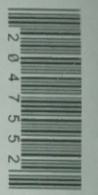
Offensive and Obscene

A Civil Liberties Casebook

by Ken Buckley

Ure Smith • Sydney



Contents

3. It seems likely that Longbottom mistook Waddy for the father of Mr Paddy Dawson, a student well known to his friends and to Longbottom as a regular participant in demonstrations.

4. Waddy made it clear that he was referring to a formal examination, not including diagnosis of any ailment.

5. Robertson testified that this was the only time in his experience as a policeman that the gates had ever been closed. In point of fact, the crowd outside Central police station was so angered by the sight of Waddy apparently being thrown out that for some time afterwards the station had the appearance of being under siege.

6. No. 295 proved to be Constable Ryan. No. 201 was not called as a witness by the prosecution, although he was clearly identifiable in a photograph taken at the time when Waddy was lying on the ground.

CHAPTER 6

Canberra Rugger-Sydney Police Style

The right to protest, and to demonstrate, is fundamental to a democracy. Protest, from its very nature, usually originates from minority groups, which aim at creating a wider awareness of grievances with a view to having them remedied. In Australia, as in Britain, there is no constitutional safeguard of the right to assemble peacefully, but any activity which is not expressly forbidden by the law is lawful. It follows that peaceful demonstrations are in themselves lawful. In practice, however, they are often hedged around with incidental restrictions: in Queensland, traffic regulations impose severe and unwarranted limitations upon demonstrations; and in all States the charges of offensive behaviour, obstruction, or hindering the police in the execution of their duty, may be used with the object of breaking up a demonstration or deterring people from attending it.

Canberra, as the seat of the Commonwealth Parliament, has naturally been the scene of many demonstrations, in which protesters from the States frequently combine with residents of the Australian Capital Territory. With the exception of the incident which is the subject of this chapter (and comparable incidents during the visit of U.S. Vice-President Agnew in 1970) these Canberra demonstrations over the years have been remarkably free from trouble. Relations between Canberra citizens and the A.C.T. police are good, and the A.C.T. police force enjoys a reputation for courtesy and tact which is (or should be) the envy of its counterparts in the States. The possibility of abuse of police power in relation to political demonstrations was further lessened by an important judgment by the Supreme Court of the A.C.T. in October 1966. This resulted from an appeal against the conviction of Mr D. J. Ball on a charge of offensive behaviour. As a spontaneous action

during a political demonstration, Ball had climbed up onto the King George V Memorial statue, hung a placard there, and refused police requests for him to come down. In upholding Ball's appeal, Mr Justice Kerr said:

> behaviour to be offensive behaviour must be calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from or non-acceptance of his views or values. The behaviour to be offensive would normally be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man.

Mr Justice Kerr went on to express his 'confident belief that in this day in Australia we are mature enough to tolerate spontaneous political protests of this kind — and I mean of this precise kind so far as the use of this statue is concerned — without having our feelings wounded or anger, resentment, disgust or outrage aroused to any significant extent.' Since this judgment, A.C.T. policemen have rarely used the charge of offensive behaviour.

It may be remarked that one of the methods employed by the A.C.T. police force to maintain its reputation amongst local citizens is of dubious validity. It is customary to 'run out of town' suspected criminals or doubtful characters found in Canberra; sometimes their train fare into New South Wales is paid for them by the police. There is no basis in law for this practice, and the net result is merely to transfer potential problems from the A.C.T. to N.S.W. In the light of this type of export, it is ironic that in January 1967 the citizens of Canberra (including local policemen) experienced trouble in the shape of a large body of imported New South Wales policemen. In fact, there were two imports: Air Vice-Marshal Ky from South Vietnam, and N.S.W. police to help maintain law and order during his State visit to Canberra. As neither import was welcome to a large number of residents, the mixture was explosive.

When it became known that Ky would arrive in Canberra on 18 January 1967, the A.C.T. Trades and Labour Council, in conjunction with members of the A.L.P., made arrangements for a protest demonstration. It was public knowledge that a number of people were travelling from

Sydney and other centres to take part in this demonstration, and senior officers of the A.C.T. police (and probably the Australian Security Intelligence Organization) over-estimated the numbers expected — it was suggested later that tourists visiting Canberra in the holiday period had been counted by the authorities as potential anti-Ky demonstrators. To help control the demonstration, 145 N.S.W. policemen, including a large number from Sydney, were brought to the A.C.T. and sworn in as special constables for the period of Ky's visit.

Following the standard procedure, the organizers of the demonstration had a discussion with the A.C.T. Police Commissioner beforehand. It was mutually agreed that the demonstration would be peaceful, the demonstrators would remain behind barriers, and the police would not enter the crowd unless there were fights or serious disturbances. Sgt N. S. Teudt of the N.S.W. contingent of police later testified that he was not told anything about this agreement.

The main demonstration, by about 500 people, was held outside Parliament House on the afternoon of 18 January. It was addressed by Mr A. A. Calwell, M.H.R., and there was no incident involving police action. When this meeting ended, a number of those present moved on to the grounds of the Canberra Hotel. Ky was due to arrive there by car later in the afternoon, and a subsidiary demonstration was planned for the occasion. Amongst the demonstrators who went to the Canberra Hotel were three men who had taken part in the organizing of the earlier demonstration. They were Mr Bruce McFarlane, a Research Fellow of the Australian National University; Mr M. J. Collins, a driver; and Mr N. C. Morton, student. It is possible that their organizing activities had been noted by a man in civilian dress who was constantly with the police that afternoon. The name of this man, who figured prominently in photographs taken at the time, is not known — the police did not call him as a witness at subsequent trials. Mr G. J. Walsh, an eye-witness, later told the A.C.T. Advisory Council that the man may have been a Deputy Commissioner of a Commonwealth security organization.

About 200 demonstrators waited patiently behind barriers in the grounds of the Canberra Hotel. There were eighty policemen there to control the crowd. The N.S.W. policemen

were conspicuous in wearing guns on their hips, as usual — A.C.T. policemen do not carry guns on ordinary duty. When Ky's car arrived, about sixty of the demonstrators congregated at one small section of the barriers, where there was a good view. Facing them was a group of Sydney policemen, headed by Sgt Teudt — and the man in civilian dress.

Up to that point, from all accounts, the crowd was orderly and in good humour. However, Ky's arrival precipitated considerable shouting and waving of banners. Whether Ky saw much of this in the few seconds before he entered the hotel is doubtful — although one witness, Mrs M. Gibbons, said that Ky saw a National Liberation Front flag being held up in the crowd, 'and it didn't seem to please him very much'. Then, according to another witness, Mrs E. Lemon, one of the N.S.W. policemen said, 'Let's get at them'; police moved aside a section of the barrier, and a number of them forced their way into the crowd. Walsh, an elected member of the A.C.T. Advisory Council, described the scene to that body later:

> The police pushed and fought their way into the densely packed crowd. (When I say fought I mean *kicked* and *punched* their way into the crowd). No resistance was offered by the crowd. Some, including myself, could not move out of their way because of the crowd pressing from behind and the police arrested three men simply because they did not get out of the way fast enough. All the men arrested were some 20 feet or more behind the barrier.[1]

In fact, four people were arrested in this incident. McFarlane and Collins were each charged with offensive behaviour and resisting arrest; Morton was charged with offensive behaviour; and T. P. Maher (a copy-boy) also with offensive behaviour. When the cases came before a magistrate the following day, McFarlane (despite the fact that he was not represented by counsel) wanted to proceed immediately with the hearing, on the grounds that he had witnesses present from Bateman's Bay, Sydney, and Wollongong, who would not be available in Canberra at a later date. However, the magistrate said that there were other matters which had priority, and all four cases were adjourned to later dates.[2]

An interesting aspect of these cases was the publicity which they received before the hearing of evidence began. Usually, arrests made in such circumstances are reported in the press the following day and then there is silence until there are further court proceedings. Defendants are generally advised by their lawyers not to make any public statements — defence counsel naturally prefer not to give the prosecution advance notice of their case. But the Canberra arrests created such a furore locally that a different course was pursued. For several days, angry letters from eye-witnesses, who included well-known local citizens, were published in the *Canberra Times*. These letters and statements contained accusations of brutality on the part of the imported N.S.W. policemen. The A.C.T. Commissioner of Police responded by claiming that these accusations were 'completely exaggerated' and saying that Canberra press reports indicated 'a village outlook'. Yet it was an open secret that A.C.T. policemen in general were annoyed at the hamhanded action of their colleagues from across the border.

The effect of the publicity was obvious at a meeting of the A.C.T. Advisory Council on 31 January, two weeks after the incident. Mr G. J. Walsh read out extracts from statements by a number of witnesses, submitted photographs, and moved that

> This Council deplores the provocative and brutal methods used by N.S.W. Police in controlling the crowd demonstrating at the Hotel Canberra on 18.1.67 against the visit of Air Vice Marshal Ky to Australia. Council therefore calls upon the Minister to take appropriate measures to ensure that there is no repetition of this type of incident on any future occasion.

In the debate on this motion, two members of the Advisory Council expressed the view that the matter was *sub judice*. Walsh replied that the police were not on trial; what he was concerned about was the importation of N.S.W. Police methods. Another member of the Council would have preferred to request the Minister for the Interior to conduct a public judicial inquiry into the incident, but an amendment to this effect was defeated and Walsh's motion was carried.

Thus the most representative forum of Canberra opinion

indicated forthrightly where it stood. Few Canberra citizens — irrespective of whether they agreed with the purpose of the demonstration — had any doubts that aggression had come from the side of the police, not the demonstrators. Any magistrate who had then proceeded to convict McFarlane and the others, unless the evidence against them was strong, would have looked foolish or worse in the eyes of the local community — and Canberra is a close community, into which magistrates are well integrated.

Another important difference between Canberra and Sydney came out in the court proceedings against the four defendants. In N.S.W., once a criminal charge has been laid against a person it may be withdrawn only with the approval of the Commissioner of Police. Prosecution is the responsibility of the police prosecutors' branch, which is subject to police discipline and has little room for discretionary action. In the A.C.T., the position is less formalized: although a police prosecutor handles most Petty Sessions cases, some cases are prosecuted by a representative of the Crown Solicitor's Office (in effect, a civilian public servant) — and the latter course was followed in relation to the charges arising out of the demonstration. As early as the first appearance of the four demonstrators in Canberra Court of Petty Sessions, on 19 January, the prosecution intimated that it did not intend to proceed with the charge of offensive behaviour against Maher; instead, a charge of hindering a constable in the execution of his duty would be substituted. At an adjourned hearing on 6 March, when a similar substitution of charges against Morton was made, defence counsel asked for costs against the Crown in relation to it, and the magistrate awarded $21 costs to the defendant.

A comparable prosecution decision concerning one of the charges against McFarlane was seriously delayed. Initially, it was agreed that the cases of Collins, Morton, and Maher would be heard jointly, and McFarlane's separately. McFarlane's case was set down for hearing first, on 6 March. In the preceding six weeks, McFarlane's solicitor wrote five letters to the A.C.T. Commissioner of Police, each time requesting particulars of the alleged offensive behaviour and resisting arrest. Apart from a bare acknowledgment of the

first of these letters, no reply was received until 2 March, when the solicitor was informed by phone that the Crown did not intend to proceed with the charge of resisting arrest. On the formal withdrawal of this charge in court, the magistrate awarded McFarlane $21 costs — as the defendant's counsel put it, he had been forced to prepare his defence, 'as far as he could, right up to the doors of this court'.

At about the same time, the prosecution also dropped the charge against Collins of resisting arrest. That left him and McFarlane facing only offensive behaviour charges. The prosecution's reason for deciding not to offer evidence as to resisting arrest was not stated. It may have been due simply to the evidence being inadequate to sustain a case, together with realization that the defence had access to much photographic material. There may also have been a tactical factor in the decision: it would be more open for the defence to bring in evidence of police brutality in relation to resisting arrest than to offensive behaviour — the latter, as it turned out, consisted of allegedly pushing other people (who were not policemen). The prosecution decision to substitute charges of hindering a constable for the original ones of offensive behaviour in the cases of Morton and Maher is easily understood in terms of the general A.C.T. disinclination to use the latter charge. On the other hand, if any charge were to be proceeded with against McFarlane and Collins, offensive behaviour was the only one (other than resisting arrest or assaulting a policeman) which could possibly fit the prosecution case against them — and if all charges were dropped, the police were open to claims of damages for wrongful arrest.

Incidentally, Sgt Teudt apparently did not appreciate some of these nice points. Under cross-examination in the case of Collins-Morton-Maher, he said that he did not know why the Crown Solicitor had decided not to go ahead with the original charges of resisting arrest — and added, 'I would like to, perhaps'. As for the dropping of the charges of offensive behaviour against Morton and Maher, Teudt said: 'The law is slightly different down here to New South Wales. Offensive behaviour is the offence which we would have normally proceeded with in New South Wales.' Moreover, Teudt went

on, in his opinion the evidence would have justified conviction on such a charge in N.S.W. Actually, as defence counsel pointed out, there is no difference between the A.C.T. and N.S.W. laws on this matter — in both jurisdictions, the offence is that of behaving in an offensive manner in a public place.

The written particulars of McFarlane's alleged offensive behaviour, as supplied to him by the prosecution shortly before the hearing of the case against him, related to 'the causing of children to be knocked to the ground' due to his having pushed women in the crowd outside the Canberra Hotel; and he was also said to have come into physical contact from behind with Constable J. A. Fogarty. It was only as the prosecution case unfolded in court that McFarlane learned that he was actually accused of jumping on Fogarty's back and bearing him to the ground. Apart from whatever may have happened between McFarlane and Fogarty — and if the police evidence of this was correct, it was remarkable that the former was not charged with assault — the prosecution case against Collins was basically the same: that he had pushed people in the crowd. The arrests of Morton and Maher were incidental to those of Collins and McFarlane, and for practical purposes the evidence given at the two trials may be considered as one.

The prosecution story was that as Marshal Ky arrived at the Canberra Hotel the demonstrators, including Collins, tried to force their way through an eight-foot gap in the barriers which had been erected. The police at this point linked arms to hold the crowd back. Collins then went to the back of the crowd where, with McFarlane, he began pushing people in front of him towards the break in the barriers. As a result, women and children were jostled and shoved, and some of the latter were in danger of being trodden on. Sgt Teudt, followed by Constable J. W. Ford, went through the crowd in order to arrest Collins. There was a struggle, and Fogarty came to the assistance of Teudt and Ford. Before he reached his colleagues, Fogarty was jumped upon by McFarlane; the latter was then arrested by two other Sydney policemen, Constables G. G. Willings and J. L. Andrews.

The two arrested men were taken to the rear of the hotel

(where police vehicles were parked). On the way, Morton came up to Teudt and Ford and tried to pull Collins away from them, saying (according to Ford), 'He's done nothing. What are you arresting him for?' Morton himself was then arrested. A little later Maher, who was between the police car and the approaching policemen with their prisoners, was told to move aside. He did not do so, saying, 'I have done nothing. I've got your number'. He too was arrested.

Seven police witnesses testified to various aspects of the prosecution case. The five who have already been mentioned were members of the N.S.W. police force. The other two — Constables B. T. Robbie and E. F. Harlovich — were members of the A.C.T. police force; they gave support but were not directly responsible for any of the arrests. Each of these witnesses corroborated part of the story told by one or more of the other policemen, but the sequence of events was such that none of them was able to see everything that was said to have happened. Thus Teudt, Robbie, and Harlovich claimed to have seen McFarlane pushing at the back of the crowd, whereas the other four policemen had not noticed this. On the other hand, Willings, Andrews, Robbie, and Harlovich said that they had seen McFarlane jump upon Fogarty; Ford did not see this happen as he was struggling with Collins at the time. Teudt, who was also struggling with Collins, nevertheless did manage to see McFarlane jump onto Fogarty's back.

Cross-examination of the police witnesses brought to light some interesting discrepancies and contradictions. Although the particulars of the charges against McFarlane and Collins referred to children being knocked to the ground, none of the policemen had actually seen any child knocked down — nor was there any mention of such an event in the written statement made by Teudt a few days after the incident. In court, the policemen stoutly maintained that there were children in the crowd and that they were in danger of being knocked over. As for the women whom the defendants were alleged to have pushed, defence counsel suggested that it was doubtful whether Teudt could possibly have seen this happen through a packed crowd which was six or eight rows deep. As counsel pointed out, these women were 'supremely

anonymous' — none of them had complained of being pushed, and Teudt could not give any description of them. Teudt explained that he did not have time to take the names of any of the women and children concerned. Robbie said that he was under the impression that McFarlane was pushing a man, not women. Harlovitch, after saying at first that McFarlane had been pushing both men and women, amended this to 'one man' — who was not protesting, as far as Harlovitch noticed.

The prosecution evidence that Morton had appeared in front of Teudt and Ford and had attempted to pull the arrested Collins away from them did not sound very convincing in the light of the fact that Morton was a short, bearded man whilst Teudt, on his own admission, weighed about seventeen stone (and Ford was six feet tall). The defence case in relation to Morton was that he had simply tried to see and note the identification numbers of the policemen. The evidence against Maher was also weak — so much so that the magistrate, at the end of the prosecution case, ruled that there was no case for this defendant to answer and dismissed the charge against him.

An extraordinary feature of the proceedings against Collins came out in cross-examination of Teudt. According to the latter, he and Ford had arrested Collins, who struggled violently. Later, Ford arrested Morton; and Robbie then came along to help Teudt take Collins away. It was admitted that by this time, when Robbie took one of Collins's arms, the latter was no longer making any attempt to resist — yet Robbie was one of the police officers who signed the original charge of resisting arrest which was laid against Collins. Incidentally, the struggling by Collins and McFarlane was associated by police witnesses with the prisoners allegedly having both called out to someone in the crowd, 'Take the photos, quick'. Constable Willings, who gave such evidence, was then shown a photograph which depicted McFarlane — dressed unmistakably in a green and white striped shirt — having his hands manacled behind his back by two policemen whilst a third held him in a headlock. Willings said that this photograph was taken just before McFarlane yelled out 'Take the photos, quick'. Quite apart from it seeming obvious from

the photograph that the prisoner was in no condition to struggle or speak, it was evident that if indeed McFarlane had thought of having photographs taken someone else had already thought and acted along these lines.

As this prosecution evidence indicated, the police were aware of the existence of photographic records which might be used by the defence. As a matter of fact, there was an element of psychological warfare at the trial of McFarlane: each day, one of his supporters stood outside the court carrying half a dozen cans which apparently contained film. The cans were empty, but they may well have served the purpose of increasing the uneasiness of the police witnesses. Early in the hearing, Teudt commented: 'Photographs sometimes give a very wrong indication'. Actually, there was much photographic material available to the defence, although it was put to its most effective use in the other trial, that of Collins, Morton, and Maher. In McFarlane's case, only a collection of stills — not moving pictures — was used in cross-examination of prosecution witnesses. These stills had been taken by Mr P. J. Wells, a professional photographer employed by the *Canberra Times*. Wells had been on the police side of the barriers when Ky arrived at the Canberra Hotel, and when the police moved into the crowd he followed them, taking photographs. These included pictures of the arrest of Collins and of a hapless and sagging McFarlane being held by policemen. Wells had not known McFarlane prior to this incident and he was certainly not an anonymous photographic supporter of the prisoner in the crowd.

McFarlane himself deposed that he was standing talking to Morton about twenty feet away from the barrier when Ky arrived at the Canberra Hotel. McFarlane did not join in the rush of demonstrators to the barrier, nor did he push anyone. In fact, he walked a little further away and turned his back on the scene; he realized that he would not be able to see anything through the crowd, and he reckoned that the demonstration was 'a fizzer' because there was not a large enough number of people there. Thus McFarlane did not see the police come through the crowd. He did not jump upon Constable Fogarty; rather, he was himself grabbed from

behind by somebody whom he subsequently found to be a policeman. Struggle was impossible because, said McFarlane, 'one constable was pressing his thumbs behind my ears and I began to black out'. He was then frogmarched away by the police.

In support of his story, McFarlane called as witnesses seven other people who had been in the crowd. These witnesses were unanimous upon certain points: they had not seen any children in the crowd, nor had there been any pushing — until the police forced their way through the barrier. As Mrs M. V. Troy put it: 'all of a sudden I found I was pushed into the shrubs by the police coming through'. Mr G. J. Walsh indicated that, contrary to the police account of the situation, there was no break in the barrier: the police themselves had moved aside an eight-foot section of the barrier in order to move into the crowd. Walsh had heard a constable (whose identification number he noted as 354) say, 'Let's get at them',[3] and Walsh himself had been pushed vigorously in the chest by a policeman. The most graphic description of events came from Mr P. N. Troy, an academic who had been present. He referred to 'a milling scrum of policemen' and 'a wall of blue serge' which came charging through the crowd. When the prosecutor suggested to Troy that he had not actually seen McFarlane being caught up in this scrum, the witness replied:

> Excuse me, if you've ever played Rugby you would know that you don't always see what is going on with the ball, and there was a ball in the scrum and the ball was some person.

The evidence given by these defence witnesses was not conclusive in itself. They were able to testify that they had not seen McFarlane jump upon Fogarty and that at the time of Ky's arrival the defendant had been towards the rear of the crowd, some distance away from the barrier. But nobody had expected McFarlane (or anybody else) to be arrested, and in the melée caused by the irruption of the police the exact circumstances of the arrest were not noted — people were naturally looking in the direction of Ky's car, not looking behind them at McFarlane. Some people had problems of their own — Morton said that he was punched in

the face by a policeman and knocked over. When he got up, he looked back and saw McFarlane being pulled away by several policemen, but he did not see what led up to this. Similarly, Walsh saw McFarlane being held by policemen (and being hit in the side by one of them) but did not know exactly how this had come about.

On the other hand, McFarlane's counsel, in cross-examination of prosecution witnesses, had already pinpointed the spot at which the defendant was alleged to have jumped upon Fogarty. In particular, Constable Andrews said that it was on a path about eight feet away from the barriers. Not only did the defence witnesses state that McFarlane was appreciably farther back than this, but one of them — Mr M. Fay, from Sydney — was himself standing on the path at about the spot where the defendant was supposed to have attacked Fogarty. Yet Fay saw nothing of the sort happen.

The prosecutor, in his cross-examination of defence witnesses, introduced a political note into the trial by enquiring about their political affiliations or sympathies. Most of these witnesses, like McFarlane himself, were members of the Australian Labor Party. In the case of one witness, Mr Fay, this line of questioning went further. Fay acknowledged that he had travelled from Sydney to Canberra to take part in other demonstrations, besides the one which figured in the trial. He was then asked: 'Were your expenses paid for these trips or . . . ?' He replied, 'No, sir'. Presumably the prosecutor's aim was to suggest that the evidence of these witnesses was not to be relied upon because they were friends or political supporters of the defendant. However, this could not be said of the newspaper photographer, Wells. He testified that he had followed six or seven feet behind the police as they made a 'spearhead and sort of forced their way through the crowd'. Wells did not see McFarlane jump upon Fogarty, nor did he witness McFarlane being seized by the police — for some seconds, the photographer's attention was drawn to the arrest of Collins and when he looked around McFarlane was on the ground.

Most of the evidence referred to above was given at the first full day's hearing of the charge against McFarlane, on 6 March 1967. That case was then adjourned for seven weeks,

and in the interim the charges against Collins, Morton, and Maher were dealt with by another magistrate in a hearing which lasted for three days. Defence counsel in this latter case thoroughly enjoyed himself, especially in cross-examination of the first witness, Sgt Teudt. Step by step, Teudt was taken again through his evidence. As a man with twenty-three years of experience in the police force, he was not likely to be trapped into verbal contradictions, and he was more or less impervious to defence counsel's suggestions. For example, there is the following extract from the evidence:

Q. Then you grabbed hold of Collins, and he immediately threw himself to the ground. Is that right?

A. That's correct.

Q. Couldn't be, Sergeant, that you just hurled yourself at him and he fell backwards on the ground? A. No.

Q. It couldn't be that a number of people in that crowd were knocked out of your way as you charged through?

A. No. Not that I'm aware of . . . .

Q. I'm putting it bluntly to you, Sergeant: if one man had been slow getting out of your way, as you came through, would you have grabbed him too?

A. For what reason?

Q. Would you have grabbed him?

A. I don't understand what you mean, Mr Enderby. I went in there for the purpose of arresting Collins.

Teudt did not budge from his previous evidence. Like his colleagues, he insisted that the policemen had not forced their way through the crowd. Rather, the crowd had parted to let them through. As Willings had expressed the point — in words which were suggestive of a miracle — 'all of a sudden there was no one at the gap which we were holding and we just walked through'.

Having set up an Aunt Sally — the police version of exactly what had happened — defence counsel gleefully proceeded to knock it down by showing in court a television film of the demonstration in the grounds of the Canberra Hotel. The film, shot from a position behind the police, showed first the crowd lining the barrier at the time of Ky's arrival. There was no gap in the barrier, and no children were visible. The crowd

was tightly packed but did not appear to be pushing against the barrier. Teudt — who acknowledged the identification of himself as a 'large fat man' — could be seen going up to policemen at the barrier and raising his arm as if pointing at something or someone. A few seconds later, the film showed the police turning their backs to the crowd, linking arms, and forcing their way into and through the crowd. Teudt himself, contrary to his own story, was not the first policeman depicted by the film as having gone into the crowd.

Needless to say, Teudt was extremely reluctant to acknowledge the veracity of the story told by the film. At various points he disputed counsel's interpretation of what was being shown. For example, Teudt suggested that the film might relate to a section of the demonstration other than the part at which he was present. He was then forced to admit that, on his own evidence, there was no other section which had a gap through which the police went. Counsel followed this up by asking, 'You think someone has been tampering with this film?'. The witness replied that he was not suggesting that. Similarly, when Teudt thought that the film did not really show him pointing, counsel was happy to establish the point by re-running the film in slow motion, frame by frame — and telling the sergeant that the film was recorded at the rate of twenty-four frames per second.

After this devastating piece of evidence, it is not surprising that in due course the defendants in the Collins-Morton-Maher trial were acquitted. Collins's own story was that, like McFarlane, he did not push anybody; he was grabbed, punched, and kicked by police. Incidentally, Teudt made an unusual admission which had some relevance to McFarlane's case. Teudt said that in the police station, after the arrests, he had found it necessary to reprimand Fogarty by saying, 'That's enough'. According to McFarlane, this was because Fogarty was trying to provoke him (McFarlane) by saying, 'You're as weak as piss'. However, in court Teudt said that he could not recall these words having been used by Fogarty, 'but I did reprimand him'.

When the hearing of the case against McFarlane was resumed, defence counsel introduced the same television film as had been used in cross-examination in the other trial. This

was done by calling as a witness Mr M. Hunter, a representative in Canberra of ATN Channel 7. He had been in charge of the mounting and operation of cameras outside the Canberra Hotel on the afternoon in question. However, by this time the prosecutor was fully seized of the potential danger which this film presented to his case. The prosecutor submitted that the film was not a complete record of what had occurred and that it was not admissible as evidence without strict proof. This would have entailed calling as a witness the man who had actually operated the camera under Hunter's direction — and this man, Mr R. McNicol, was resident in Sydney.[4] To meet the prosecutor's objection, defence counsel said that he would arrange for a subpoena to be served on the cameraman; but that would take time, and meanwhile he asked for the film to be admitted subject to subsequent proof of it. The prosecutor still objected, but decided not to press the point when it became obvious that the magistrate thought he was being obstructionist.

On the projection of the film in court, the prosecutor objected that it was not relevant: neither McFarlane nor Fogarty could be distinguished in it. Defence counsel retorted that this was precisely the point: what the prosecution claimed to have happened at a certain place and time did not happen there and then. According to the prosecution evidence, the police had passed through a barrier, and a few seconds later McFarlane, on a path about eight feet from the barrier, had jumped upon Fogarty's back. The film showed the police going through, followed by the recognizable figure of Wells, the newspaper photographer; the police were clearly on the path at and beyond the point where McFarlane was supposed to have been — yet there was no sign of him in the film. As Mr C. L. Hermes, S.M., commented to the prosecutor: 'You would not expect the defendant to be seen if the defendant's evidence is true. He is twenty-five — I forget how many — thirty feet away from the crowd or something like that.'

Defence counsel did not contend that the film was positive proof of the wrongness of the prosecution case. Rather, like the evidence of defence witnesses, it tended to prove that events did not occur as the prosecution alleged. This point

was, of course, strongly emphasized by counsel when he made his concluding address to the court on the final day of the trial — after Mr E. G. Whitlam, Leader of the Opposition in the Commonwealth Parliament, had testified to Mr McFarlane's good character. The prosecutor, in his own final address, withdrew the references in the particulars of the charge to children having been knocked down; and the magistrate described the reasons given for this withdrawal as 'masterly understatements'.

Bruce McFarlane was then acquitted. The magistrate, in a brief judgment, said that from the evidence he did not know where the truth lay. He did not go beyond this to comment upon the evidence, and his judgment was perhaps the most masterly understatement of all. The defendant thus left the court without a stain on his character but with little hope of redress by way of action at law for damages. Instead of taking the easy way out by pleading guilty and being fined perhaps $20 each, McFarlane and the other three men had defended themselves and incurred legal costs of about $1,500 as a result.

This matter of costs was brought up at a meeting of the A.C.T. Advisory Council in May 1967. In reply to the Council's earlier resolution concerning the provocative and brutal methods of the N.S.W. police, the acting Minister for the Interior eventually wrote that although the charges against the four men had been dismissed, 'no evidence was given before the court to support the suggestion that the police had been provocative or had used undue force in making the arrest'. In discussion of this ministerial statement, Mr G. J. Walsh illustrated its falsity and evasiveness by quoting extracts from the evidence. He went on to say:

> I think, Mr Chairman, there is something rotten in a system that allows the police to use taxpayers' money at will to prefer charges as unjust as these were, whilst the taxpayer himself must find hundreds of dollars to defend himself against such charges, because as you may know there was no chance of legal aid in cases of this nature . . . these citizens defended not only themselves in court, but the rights of all Canberra citizens to be allowed

to congregate freely and to voice disapproval on any issue.[5]

After further discussion — in which Dr T. H. Harrison suggested action against some policemen for perjury or the making of false statements — the Advisory Council resolved to ask the Minister for the Interior to make an 'act of grace' payment towards the legal costs of the four acquitted men and to hold a public judicial enquiry into the circumstances of the arrests and charges. The Minister, Mr J. D. Anthony, subsequently rejected these requests, saying that the question of costs was entirely one for the court to decide. Yet if he was properly advised he must have known that magistrates are extremely reluctant to award costs against the police — partly because, in such cases, the responsibility for payment falls upon the individual policeman, not the Police Department.

Mr Anthony's mealy-mouthed attitude is typical of the response of Australian governments to such cases. It is remarkably rare for a government to acknowledge that an injustice has resulted from the action of a member of the police force. The standard governmental reaction to an allegation of this nature is to run for cover: a statement is made praising the police in general terms, the Commissioner of Police usually says that he has ordered an enquiry (the course and outcome of which are generally not made known to the public later), and it is hoped that court proceedings will take care of the rest. Respect for the rights of the individual accused is notably absent at a governmental level. There is an unquestioned assumption that the policeman is always in the right — or if he is wrong, it is left to the objector to prove it up to the hilt and at his own cost.[6]

In the case of McFarlane and the others, part of the legal costs was met by contributions from well-wishers at the Australian National University and other sources. The remaining deficit was wiped out by the lawyers concerned agreeing to waive their fees. Most of these lawyers, incidentally, were associated with the Council for Civil Liberties — a fact which explains why the C.C.L. was not directly involved. It remains to add that in the following year a Civil Liberties Association was formed in the Australian

Capital Territory. Mrs Julia McFarlane (Bruce McFarlane's wife) was elected to the position of honorary secretary of this body. She now invariably carries a camera at demonstrations!

Dr R. F. Brissenden of Canberra composed a song to commemorate the occasion of the arrests. The words of this song are:

WALKING THROUGH CANBERRA

or

THE BALLAD OF MUSCLES McFARLANE

I was walking through Canberra where the bullshit grows thick,
With me handcuffs and notebook, me gun and me stick,
When who should I see but that terrible man:
It was Muscles McFarlane, the pride of his clan.
All in blue, all in blue,
Each word I swear is true:
I'm a New South Wales copper, I can't tell a lie.
McFarlane, he stood at the rear of the crowd;
He was pushing and shoving, which is not allowed.
Men, women and children he'd felled to the ground,
And hundreds of bodies lay scattered around.
All in blue, etc.
I'm a tough Sydney sergeant, that none can dispute,
With an ivory skull and a size fifteen boot;
I eat students for breakfast and hoodlums for tea,
But Muscles McFarlane scared the Christ out of me.
All in blue, etc.
He stood eight feet tall and weighed twenty-five stone,
Like two bloody red stop-lights his spectacles shone.
So me and me cobbers, we turned tail and ran
At the sight of McFarlane, that terrible man.
All in blue, etc.
As Muscles McFarlane advanced to attack
Even Iron-Fist Fogarty showed him his back;
And that's how McFarlane, with one mighty bound,

Bore Fogarty struggling, brave lad, to the ground.
All in blue, etc.
Once McFarlane was down we all jumped him, of course,
For that's what we're taught in the New South Wales Force:
If a bloke's on the ground we can all put the boot in,
If he gets up and runs, then we're licenced to shoot him.
All in blue, etc.
That's me story, Your Worship — it's here in me book;
And if you don't believe me you're welcome to look.
And should Muscles McFarlane attempt to deny
What I've said — just remember that policemen can't lie.
All in blue, all in blue,
Each word I swear is true:
I'm a New South Wales copper, I can't tell a lie.

NOTES

1. Minutes of A.C.T. Advisory Council, 31 Jan. 1967.

2. A spectator who exclaimed 'Oh, no' at the magistrate's decision in McFarlane's case was removed from the court by order of the magistrate.

3. This proved to be Fogarty's number. In court, Fogarty denied saying this.

4. McNicol was not anxious to appear as a witness. It was a curious coincidence that he had himself been arrested and charged with offensive behaviour whilst operating a television camera at the big Sydney demonstration in 1964 (referred to in the previous chapter). On that occasion McNicol was not only acquitted: the magistrate took the exceptional course of awarding costs against the policeman concerned.

5. Minutes of A.C.T. Advisory Council, 24 May 1967.

6. The cost may entail more than time and money. A very serious matter is that before McFarlane was acquitted some of his students were questioned about him by someone from the Attorney—General's Department. Amongst other things, this questioning related to whether McFarlane had had sexual relations with any female student. In fact, there was no such 'dirt' to be unearthed and no public reference was made to this filthy line of investigation.