# CIVIL LIBERTIES IN AUSTRALIA

BY DR. GEOFFREY A. FLICK

## FOREWORD

The Hon. Mr. Justice M. D. Kirby
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January 1981

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This is a useful and timely book about the legal definition of freedom in Australia. It approaches civil liberties from the standpoint of the lawyer. It elaborates, in the topics chosen, the relevant decisions of the common law, statutory provisions, police rules and judicial attempts to explain the balances that are necessarily struck in any matter of civil liberty. These balances affect the equilibrium that is maintained between the claims of authority to uphold law, order and peace in society and the claims of individuals to be free from interference, oppression, unfair procedures and abuse of state power.

### Civil Liberties Today

Of course, there may be debate about the scope of 'civil liberties'. This book sees the topic as embracing the criminal investigation powers, demonstrations, criminal contempts and topics of more recent concern: freedom of information, discrimination, obscenity and indecency. The focus of concern about civil liberties varies from place to place and over time. Attention to the 'hard core' of police powers is likely to remain at the heart of the debate. Changing social mores reduce the vigour of the debate about obscenity and indecency. The right to demonstrate, which was so much a matter of concern in the 1960s, waned for a time, only to be revived lately by debate about certain statutory provisions, some of which are examined in the text. It is likely that in the future lawyers will help to redefine the ambit of 'civil liberties' concerns. An obvious candidate for future attention will be the growing body of the new administrative law. As the importance of the decisions of government and its agencies, both at a federal and state level, becomes more clearly perceived and as new protective machinery is created, attention will be needed to the way in which this legislation can best be put to the advantage of the individual dealing with the impersonal state. Dr. Flick has mentioned some of the administrative law developments at a Commonwealth level in his discussion of access to government information. He will be uniquely well placed to redefine 'civil liberties in Australia' in this direction. Since writing this book he has been appointed Director of Research of the Administrative Review Council in Canberra.

Other likely topics for future studies of civil liberties will be bound up with the remarkable technological changes that are so much a mark of our time. Changes in information technology, particularly developments in computing and telecommunications, pose quite novel dangers for civil liberties. They include not simply the danger to individual privacy arising from automated personal data files[1] but also the dangers that may arise from increased use of surveillance and new calls for coercive powers to cope with modern problems, whether they be related to narcotics, social breakdown consequent on unemployment or greater risk of social harm resulting from linked computers in the 'wired society'.

The debate about the proper scope of 'civil liberties' could be endless. That the scope is changing and that lawyers must change too, is beyond doubt. Dr. Flick has chosen his topics. Each of them is a lively subject of current controversy as the book goes to press.

Criminal Investigation

The first three chapters deal with the vital question of criminal investigation by police. They traverse subjects which have been canvassed at length in a series of law reform reports. One of these, the second report of the Australian Law Reform Commission, Criminal Investigation[2], contains an interesting counterpoint to this book. Dr. Flick examines in turn the current law in Australia governing arrest, search and seizure and interrogation. The same chronological study was adopted by the Australian Law Reform Commission, with some additional topics, and with suggestions concerning the needs for reform. The Commission's report, with certain modifications, became the basis of the Criminal Investigation Bill 1977 (Cwlth). Although this Bill lapsed with the dissolution of Parliament, its reintroduction, in a modified form, has been promised.

Criminal investigation is a graveyard of reform reports. The Australian Prime Minister, Mr. Fraser, told the Australian Legal Convention that it was 'an area in which there has been much dissatisfaction, considerable writing, many proposals for reform but not much legislative action'.[3] The importance of the subject matter is beyond dispute. In a recent decision in the Full Court of the Federal Court of Australia, Mr. Justice Brennan, now a Justice of the High Court of Australia, expressed the proposition in blunt, direct, powerful language:

> Liberty ends where the power of arrest begins.[4]

The same proposition could be advanced in respect of the succeeding chapters of this book.

The beginning of 1981 saw the publication in Britain of the report of the Royal Commission on Criminal Procedure.[5] Like the report of the Australian Law Reform Commission and of the others in this field[6] the Royal Commission traverses the subject matter of the three first chapters of this book. By majority, the report urges increased police powers of arrest, detention and questioning. Unlike the Australian report and the Criminal Investigation Bill 1977, it pulls back from the recommendation of regular tape recording of confessions to police. It does, however, propose that a summary or, if there is one, a written statement, should 'for the more serious cases be recorded on tape, with the consent and knowledge of the suspect'.[7] As in the Australian report, the Royal Commission recommends no change in the right of silence and, by majority, no right to comment at the trial on the failure of the accused to answer questions or say anything whilst under police interrogation. It was felt that it would be inconsistent in principle to require the onus of proof at the trial to be on the prosecution, to be discharged without any assistance from the accused, yet to enable the prosecution to use the accused's silence in the face of police questioning as part of the case against him.[8] The Royal Commission proposed replacing the Judges Rules with a new, clear, code of police practice which would have legal effect. It was for this purpose that the Australian Law Reform Commission devised the Criminal Investigation Bill. Vital rights and duties of citizens and police ought not to be inaccessible. They ought to be contained in an available public statute for the instruction of the community and the guidance of its police officers. One of the clearest advantages of Dr. Flick's text is that it brings together, in the one volume, ready reference to the numerous sources of police powers and duties. Pending the passage of the Criminal Investigation Bill or measures like it, Dr. Flick's work will be a most useful source of the uncodified variety of laws on which civil liberties in this area presently depend.

## Contempt

The chapter on contempt discloses the remarkable ingenuity of people in their efforts to insult and belittle judges or otherwise to interfere in the due administration of justice. It may come as a surprise to read that impersonation of a legal practitioner may amount to a criminal contempt.[9] The hapless prisoner who threw a brickbat at Chief Justice Richardson and had the offending hand cut off prior to his execution[10], suffered a punishment which few modern judges would feel inclined to mete out to modern contemners, even if they had the power. In R v. Cook; ex parte Twigg[11] the High Court of Australia has reminded us once again of the limited scope of contempt and of the fact that judges must act with special caution in applying its rules.

The case of The Sunday Times, cited in the text, in which the House of Lords last reviewed the scope of the law of contempt eventually came before the European Court of Human Rights[12], whose criticism of the English law of contempt finally propelled the British Government to a venture in reform legislation. In November 1980 it introduced a Contempt of Court Bill based substantially on the report of the Phillimore Committee of 1974.[13] The Bill is still before the United Kingdom Parliament as this book goes to press. The introduction of the Bill coincided with a finding, in November 1980, by Mr. Justice Park, that a legal officer of the English National Council for Civil Liberties was guilty of a 'serious' contempt of court, in showing to a reporter documents which had previously been read out in open court.[14] Fired by this decision, media and academic writers assailed the reform measure as inadequate to deal with the current perceived defects in contempt law. However, as if to show the need for a law of contempt to assure a fair trial for persons accused, the English press and television, in January 1981, exceeded normal bounds in their coverage of the arrest and charge of a person accused of one of the so-called 'Yorkshire Ripper' murders. The editor of The Times stated the issue for civil liberties:

> Public curiosity cannot be an excuse for harming an individual's right to have the presumption of innocence applied to him and to his right to a fair trial. ... What the coverage of the past three days has demonstrated is that it does not matter to many organs of the media what the law of contempt says. They will break it anyway if the case is spectacular enough and engenders sufficient curiosity on the part of their viewers or readers. Yet it is precisely in that sort of case — where a heinous crime is alleged — that the defendant most requires the protection of the law.[15]

Another issue in this chapter has also been the subject of recent controversy. I refer to the claim of a journalist to privilege against having to disclose his sources to a court. In the United States, despite the constitutional guarantee of free press contained in the First Amendment, the Supreme Court has held that the countervailing importance of the due administration of justice in the courts displaces the interest of the press in protecting its confidential sources.[16] A similar rule has been adopted in Australia.[17] In 1980 the House of Lords affirmed a like rule in British Steel Corporation v. Granada Television Ltd.[18] Although this decision too has been the subject of media and academic criticism, and although Lords Salmon and Scarman have foreshadowed amendments to the Contempt of Court Bill to confer a special protective discretion on the courts, two law reform bodies which recently examined the issue reached conclusions similar to the House of Lords.[19]

## Freedom of Information

The discussion of freedom of information is timely, for we may anticipate the Commonwealth's freedom of information law. Indeed, freedom of information legislation is proliferating throughout the English-speaking world. The United States Act of 1966 has provided the spur. In Canada, legislation in the Provinces of Nova Scotia and New Brunswick has led on to important recent proposals in Ontario[20] and a government-supported Bill in the Federal Parliament.[21] In Britain, despite the lack of enthusiasm of successive governments, a Private Member's Bill is to be introduced in 1981 by Mr. Frank Hooley M.P., with support from Members of all parties. The debate about the Australian Bill is canvassed in Dr. Flick's book. At the heart of it is the claim for final Ministerial decisions, unreviewable by the Administrative Appeals Tribunal, in respect of documents which 'pertain to the most sensitive areas of government' or which 'are central to our Cabinet system of government and to relations between Ministers and their advisers.[22]

The claim of access to government information is likely to lead to laws and proposals for laws in the States of Australia. Already in New South Wales an interim report on Government Administration has foreshadowed draft freedom of information for that State. In Victoria, the Government is reported to be awaiting the final outcome of the Federal legislation. The Opposition has prepared a draft Bill of its own. In South Australia, a Working Party on Freedom of Information published a paper early in 1979, although its status is unclear following a change of government. The passage of legislation of this kind in any jurisdiction in Australia is likely profoundly to affect our administrative tradition of secrecy and confidentiality. It seems unlikely that the move will be contained in one jurisdiction.

## Official Secrets

In the discussion of official secrets legislation, Dr. Flick foreshadowed important developments, in Parliament and the courts, to review the scope of the laws which, throughout the Commonwealth of Nations, trace their origins to the Official Secrets Act 1911 (U.K.). In Britain, the Franks Committee described the legislation as 'a catch-all' and 'a mess'.[23] A Royal Commission in Canada, inquiring into the Canadian equivalent, described it as 'too wide in that it imposes criminal liability in many unnecessary situations'.[24] In Britain, in October 1979, the Government introduced a Protection of Official Information Bill, to replace s.2 of the Official Secrets Act 1911. Again, the Bill coincided with events which caused the direction of the reforms to be

questioned. It was claimed that the espionage scandal known as the Blunt Affair could never have been opened to public scrutiny and comment if the Protection of Official Information Bill were enacted. The Bill was withdrawn by the Government.

In Australia, at the end of 1980, the equivalent provisions of s.79 of the Crimes Act 1914 (Cwlth) came under the scrutiny of the High Court of Australia following the publication of the book 'Documents on Australian Defence and Foreign policy 1968-75'. On a motion to continue an ex parte injunction against re-publication of extracts of official information in the book, Mr. Justice Mason heard arguments based on s.79 of the Crimes Act, the disclosure of confidential information and the infringement of copyright. Only on the last ground did he decide to continue the injunction pending the hearing of the action. In the course of his discussion of confidentiality, his Honour said:

> It may be sufficient detriment to the citizen that disclosure of information relating to his affairs would expose his actions to public discussions and criticism. But it can scarcely be of relevant detriment to the government that publication of material concerning its actions will merely expose it to public decision and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will continue the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[25]

As in Whitlam v. Sankey[26], the High Court of Australia claimed for itself the right to inspect the documents and to determine where the 'public interest' lay. It has now been disclosed that a Task Force of the Federal Attorney-General's Department, to review Australia's official secrets legislation, has been 'reactivated'.[27] Accordingly, the debate continues.

Discrimination

The discussion of laws on discrimination is particularly useful for collecting the growing body of relevant law and placing it before the legal profession. Clearly, we have not heard the last word on this chapter. A report of the New South Wales Antidiscrimination Board, released in January 1981, serves notice of the likely future claims for laws against discrimination on the grounds of age: whether because of youth or because of advanced years, irrelevant to the decision in hand.[28] The problems of youth unemployment and the demographic shift in Australia towards the aged, make it likely that this will be a topic of future concern to civil liberties.

In the area of sex discrimination, the Victorian Government has sponsored the Crimes (Sexual Offences) Bill 1980, designed to establish 'the limits of the criminal law' in relation to sexual offences, particularly consensual homosexual conduct between adults. In the preamble to the Bill it is declared that it is 'undesirable for the laws relating to sexual behaviour to invade the privacy of the people of Victoria more than is necessary to afford them' protection from sexual exploitation. It is also likely that we will hear more of this topic. 1981 opened with another Bill on an aspect of discrimination well known in the United States[29], but not so far, in other common law countries. The Attorney-General for South Australia made public a Bill for a Handicapped Persons Equal Opportunity Act. The Bill envisages a Physical Impairments Discrimination Board and a Commissioner for Equal Opportunity. It renders it unlawful for employers, principals, contractors and partners to discriminate against a person on the ground of physical impairment unless, in consequence of that impairment, the person would not be able to perform adequately the work 'genuinely and reasonably required for the employment or position in question'.[30] Various other forms of discrimination in clubs, education and accommodation are dealt with and exceptions are provided for. The International Year of the Disabled Person will undoubtedly focus attention on this new dimension of civil liberties.

In relation to matrimonial property, a matter dealt with by Dr. Flick, the recent report of the Joint Parliamentary Committee on the Family Law Act has specifically proposed a major inquiry by the Law Reform Commission concerning a regime of joint matrimonial property in Australia.[31] Such a project has also been favoured by the Family Law Council.

Conclusions

In the last chapter, Dr. Flick refers to the way in which, without confronting parliamentary reform of the laws relating to obscenity, nude beaches have simply been created by announcements of the Executive Government. It is pointed out that in seeking to suspend, in particular cases, the operation of general laws, the Executive may be acting contrary to the Bill of Rights. The history of law reform as it applies to civil liberties, at least in Australia, is a sobering one. The issues involved are always controversial. Generally they stir strong passions. Frequently they deeply divide the community. In the consequence, quite frequently, nothing gets done.

In most of the topics of this book, however, things are happening. The content of civil liberties in Australia, and indeed its very definition, are the subject of movement and debate as rarely before. The starting point of authoritative reform is a proper understanding of legal history and of the current state of the law. Dr. Flick's book will fill a notable gap in Australian legal writing. A clear statement of the current law may even, on occasion, promote the movement for its orderly reform.

SYDNEY
29 January 1981

M.D. KIRBY

FOOTNOTES

1. Report of the Committee on Data Protection (Lindop Report), Cmnd. 7341, 1978; Australian Law Reform Commission, Privacy and Personal Information (ALRC DP 14), 1980.

2. ALRC 2.

3. (1977) 51 ALJ 342, 344.

4. Webster and Daff v. McIntosh, unreported, Federal Court of Australia (Brennan, Deane and Kelly JJ), 6 November 1980, mimeo, 7.

5. Report, Cmnd. 8092, 1981.

6. For a list, see (1979) 53 ALJ 626, 629.

7. Royal Commission on Criminal Procedure, 'The Balance of Criminal Justice', Summary of the report, 8.

8. ibid, 9. Cf. ALRC 2, 64.

9. See chapter 5. In the Marriage of Slender (1977) 28 FLR 267.

10. See chapter 5. Anon (1631) 2 Dyer 188.

11. (1980) 54 ALJR 515. Cf. Attorney-General (NSW) v. Willesee & Ors, unreported, Court of Appeal (NSW), 11 August 1980.

12. European Court of Human Rights, The Sunday Times Case Judgment, (1979), Strasbourg, Print.

13. Committee on Contempt of Court (Phillimore Committee), Report, Cmnd, 5794 (1974).

14. Home Office v. Harman, The Times, 28 November 1980, 8 (Park J.)

15. The Times, 7 January 1981, 11 ('The Right to a Fair Trial').

16. Branzburg v. Hays; in Re Pappas; United States v. Caldwell, 408 US 665, 690 (1972). Cf. in Re Farber, 99 S.Ct. 598 (1978).

17. McGuinness v. Attorney-General (Vic), (1940) 63 CLR 73; Re Buchanan (1965) 65 SR (NSW) 9.

18. [1980] 3 WLR 774.

19. New Zealand, Torts and General Law Reform Committee, 'Professional Privilege in the Law of Evidence', Wellington, 1977. Cf. Law Reform Commission of Western Australia, Privilege for Journalists, Project No. 53, Perth, 1980.

20. The report of the Ontario Commission on Freedom of Information and Privacy, Public Government for Private People, 1980, Vol. 2, 105.

21. Bill C-43 (Canada), (Access to Information and Privacy Act 1980).

22. Senator P.D. Durack, Attorney-General, Commonwealth Parliamentary Debates (The Senate), 11 September 1980, 809-10.

23. Report of the Committee on Section 2 of the Official Secrets Act, 1911 ('The Franks Committee'), Cmnd. 5104, 1972.

24. Commission of Inquiry Concerning Certain Aspects of the RCMP (Macdonald Commission), First Report: Security and Information, Ottawa, 1979.

25. Commonwealth of Australia v. John Fairfax & Sons Limited, (as yet unreported), 8 December 1980, Print Copy, 7.

26. Whitlam v. Sankey (1978) 53 ALJR 11.

27. Attorney-General's Department (Cwlth), Annual Report, 1979-80, 29.

28. Anti-Discrimination Board (NSW), Discrimination and Age, 1980.

29. The matter reached the United States Supreme Court in South Eastern Community College v. Davis, 47 USLW 4689 (1979).

30. Handicapped Persons Equal Opportunity Bill 1981 (SA).

31. Australian Parliament Joint Select Committee on the Family Law Act, Family Law in Australia, 1980, I, 107.