

AN OUTLINE OF THE HUMAN RIGHTS
COMMISSION'S RESEARCH PROJECT ON
THE RIGHT OF PEACEFUL PROTEST

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INTRODUCTION

In 1985, the Human Rights Commission decided to undertake a research project on the right of peaceful protest and asked me to carry out the research and writing of a report. I had previously researched and written the Commission's Occasional Paper Number 8, *The Right of Peaceful Assembly in the ACT.*, A.G.P.S., Canberra, 1985, and so the project was obviously of great interest to me.

The aim of the project is to inquire into and report on the right of peaceful protest having regard to the law and practice in Australia and Australia's obligations under international human rights treaties. The relevant treaties are the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, ratified by Australia in 1980, and two conventions of the International Labour Organisation (I.L.O.), on Freedom of Association and the Right to Organise, 1948 (Number 87) and the Right to Organise and Collective Bargaining, 1949 (Number 98), both ratified by Australia in 1973. If the research suggests that Australian law and practice does not meet the international standard prescribed by these treaties, then the report should include recommendations as to how this can best be achieved.

When the Commission decided on this project, it had in mind that the United Nations had declared 1986 the International Year of Peace, and that one of the essential requirements for peace is the exercise of human rights and freedom. For peace to be maintained in any community it must be possible for ordinary men and women to Protest their grievances to the government - to speak out on issues they believe important - and governments should be prepared to respond. In this way, it should be possible to bring about social and political change by peaceful means. Without this channel of communication to government, the likelihood of civil unrest is immeasurably increased, and . such a government would be forced to govern by repression rather than Consent.

As a part of the project it was decided to organise this seminar - to explore the significance of peaceful protest in our community, the conditions under which protest takes place, and the restrictions placed upon it. Not only will the seminar, hopefully, prove interesting for everybody participating, but we hope that in the plenary session tomorrow afternoon, the reports from workshops will identify principles, problems and issues thought to be significant for the right of peaceful protest. Selfishly, I hope to draw upon the proceedings of the seminar in my research and writing of the report, and I would welcome comments or contributions on the right of peaceful protest, preferably in writing, from anyone here.

Terms of Reference

The terms of reference for the project identify three (3) main sections. The first section, which we have tentatively called 'The Right of Peaceful Protest Examined' (for want of a better title), is divided into five (5) parts. The first part considers what we mean by the right of peaceful protest. When lawyers talk about rights they generally mean a claim which is recognised by law and enforceable in the courts - philosophers would call this a 'positive' right. But the right of peaceful protest is not this sort of right - it is not a right for violation of which there is a specific remedy. A remedy will only be available if, coincidentally, some other right, such as the right to physical integrity, is violated, in which case a person may be able to sue for assault or false imprisonment. Like most of the so-called rights popularly thought to exist, the right of peaceful protest is in reality a 'residual freedom' - that is a claim recognised though not necessarily enforceable by law. The 'right' comprises that residue of freedom remaining after account is taken of all the many restrictions imposed by law.

'Protest' I have taken to mean a public assertion of views including those of dissent and disapproval.

'Peaceful' I have taken to mean non-violent but not necessarily tranquil or quiet.

If you look at the Articles of the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights you will not find the right of peaceful protest specifically referred to. This is

because it is an amalgam of other rights: the right to freedom of thought, conscience and opinion, the right to freedom of expression, the right to freedom of peaceful assembly, the right to freedom of association, the right to freedom of movement, the right to take part in the conduct of public affairs. These specific rights will be considered in the second section of the project on the international standard.

The second part of the first section addresses the vital importance of peaceful protest to the proper functioning and the very existence of a democracy. Without peaceful protest there could be no free and fair elections. Without peaceful protest it may, not be possible for people to make known to government their views on particular issues. Even President Reagan has spoken out on the repression in South Africa. He was reported as having said on the tenth anniversary of the Soweto riots, that "permitting peaceful protest is the hallmark of civilised government".

The third part of the first section considers the role of the media. To anybody who makes a study of peaceful protest it quickly becomes apparent that the media fulfills an essential function in reporting protest activity so that the government and the rest of the community are made aware of the protest. But the question is whether what is reported represents a true picture of that protest. It has often been said that the media sensationalise protest by concentrating on violence and confrontation, and that they trivialise protest by failing to report background material to put the event in context. The result', it has been said, is that the reader or audience is left with 'a distorted impression of what happened and why.

The commentaries I have read suggest that where distortion does occur, it is usually not deliberate but rather the product of professional imperatives - criteria which determine what is selected as news and how that news is presented. For example, news , by definition, something which is new - something which has happened in the last 24 hours - and, therefore, news tends to give scant attention to the social and historical background which gave rise to that event. News is, of course, a product to be sold to the reader or audience. In the case of commercial radio and television, or the newspapers, the audience ratings or the readership figures are vital to attracting the advertising upon which commercial

radio and television and the newspapers are financially dependent. Even in the case of the ABC, there is still concern for the ratings - because they are a measure of the success of the ABC's product. The fact that the ratings for the ABC 'National' fell heavily was an indication of the failure of that product, which led ultimately to a revised format. Because 'the news' is a product, it must be attractive and capable of easy assimilation by the consumer. This can lead to a concentration on dramatic or sensational incidents, on news of, or interpretation of the day's events by a few public figures, and to the simplification of stories. Thus, both the media and their readers or audience need to be aware of the possibility of distortion.

The fourth part of the first section considers the nature of protest. Clearly, there is a very wide variety of different forms of protest. For practical reasons I have limited my research to public and physical manifestations of protest, thereby including marches, meetings, pickets, sit-ins, blockades, boycotts, hunger-strikes, petitions, work bans, walk-outs and a variety of other public and physical protests. This leads me to a story I heard recently which illustrates the diversity of protest activity.

Those of you who watch the ABC may have seen recently a repeat of Michael Palin's series of "Ripping Yarns" - my favourite of which was a tale about a bankrobber by the name of Eric Olethwaite who was described by his mother as "a boring little sod" and whose main interest in life was 'precipitation' and rain gauges. One of the episodes (not concerning Eric Olethwaitel) was called "The Curse of the Black Claw", which was about the black claw of some gigantic extinct bird. When pointed at a person this claw had the extraordinary effect of increasing their libido - their sexual lust - by one hundred-fold. A central character in this episode was Michael Palins. aging, disreputable, dirty, perennially unshaven Uncle Jack, who lived, in a crumbling mansion "somewhere in the English countryside". One of the best lines concerned the advanced physical decay of Uncle Jack. We were told that "when he lived in London, Uncle Jack contracted Pellagra, Lockjaw and Scurvy as a protest against the British postal charges"!

Not only is it intended to consider the diversity of protest, but also the nature of the subject-matter of the protest. Is the protest about home government policy for example toward unemployment or the farmers, or is it about the actions of a foreign government, like South Africa, or French nuclear testing in the Pacific, or does it concern the protection of the environment, like the logging of rainforests in Tasmania, or perhaps the protection of religious thinking through seeking the banning of a film like Jean-Luc Godard's *Hail_Mary*? And to whom is the protest directed? At a home government, at a foreign government, at a company or an employer, at a property owner or a religious group? Then who are the protesters? Are they identifiable in terms of age, sex, occupation, class, race, residence? How many people participated in the protest, was the protest sustained over a period of time, and did violence occur? Finally, what was the outcome of the protest? Did the government respond in any way? Did the protest lead to a change in the law, and how did the public react? These are the sort of questions which, if we can provide some answers, may lead to a better understanding of the nature of protest.

The fifth and last part of the first section is on peaceful protest and the exercise of other rights and freedoms - the need to ensure that protest remains peaceful and does not interfere unduly with the exercise of other rights and freedoms. What restrictions on the right of peaceful protest are justifiable? Those who advocate 'positive' rights concede that in any society no right, with the exception of the right to life and the essential requirements for human existence, can be absolute. Remembering that the right of peaceful protest has a special significance in a democracy, in each instance a reconciliation of different and sometimes conflicting interests may be required, with the objective of allowing optimum freedom for all those involved.

Most of the Articles of the International Covenant on Civil and Political Rights which relate to the right of peaceful protest permit reasonable limitations on the exercise of rights, provided the limitations are prescribed by law and necessary in a democratic society. Such limitations may be justified by reason of national security, public order, public health and morals, and the rights and freedoms of others.

The main responsibility for preserving the peace and, where necessary, reconciling conflicting interests, lies with the police. And in order to perform this function, they have been entrusted with special powers. In employing these powers, police officers have an independent discretion which should be utilised for the benefit of the community they serve. How police officers exercise their discretion - how, for example, the police officer on the spot decides to reconcile conflicting interests and what steps are necessary to maintain the peace - will often determine whether and to what extent citizens are able to enjoy their rights and freedoms. Police should therefore receive careful training and guidance in what tactics to adopt when handling protesters. A favourite story of mine, which nicely illustrates this point, is about the police officer on duty one Sunday morning at Speaker's Corner in London's Hyde Park. This is the equivalent of the Yarra bank in Melbourne or the Domain in Sydney for soap box oratory. A large crowd was gathered at Speaker's Corner listening to an anarchist, whose vehement speaking was stirring up loud and potentially violent opposition in the crowd as well as some equally violent support. When the speaker urged his listeners to join him in a march to Buckingham Palace to burn it to the ground, there seemed a strong possibility of a violent brawl. At that moment, the duty police officer, who had been standing nearby, stepped forward, held up his hand and shouted in a loud voice: 'All right! All right now! Sort yerselves out! We'll have some order here! All of them as is for burning down Buckingham Palace to the left! All the rest to the right!' And the situation was immediately defused.

Police tactics and strategy are very important. For example, in some situations the adoption by police of a confrontationist approach can often antagonise a large crowd and provoke violence, while a more low key approach might achieve a peaceful dispersal.

That comprises the first section of the project. The second section is concerned with the International Standard, with the rights set out in the Universal Declaration of Human Rights; the International Covenant on Civil and Political- Rights, and the two I.L.O. Conventions on freedom of association, the right to organise and collective bargaining. The Universal Declaration of Human Rights, 1948, is, as its name suggests,

only a declaration, a manifesto of human rights which does not seek to impose binding legal obligations on signatory states. Despite this, many eminent jurists now argue that the Declaration has achieved such moral and political authority that its justiciable provisions should be regarded as part of Customary -International Law. Australia is a signatory of the Universal Declaration.

The International Covenant on Civil and Political Rights which, together with the International Covenant on Economic, Social and Cultural Rights, was a development from the Universal Declaration, does impose binding legal obligations. Australia ratified the Covenant on Civil and Political Rights on 13 August, 1980 and, as a result, has undertaken to recognise the rights set out in the Covenant and to ensure that any person whose rights are violated shall have an effective remedy. I mentioned earlier that the Covenant, like the Universal Declaration, whilst not specifically referring to the right of peaceful protest, contains a number of Articles which relate to it. The right of peaceful protest is essentially an amalgam of components of a number of other rights. These include the right to freedom of thought, conscience and opinion, the right to freedom of expression, to freedom of peaceful assembly, to freedom of association, to freedom of movement, and the right to take part in the conduct of public affairs. These rights may be subject to limitations, if prescribed by law and necessary in a democratic society, for reasons of national security, public safety, public order, public health or morals, and the rights and freedoms of others.

The I.L.O. Conventions on 'Freedom of Association and The Right to Organise' (No. 87) and 'The Right to Organise and Collective Bargaining' (No. 98) are the two most significant I.L.O. instruments on the right to freedom of association. Australia ratified these conventions in 1973 and is, thereby, bound by their provisions.

This second section of the project will make a study of these provisions to ascertain the extent of Australia's obligations under International Law.

The third section will examine Australian law and practice with a view to seeing whether it meets the international standard. It is not intended that this should be a comprehensive and all-embracing survey of relevant Australian law and practice, because this would be too enormous an undertaking. A more selective approach is envisaged, identifying the typical character of Australian law and practice, including reference to comparative material, and assessing whether this measures up to the international standard. Where it does not do so, general recommendations for reform will be made and, where appropriate, specific recommendations in respect of A.C.T. and Commonwealth law and practice.

Examples of relevant law and practice concerning the freedom of expression component of the right of peaceful protest are:

- the tort of defamation
- the law of obscenity
- the statutory offence of offensive or insulting words and behaviour
- the law of contempt
 - security regulation, e.g. under the Crimes Act 1914 , (Cth) and the A.S.I.O. Act 1979 (Cth)

Examples concerning the freedom of assembly component are:

- common law prevention and control measures, e.g. police powers to prevent a breach of the peace, binding-over orders
- statutory prevention and control measures, e.g. advance notice or permit requirements, power to prohibit or impose conditions, power to disperse
- criminal and tortious liability, e.g. trespass, public nuisance, obstruction of a police officer, offences under the Public Order (Protection of Persons and Property) Act 1971 (Cth), special legislation restricting assemblies on the highway, near Parliament and in other public places.

Examples concerning the freedom of association component are:

- the common law, e.g. the industrial torts of conspiracy, interference with contractual relationships, intimidation, and intentional use of illegal means
- statutory restrictions, e.g. unlawful associations (Crimes Act 1914 (Cth), s.30A), prohibition of secondary boycotts (Trade Practices Act 1974 (Cth), s.45D), the offence of watching and besetting (Crimes Act, 1900 (N.S.W.), s.5458).

Much depends on the way in which the law is enforced. The examination of Australian law and practice will necessarily include a consideration of police practice with reference to the way in which recent protests have been handled.

That, briefly, is the scope of the research project and report which the Human Rights Commission have asked me to undertake, and on which I would welcome comments or contributions.

The Seminar

Turning to the Seminar, the breadth of the project, which I hope will by now have become apparent, meant that there were a very large number of topics we could have included. For the first day, we selected a small number of more general topics included in the first section of the terms of reference: media reporting of protest activity; protest as a political strategy; responses to protest; and policing protest. For the second day, we selected a small number of more specific topics, included in the second and third sections of the terms of reference: the right of peaceful protest in international law and Australia's obligations under the International Covenant on Civil and Political Rights; notification or authorisation requirements for public assemblies - which is very topical for the A.C.T. at the moment with a new Public Assemblies Ordinance reported to be imminent; the protection of diplomatic personnel and premises - again very topical for the A.C.T. after the incident with the South African Embassy official striking a protester; and, lastly, picketing.

But even with this fairly small number of topics, it has still been necessary to run some parallel sessions. If this results in your missing a session you would have liked to attend, copies of the papers will be available after the session.

Because we did not intend that the Seminar should comprise solely the giving of papers, time has been set aside on both afternoons for workshops on each day's papers. We are fairly flexible about how many workshops there should be and on what topics and, at the end of the session on 'policing protest' this afternoon, I will ask for an indication of how you would like the workshops organised; and, similarly, tomorrow at the end of the morning sessions.

What we would like the workshops to achieve is a discussion of what you consider are the main issues arising from the papers concerning that particular topic. White boards will be available in the workshop rooms, and we would like you to identify the main issues and record any comments, suggestions or ideas so that these can be brought to the final plenary session tomorrow afternoon.

The Commission hopes to publish the proceedings of the Seminar, including where appropriate, the contributions from workshops which can often be very valuable.