopted in Australia by the Crimes (Internationally Protected Persons) Act 1976. This is an important piece of legislation, particularly as it extends the category of persons entitled to special protection under Commonwealth laws and creates a new range of offences that may be committed against internationally protected persons. Various offences contained in the Public Order (Protection of Persons and Property) Act 1971, designed to protect diplomatic and other like protected premises and personnel are also set out.

The paper contains an interesting discussion of various circumstances in which an ostensibly peaceful form of protest might be contrary to international law and give rise to the duty of the Australian Government and its agencies to protect diplomatic Missions and their personnel. Interference with freedom of movement of diplomatic personnel or with their freedom of communication are amongst the examples given. The painting of slogans on the exterior wall of an Embassy, or the holding of placards over the wall of an Embassy and questions of trespass or other intrusions, with respect to an Embassy, are considered. Reference is also made to the phrase, "impairment of dignity", in the Vienna Convention on Diplomatic Relations and to limitations on its application, as mentioned by Kerr J. in Wright v. McQualter.(2) Australian legislation, including

some relevant provisions of the Public Order (Protection of Persons and Property) Act 1971, is cited with respect to the above.

Consideration is also given to the duties and liabilities of the Australian Government in cases of breach of the Vienna Convention on Diplomatic Relations, as through a peaceful demonstration. The determination of the best balance between allowing a reasonable freedom to protest and the duty to protect the premises and personnel of foreign Missions may require important judgements to be made by police and other authorities.

Clearly much thought and research has gone into Mark's paper. It raises several important issues for discussion and ultimately for determination, in appropriate cases, by the courts. Accordingly, it is a welcome contribution to legal writing in the area covered and it should be of interest to all those who are concerned with diplomatic protection. and the right of peaceful protest in Australia and elsewhere.

Footnotes

- (1) E.g. see Lord Scarman, *The Red Lion Square Disorders of 15 June 1974, Report of Inquiry* (Cmnd. 5919) 1975, at p.36, citing the proposal of the Commissioner of Police of the Metropolis (Sir Robert Mark). See also A. Hiller, *Public Order and the Law* (Sydney Law Book Co.) 1983, at p.19 and n.48.

- (2) (1970) 17 F.L.R. 305, at p.321.