

Chapter 1 – Introduction

Beginning the search for Australia’s civil liberties

No-one has tried to capture the full story of civil liberties in Australia: this book lays down the the first framework of a structure on which others can build. A complete Australian history would capture details of how society operated and interacted in the Dreamtime before European settlement.

While virtually impossible to do because of the Aboriginal oral history tradition, now largely unknowable in terms of what white settlers call ‘civil liberties’, we try here to put down markers for future researchers and historians.

Apart from the Aboriginal period before 1788, there are two fairly distinct periods of European settlement in Australia, from the First Fleet in 1788 to Federation in 1901, and from Federation until now, nearly 2020. While each period is roughly 120 years, information before 1901 is patchy by comparison with the second period. Even then, recorded

documentation doesn’t emerge until about the mid-1930s when the first formal civil liberties group began, so that the past 90-odd years are the main concentration of the research effort. The chapters are being published first on-line to allow corrections and additions before (probable) conversion into printed book form, and also with the hope that publishing will spark wider interest in the subject, and help reverse a decline.

In particular, we would like to encourage historians and others to explore the “lost” Aboriginal notions of liberties and rights, much as Bill Gammage has done for Aboriginal use of fire and pasture control in his book, *The Biggest Estate on Earth*¹. Discussing the-then Aboriginal civil liberties background, however, is different from discussing trees and land. When only indigenous people occupied the landmass, from about 60,000 years ago to 1778, notions of liberty, freedom and equality probably differed radically from today. But they must have existed: wherever there is trade, and

Civil liberties are the basic rights that all citizens have to do or say what they want, as long as they do not break the law or affect other people’s rights.

– Macmillan Dictionary

Civil liberty

Freedom from arbitrary interference in one’s pursuits by individuals or by government. The term is usually used in the plural. Civil liberties are protected explicitly in the constitutions of most democratic countries. (In authoritarian countries, civil liberties are often formally guaranteed in a constitution but ignored in practice).

– Concise Encyclopedia

1 The Biggest Estate on Earth: How Aborigines Made Australia. Bill Gammage, Allen & Unwin (online page). October 2011. ISBN 978-1-74237-748-3.

gathering for social ceremonies, there are rules and niceties to observe. Early white arrivals unfortunately did not closely study Aboriginal culture while it existed in unchanged form, and descendant Aboriginal Australians now operate to only part-remembered aspects of what was a successful system for many tens of thousands of years². In the Mabo No 2 rights to land case, Mr Justice Toohey said that a society must be "sufficiently organised to create and sustain rights and duties" for there to be a system of land utilisation determined by that society.³ Chapter 2 discusses these issues.

We also discuss a collection of a little of what is known about the 1788-1901 period. Again, records on civil liberties for this period are sparse, apart from the notorious "Battle"⁴ of the Eureka Stockade in 1854. In the colonial era, from white settlement in 1778 to 1900, Australia's civil liberties were wrapped inside the common law, carried across the sea from England, like a backpack the English temporary or permanent emigrant wore as part of his (mostly his) national dress, frequently as a soldier or sailor. As former Chief Justice of Australia, Robert French (photo), has noted:



A general proposition dating back to the 18th century, was that the common law of England applied to settled colonies to the extent applicable to their conditions and the terms of the Charters or Instruments providing for their government. It has been traced to an opinion given by Counsel to the Board of Trade and Plantations in London in 1720:

“Let an Englishman go where he will he carries as much of law and liberty with him as the nature of things will bear.”

That sentiment was endorsed by the Privy Council two years later and also cited approvingly in Blackstone's Commentaries on the Laws of England⁵.

At first though, the law which transliterated to the embryonic Australia was naval-military, decided and doled out sententiously by the uniformed governors and officers of the corps that was literally the national guard.

² By contrast, the Magna Carta that we celebrate as a foundation stone of non-Indigenous liberties and rights is not yet 1000 years old, dating from 1215.

³ Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

⁴ <http://www.lancashireinfantrymuseum.org.uk/the-battle-of-the-eureka-stockade/>

⁵ B H McPherson, 'How Equity Reached the Colonies' (2005) 5 Queensland University of Technology Law and Justice Journal 108, 109 citing Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain (Reed and Hunter, vol 2, 1814) 209; Anonymous (1722) 2 P Wms 75; 24 ER 646; W H Blackstone, Commentaries on the Laws of England (Clarendon Press, 1st ed, 1765–1769) 104–105 ...as quoted in Harold Ford Memorial Lecture, Trusts and Statutes, Chief Justice RS French AC, 20 May 2015, Melbourne Law School.

Under the rule of the first Governor, Captain Arthur Phillip, administration of British law in the new Colony was quite different from legal practice in England. New South Wales was a penal colony. Although the 1787 Charter of Justice provided for the establishment of civil and criminal courts in the Colony, these were more like military tribunals than English courts of law. Justice was often arbitrary because there was no trial by jury. Those who sat in judgement were generally naval or marine officers who had little practical knowledge of the law⁶.



Left: The Founding of Australia 26 January 1788, by Captain Arthur Phillip R.N. Sydney Cove by Algernon Talmage. – State Library of NSW ML1222

As decades progressed, there were increasingly antipodean-nuanced disputes around settlers and property, in which the Indigenous owners of land were afforded no rights. Sixty years after European settlement, gold discovery begot personal and bureaucratic greed, producing claims about rights and liberties for the first time between white “equals” before the law.

The Eureka Stockade mining licence rebellion and the start of anti-Chinese White Australia debates stand out in the middle of the 1800s. Eureka morphed into a racist hum in the community, ostensibly over who would be allowed to mine and migrate, which continues as a murmuring undertone to this day.

Portrayed as a revolt by gold miners – “diggers” – of Ballarat, Victoria, who took action against the colonial authority of an absent Crown taxing mining without representation, at least 27 people died, most of them rebels. The rebellion was the climax of civil unrest around Ballarat during the Victorian gold rush, with miners objecting to selective application of the law, the cost of a miner's licence, taxation without representation and repressive actions of police and the military. The rebels' crude stockade could not withstand a swift and deadly raid by colonial forces.

⁶ http://www.sl.nsw.gov.au/discover_collections/history_nation/justice/

The most remembered event in white Australian history of people standing up for their rights occurred at Eureka in December 1854, under the rallying cry:

*We swear by the Southern Cross
to stand truly by each other,
and fight to defend our
rights and liberties.*



The iconic flag of Eureka, blue ground with a large silver or white cross and stars, is instantly recognised by all Australians. The story is about justice and a fair go, or the lack of it, in Australia. It is the only story of an official massacre of mostly whites by mostly white, mounted police, soldiers and troopers in Australia (in all other cases, those massacred were black Australians). One contemporary observer, the Italian miner Raffaello Carboni, wrote:

*Some twenty Ballarat miners lie in the grave, weltering in their gore!
double that number are bleeding from bayonet wounds; thirteen more
have the rope round their necks, and two more of their leading men are priced
four hundred pounds for their body or carcass.*

The Geelong Advertiser correspondent reported:

*...my soul revolted at such means being so cruelly used by a government to
sustain the law...All whom I spoke to were of one opinion, that it was a
cowardly massacre.*

Despite 12 people being tried for high treason, mass public support for the captured rebels erupted in the colony's capital of Melbourne, and they were not convicted.

The introduction of the Electoral Act 1856 followed: it mandated full white male suffrage for elections for the lower house in the Victorian parliament. The Eureka Rebellion is controversially identified with the birth of statutory democracy in Australia and interpreted by some as a political uprising. (*See the Victorian chapter for more background on the Eureka story*).

The Botany Bay colonies had been founded on forced work or chain gangs, if not strictly slavery, and master-servant relationships had not improved over half a century later by the time of the Eureka events. Employers tried to hold workers by law as tens of thousands fled to goldfields sprouting around the continent, and a flood of economic

migrants saw the population quadruple in 20 years. There were instances of civil disobedience seeking workers' rights, including battles for the eight-hour day by the emerging union movement, from the 1850s through the 1890s. Eventually, great strikes caused massive political and social upheaval: the 1890 maritime strike; the 1891 shearers' strike; the 1892 Broken Hill miners' strike; and the 1894 shearers' strike.

When a large number of sheep shearers in Queensland struck against poor conditions and reduced wages, the Queensland police responded violently to break up the strike. This public revolt, like each of the industrial conflicts, was eventually defeated in a significant blow for the labour movement. The setbacks evoked vastly different responses: William Lane and others sought refuge by creating an embryonic society called New Australia in Paraguay; others in the labour movement, disenchanted with direct action, turned to a political solution and sought election to parliaments using manhood suffrage, effectively creating the Australian Labor Party⁷.

Since 1 January 1901, an “independent” Australia has understood civil liberties to be local, and also changing as the world inside and outside Australia developed. Over the decades, notions of civil liberties, civil rights, and human rights have meant different things, with “human rights” becoming more prominent on creation of the United Nations in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948. Australia had much to do with both, through H.V. Evatt, who became president of the UN General Assembly in 1948-49, the noted equality campaigner and matriarch of NSW judges, Jesse Street (photo), and William Roy Hodgson⁸ (photo), a Gallipoli hero in 1915 and one of the nine co-drafters of the UDHR.



After a discussion of Indigenous liberties, the following chapters based on states and territories examine more closely the patchy progress of civil liberties groups in Australia in the 20th and 21st centuries.

Australians in general accept the philosophy of the individual's right to a fair go. 'Fair go' is a quintessential antipodean phrase traditionally used in politics, the workplace and sport. Many would say it's ingrained in the national psyche. Broadly, a fair go means everyone has a right to basic freedoms and a



⁷ Summary at: http://en.wikipedia.org/wiki/Australian_labour_movement

⁸ <http://www.cla.asn.au/News/dead-to-rights-how-an/>

reasonable standard of living. So the concept of a fair go is intertwined with individual civil liberties, rights and responsibilities.

This history of civil liberties groups in Australia focuses on those established primarily to defend civil liberties in general. It does not include the many special interests groups formed to fight for specific rights: for example prison reform, gays (people with non-traditional sexual orientation), Aborigines and Torres Strait Islanders (“Indigenous”), migrants, refugees, the disabled, and the environment...though civil liberties groups are usually strong supporters of such battles and their warriors. Frequently the people of the various groups are interchangeable.

Even when formal groups are counted, active concern for civil liberties and human rights in general have only ever involved an extremely small percentage of the Australian people (as is still the case). Judging by the rolls of various voluntary civil liberties organisations, only about 0.1% of the current population (perhaps no more than 25,000 people over nearly a century) have taken the basic practical step of joining a formal civil liberties organisation to defend the philosophy of liberties. You could argue that maybe another 5-10% have become incensed and taken action on a particular current issue (for example, the jailing in Guantanamo Bay, Cuba, and then Adelaide of naive adventurer into war zones, David Hicks, in the early 2000s). But even with that outstanding example, it took about five years for a national conscience to emerge that Hicks had received a rough trot from governments, and for some sympathy to start swinging towards him.

Just a few people operating in such a small and largely ignored public ‘space’ would not be expected to hold the national sway that civil liberties groups have done, and do; they have always ‘punched above their weight’⁹. Among the dedicated people over the years have been some very special talents, whose stories we touch on. Also, while there is a reluctance to join, there is also an appreciation that Australians each have a small stake in whatever is being discussed when liberties and rights are mentioned.

While even a bomb (allegedly planted by ‘terrorists’ at the Hyatt Hotel Sydney in February 1978, killing three – see photo) won’t move Australians to protest, they retain the potential for mass action if an issue can be directly related to the present day and the personal.



⁹ Personal comment, Special Minister of State, John Faulkner, to CLA President Kristine Klugman 2008 about CLA.

The term “civil liberties” has had to carry more heft in Australia because the nation’s fathers deliberately decided to not include a bill of rights in the founding Constitution¹⁰. Therefore, formally, the only rights possessed by Australians are these, found in the Australian Constitution or from High Court decisions:

- right to property (that is to “just compensation”, s 51 [xxxi] of the Australian Constitution)
- right to trial by jury (s80)
- right to free trade between the states (s92)
- right to have no national religion (“freedom of religion”, s116)
- right to no discrimination based on state of residence (s117)
- implied right of freedom of political communication (found by High Court in 1992 and 1994 cases, *Australian Capital Television v Theophanous*, and *Lange v ABC*).
- an implied right to vote (found by High Court in 2007, *Roach v Electoral Commissioner*).

In 2015-6, discussions around civil liberties, rights and freedoms in Australia needed to include the concepts below, as assembled by the Australian Law Reform Commission inquiry for parliamentary scrutiny of fundamental rights, freedoms and privileges: ALRC Terms of Reference:

Freedom of speech
Freedom of religion
Freedom of association
Freedom of movement
Vested property rights
Retrospective offences
Retrospective application of obligations (civil)
Fair trial
Burden of proof
Privilege against self-incrimination
Client legal privilege
Strict and absolute liability
Appeal from acquittal
Procedural fairness
Judicial review
Delegating legislative power
Authorising what would otherwise be a tort
Executive immunities

The list remains a work-in-progress: it took five score years and fifteen years to set down an idea of what Australians are entitled to as citizens...but the government has legislated no compact about to entrench what are still disputed “rights”, nor how to enforce them, nor what “Australian citizenship” means.

¹⁰ Commonwealth of Australia Constitution Act 1900 (Imp).

Summing up the 20th century, a doyen of civil liberties people in Australia, former High Court Judge Michael Kirby, said:

The lesson of this century is that democracy is not an absolute. Unbridled majoritarianism can be a most oppressive tyranny. The essence of democracy, as we now understand it, lies in the way it treats vulnerable minorities. Indeed, that is the abiding lesson of civil liberties.¹¹

Minorities have fared poorly in Australia: mostly their liberties and freedoms have been held together by a slender thread connected to the traditional common law, largely freed of constitutionally guaranteed rights, and by the amorphous concept of the fair go, whereby even someone you may not like deserves a reasonable shot at equal opportunity and equitable treatment.

When the first recognisable civil liberties group emerged, spurred by censorship, in Melbourne in the mid-1930s, what did it have in mind? Here's what an early proponent of liberties said:

Without fear, favour or affection, the Australian Council for Civil Liberties exposes and resists all attacks upon democracy and liberty, no matter from what quarter they come¹².

Whether the group lived up to the high-sounding words is debated in a later chapter. Across the continent, the first WA group to form said this:

Governments, by their very nature, tend to react to opposition groups by arming themselves with powers beyond what are needed for the safety of society. Laws made by governments are administered by human beings who cannot be entirely free from prejudice or un-influenced by wealthy and powerful minorities. Democratic societies, therefore, tend to throw up watchdog organisations to monitor the actions of governments¹³.

The same is true in the 21st century. But the accelerated pace of information flow and technology now means today's watchdogs need to be ubiquitous and lightning fast to keep pace with those, well funded, who drive the public agenda and discourse. Increasingly, the levers of power are centralised and operated electronically, messaging is broadcast and narrowcast from political cells dictating common thought and speech:

¹¹ Speech, 30th anniversary dinner of the NSW Council for Civil Liberties, 1994: The Hon Justice M D Kirby AC CMG, then President of the NSW Court of Appeal and Chairman of the Executive of the International Commission of Jurists.

¹² Maurice Blackburn (1880-1944) quoted in Dr James Waghorne and Prof Stuart Macintyre, Liberty: A History of Civil Liberties in Australia University of New South Wales Press 2011 p45

¹³ John A. McKenzie 'The First WA Council for Civil Liberties', in Early Days Journal and Proceedings of the Royal Western Australian Historical Society (Inc) Vol 10, Part 3, 1991 p249

it is extremely debatable whether the form which gave birth to civil liberties in Australia – city-based bodies named after their state – is the best way into the future.

In recent decades, a succession of governments, from the latter days of Hawke/Keating Labor in the late 1980s–90s, through the Howard Coalition period of the mid-90s to 2007, saw liberties leach away as technology facilitated and privileged centralised control. While the Rudd and Gillard Labor governments made progress in expressing sorrow for how Aborigines had been treated, briefly covering an open wound, they nudged the swinging pendulum further right through every boat refugee “initiative”. The Abbott Coalition government gave the pendulum another hefty heave, harder right, on everything from refugees to environmentalism. The Turnbull Coalition government has proven even less liberties- and rights-friendly.

A robust civil liberties environment depends on governments respecting the rule of law and the individual rights of citizens. Ironically it is usually government which infringes people’s liberties and rights first, foremost and most frequently, through repressive laws, regulation and actions. Government sub-groups – like departments, agencies and forces exercising corporate or organisational power – also undermine public liberties. This is demonstrated most vividly in the anti-terror laws of the early 21s century.

Australians have never had a bill of rights to call upon to defend our freedoms. Citizens must continually fight against government incursions into rights, without any basic, agreed legal contract or obligations to appeal to, or reference. Opponents of civil liberties often misrepresent proponents by accusing them of rejecting any limitations on behaviour. In fact, civil liberties people recognise that one’s ability to enjoy security means a restriction on others to act as they please. The liberty of the individual is always to be contextualised by his or her responsibility to others in the community.

Are Australians free to act as they please? Some would argue that Australians are among the most legislatively constrained people in the world, particularly since specialist counter-terrorism laws emerged in the early 21st century. However, Justice Dyson Heydon, in one of his last decisions on the High Court in 2013, summarised the ‘Principle of Legality’ this way:

At common law, citizens are free to behave as they like unless there is a prohibition created by common law rules or by legislation. That freedom need not depend on any express rule. Putting aside the positive grant of rights by the law, the common law recognises a "negative theory of rights". In the words of Glanville Williams, under that theory, rights are marked out by "gaps in the criminal law". Similarly, Lord Goff of Chieveley said that under the English common law "everybody is free to do anything, subject only to the provisions of the law". In this sense, there are many common law rights of free speech¹⁴.

¹⁴ Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3, [145] (per Heydon J)

CLA vice-president and national media spokesperson, Tim Vines (photo), expressed it another way:

What I've found very interesting doing media for Civil Liberties Australia is how people look to the law for permission to do something, rather than look to the law for any limitations on what they want to do. The latter is the proper way to go about life¹⁵.



Credibility is the cornerstone of the formal groups fighting for liberties, rights and freedoms. Such groups are expected to demonstrate exemplary behaviour, while the salaried and serried opponents of freedom can make outrageous claims, particularly about threats to “law and order” and of “rule by judges”, which are more vapid than valid, and seldom benefiting from hard evidence.

To maintain credibility, CL groups must maintain a non-party political position. When they slip or fail, they are rightly charged with partisanship or being a ‘front’ organisation, and their sometimes legitimate stance on issues is therefore devalued. Such slippage has occurred with several groups in Australia, as the following chapters will show. Defence of civil liberties should not need to be a party political position, but a matter of inherent justice and rights, shared and endorsed by all politicians.

In reality, CL groups have historically been supported more by the ‘left’ than the ‘right’ of Australian politics, which reflects the philosophical bases of the formal parties today, but not through much of the period from the 1930s to the 1980s, when the description “liberal” in fact meant standing up for individual freedoms. That is rarely the case nowadays among all but a few parliamentary representatives of the Liberal Party.

The preferred stance of CL groups of political neutrality is compromised when the chief attacks on liberty come from extremists on either side of politics, as they often do. However, in the second decade of the 2000s, both major political parties have swung so far to the conservative right of the spectrum as to be indistinguishable in their policies as far as rights and liberties are concerned. This is clearly demonstrated by the bi-partisan positions of the major parties on issues such as the anti-terror laws, privacy incursions and electronic surveillance, off-shore detention of asylum seekers and the dominance of an economic imperative over personal freedoms.

Once political parties universally accepted economic rationalism, social policy for some decades has been the silent servant of fiscal demands. At the same time, globalisation means that important decisions made in foreign capitals are replicated in Australia,

¹⁵ Tim Vines, National Media spokesman and Director, (later Vice-President) Civil Liberties Australia 12 March 2013

thoughtlessly. The outcome is that factors outside the influence of the nation state, dominated by international corporations and trade agreements, dictate national social policy. Free trade agreements formalise this process of power transfer, from nation states to corporations: the FTAs even include the signed over-turning of national legal sovereignty by replacing High and Supreme Courts with ad hoc tribunals of questionably qualified and dubiously influenced lawyers.

Following on from this theme, there is a cogent argument for civil liberties groups in particular to not take the government shilling. Reliance by a group on public funding may consciously or unconsciously influence the degree to which it is prepared to stand independent. It may become reluctant to bite the hand that feeds it, and shy away from being critical of government policies and practices. The Civil Liberties Australia Board took a formal decision in 2015 to not apply for or accept government funding (CLA has never done so). However, in Australia, where corporate and private philanthropy is in its infancy by comparison with the USA, UK and Canada, fighting for liberties and rights is hard to finance.

The need for a balanced approach has been well expressed around the globe:

No freedom can be absolute. Nor can there be a hierarchy of freedoms. Freedom of expression, fundamental though it is to a liberal democracy, is not absolute. And a right to free speech does not always trump other competing rights. This is the messy, practical business of human rights: often there will need to be a balancing act between rights and interests...¹⁶

Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted ... Equality may demand the restraint of the liberty of those who wish to dominate; liberty ... may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised¹⁷.

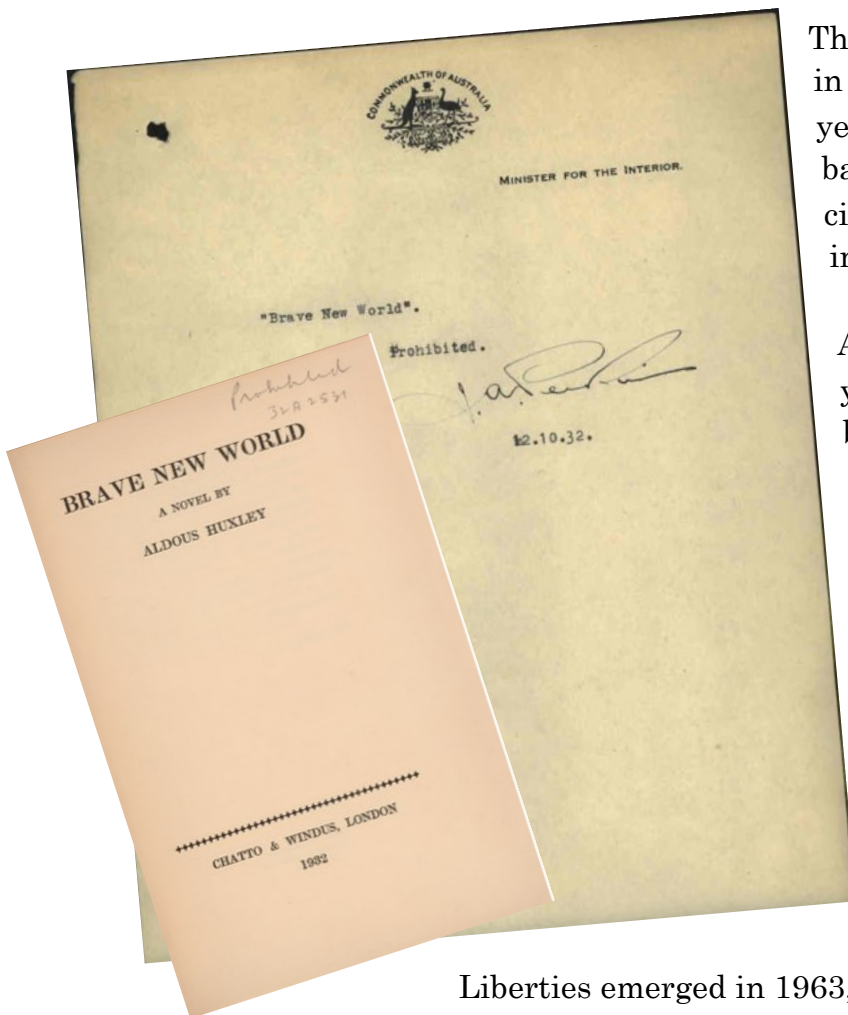
In the 1880s, the Australian continent was the most prosperous on earth, and thinking accelerated about uniting the various colonies. By the 1890s, an economic depression provided the backdrop for events leading to federation, preparing for the early elections and then the sitting for the first time of a federal parliament. In those halcyon days of hope, there was little need for a liberties or rights movement, as freedom – with responsibility – came gift-wrapped in politics, legislating and legislation.

¹⁶ Dr Tim Soutphommasane, Race Discrimination Commissioner, Alice Tay lecture in Law and Human Rights, Freilich Foundation, ANU 3 March 2014.

¹⁷ Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*.

But no sooner had the federal parliamentary system been established than a major world war sucked Australia into a vortex created in the northern hemisphere. With little respite, a global recession struck just a decade later, further entrenching the description “Unlucky Australians” for people born between about 1870 and 1900.

Sweeping movements in society stemming from the turbulent years of war and poverty, like communism and socialism, were battling for thoughtful supremacy in the mid-1930s when the first civil liberties group formed in Australia. Networks and groups had learned to band together: it was a time of vibrancy and change in art, poetry, music and literature, and the avant-garde people leading those pursuits became the core of the new campaigners for liberty. They had learned the ways of public protest and media-based lobbying, rather than more passive traditional methods, like submissions to government and letter writing.



The issue that first fired their passion in a major way was censorship in the years leading up to World War Two: battles over books created the first civil liberties group in Australia, based in Melbourne (*See Victorian chapter*).

Active and successful in its early years, the group was largely silenced by wartime provisions of secrecy and surveillance. It and other social movements were mostly quiescent until re-emerging strongly in the mid-1960s and early 70s, when there was a national flourishing.

Left: National Archives of Australia documents on censorship: <http://blog.naa.gov.au/banned/>

Just as the NSW Council for Civil Liberties emerged in 1963, more modern communication techniques were spawning a range of protest-oriented movements, including the environment (anti-whaling, logging, sustainable population, coal and other mining). Public protest against Aboriginal disadvantage emerged, including Aboriginal land rights, stolen generation protests, Freedom Rides (1965), the Wave Hill strike (1966), and the Aboriginal Tent Embassy (1972). Australians found their voice in

the 1960s, and matched it with their votes to change a 23-year-old government in the early 1970s.

The trend to rebel against government, rather than passive acceptance, was reinforced by massive anti-national service conscription-by-lottery demonstrations and anti-Vietnam war marches, not seen since the 1914-18 war period.

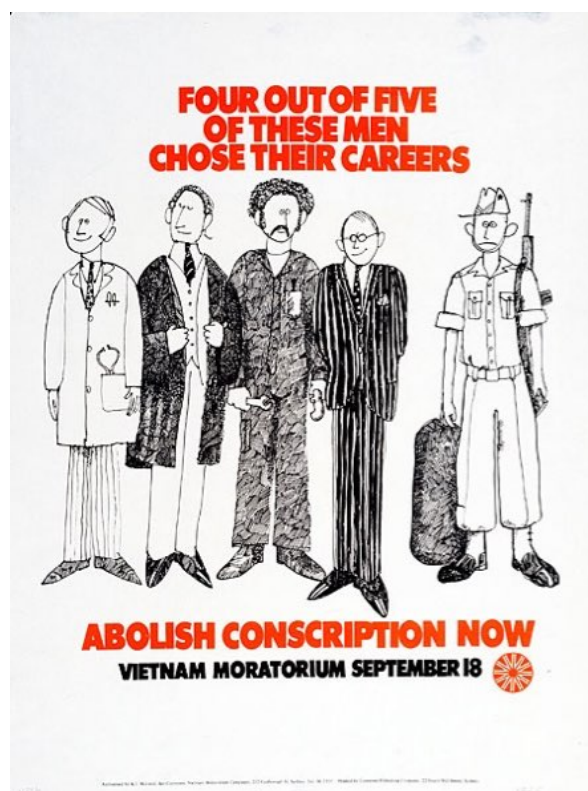
Once Australia learned to protest, people began campaigning, pro-abortion and right to life proponents found their voices, as did disability rights groups. The women's movement grew sharply from the early 1970s, boosted by emergence of the briefly-flourishing Whitlam Labor government, which enabled Australian society to change forever. Rights organisations for Lesbian, Gay, Transgender and Bisexual people (LGTB) followed.

Underpinning an at-first reluctant acceptance of European migrants after World War Two, Asian migrants and rights for refugees became the battle ground, repeated later when Muslim asylum seekers began to dominate the influx, and Islamic protests (anti in the form of Reclaim Australia and pro in the form of No Room for Racists) mirrored the "White Australia" debates of 100 or so years earlier.

While these rambunctious times were unfolding, the second half of the 20th century saw the rise of civil liberties groups in most Australian states, described in detail later in their own chapters. For a decade or so, the civil liberties groups were the mainstay of the fight for liberties and rights. Then they were overtaken by a wave of change.

Since around the 1970s and 1980s, government-established and/or -funded bodies whose mandate it is to watch and defend rights emerged: for example Human Rights Commissions, the state and federal Ombudsmen, legal aid bodies, migrant, Aboriginal and women's legal services, as well as a plethora of organisations looking out for the interests of the aged, youth, disabled, and others.

Non-government organisations (NGOs) came to prominence, such as the Human Rights Law Centre, the Australian Privacy Foundation, Public Interest Advocacy Centre, refugee groups, drug rehabilitation groups, euthanasia and abortion rights and wrongs groups. Some receive government grants, many do not. These changed circumstances brought CL groups face to face with new challenges of relevance. For the most part, they have responded by concentrating on legislative proposals and lobbying of



politicians. The rise of terrorist activity forced major change, after the security of everyday living shattered in western democracies when two towers in New York crumbled to the ground during the 2001 Al Qaeda '9/11' (11 September 2001) aircraft attacks on the US World Trade Centre, as well as the Pentagon in Washington DC.

The threat of terrorism became the witches' wand to transform tranches of panicked "emergency" laws into huge increases in the powers of executive government, intelligence and security services, the military and police. The legal imposts – incursions into liberties – have been greater in Australia than in comparable countries, academic experts say.

As Dr Chris Michaelson, a CLA member, has pointed out¹⁸, prominent political debate on counter-terrorism law and policy as a result of the '9/11' attacks has been whether, and to what extent, it was (and is) necessary to curtail civil liberties and human rights to combat international terrorism effectively. On one side, agents of the intelligence and security services advocate extreme anti-terror laws because liberal democracy itself is targeted as the enemy by Islamic extremists.

'Gigantic' policy at odds with reality of risk
Article posted on Wednesday 14 September 2011



Australia's counter-terrorism law and policy is 'close to moral and political bankruptcy', Dr Chris Michaelson writes. He calls for a comprehensive review and reform of Australian anti-terrorism laws – 'the most draconian in the Western world' – as well as an inquiry what went wrong in the cases of Habib and Hicks.

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On the other side, defenders of traditional rights maintain that it is particularly in times of crisis that liberal democratic states must adhere strictly to principles which make our free society what it is. To believe that depriving citizens of their individual rights and freedoms is necessary to maintain security is to put oneself on the same moral plane as the terrorists, for whom the end justifies the means. In fact, sacrificing fundamental values such as the rule of law, civil liberties and human rights amounts to losing the war on terrorism without firing a single shot.

The image of balancing liberty and security in the context of countering terrorism is based on the false assumption that the two goods are mutually exclusive. Liberty and security, however, are interrelated and mutually reinforcing; they cannot, logically, be 'balanced' against each other¹⁹.

Further, increasing the powers of the State has grave consequences. While reducing citizens' rights may increase security against terrorism, it diminishes an individual's security against the State's power. Dismantling traditional checks and balances of due

¹⁸ <http://www.cla.asn.au/News/gigantic-policy-at-odds-with/> Cartoon by Ian Sharpe.

¹⁹ Michaelson, Christopher – "Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric" [2006] UNSWLawJl 13; (2006) 29(2) University of New South Wales Law Journal 1

process and essential freedoms – such as the right to liberty, privacy and security of person – reduces the individual’s protections against abuses by the State.

As well, the citizen’s ultimate ‘security’ – transparency of and by government – may suffer because the growth in state power through anti-terror laws is unevenly distributed within the state. The executive, freed from traditional constraints, gains significant autonomy. The citizenry, by contrast, with no alternative source of information, must trust executive judgement that the terrorist threat faced by the state is indeed sufficiently dire to justify the reduction of individual liberty. People must also rely on the government’s assessment as to whether the counter-measures adopted will actually address the threat effectively, an issue frequently not well debated.

The result is that a tight, core “executive” of usually three or four people controls the “balance” between liberty and security. At such councils of state, the usual boundary-riders of the rule of law and human rights are easily overturned for the sake of appearing tough...on terrorists, on bikies, on criminals. Ultimately, if such control further condenses into just a couple of, or one, set of hands. the result is dictatorial.

George Williams (photo), when Professor (now Dean) of Law at the University of NSW, a respected national commentator on constitutional law and the impact of the security legislation and a member of CLA, has written:



October 2014 will go down as the month in which the federal Parliament made some of its greatest ever inroads into freedom of speech and freedom of the press. Ironically, this occurred only weeks after our politicians extolled the virtues of these freedoms in the debate over section 18C of the Racial Discrimination Act.

It is disturbing that our political leaders have moved so quickly from this to anti-terror measures that impose lengthy jail terms for journalists and others who speak about matters of public importance. It reveals a shallow adherence to freedom of speech, and an unwelcome, authoritarian streak on behalf of the government and the opposition when it comes to restricting democratic freedoms.

....Sometimes, the secret activities of our law enforcement and intelligence agencies must be subjected to public scrutiny. A blanket prohibition upon disclosure may be good for the government of the day, but it is dangerous for our democracy²⁰.

Along with a clampdown on external scrutiny, the extreme laws introduced since ‘9/11’ are now incrementally creeping to encompass home-grown criminal activities, for

²⁰ Anti-terror laws undermine democracy, *Sydney Morning Herald* Comment, 2 Nov 2014.

example in regard to the “war on bikies”. Thus measures once considered extreme and un-Australian have become accepted as a normal aspect of the criminal justice system.

In the absence of any meaningful scrutiny of the operation of terror laws, it is left to small groups such as Civil Liberties Australia to attempt to make an evaluation nationwide of the impact of these new draconian laws. As quoted, various academics have pointed out the dangers to our traditional freedoms, but these have been largely – and seemingly, deliberately – ignored by decision makers.

Is the loss of citizens’ liberty justified? Michaelson (photo) points out that it is certainly not clear whether counter-terrorism measures following the ‘9/11’ attacks have actually increased security, or merely diminished liberty. Indeed, the nation state and security services have no idea whether counter-terrorism measures introduced in fact reduced the threat of terrorism: decades on from the aircraft attacks, a new wave of terrorism – perhaps largely germinated by the West’s initial responses to the 2001 terrorism – is spreading expanded methods of fear and dread globally.



Will the response to the current wave of terror likewise create its own “fresh” brand of terror 20 years from now?

The cycles of terror won’t be broken until a better response is devised than the military-security-bomb-everything-from-above, “war” on terror approach. In discussing and debating this new way, civil liberties people worldwide will have an ongoing role. It is axiomatic that the West has to live what it preaches: respect, tolerance, the rule of law...generally, a fair go for everyone. There’s no reason why Australian civil liberties people can’t help the world think its way through to a better life and liberty as the 21st century matures.

Undoubtedly, a new – fourth – period of civil liberties has begun in Australia. In the 21st century, the issues are global as electronic devices and thinking shrink distance and time. We look at what this trend means for the future of civil liberties groups in the book’s final chapters.

The aim of this series of chapters on the history of state civil liberties groups is to learn from history. How can voluntary civil liberties groups adapt to face vastly changed circumstances and the challenges of draconian terror laws, new information technologies and increasing globalisation?