Police Powers in the Premier State, or the Premiers Police State?

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The atmosphere of moral panic over issues of crime and policing that pervades New South Wales (NSW), particularly in the lead up to state elections, has led to a steady increase in police powers for most of the last decade. In the past five years in particular there has been a noticeable acceleration in this trend, especially in relation to highly emotive campaigns such as “the war against drugs” and “the war against terror”. This article examines the extent to which these legislative campaigns have impacted upon fundamental legal principles of the common law, and of the national and international community. Assurances from the NSW Premier, Bob Carr, that NSW has not become a “police state”[1] may serve a limited purpose within a parliamentary debate, but beyond such rhetoric there is a clear need for some established criteria by which the erosion of civil liberties can be measured. This article will examine existing NSW legislation with a view to assessing the extent to which recognised fundamental rights are being routinely compromised.

Neither the Commonwealth nor NSW has a legislated Bill of Rights. Thus, there is no reliable constitutional mechanism by which to measure legislative enactments for their compliance with fundamental values underlying our system of government. Nevertheless, there do exist some common law principles and a number of international covenants that provide some guidance in this regard, and at least two Australian jurisdictions have enacted pertinent legislation recognising fundamental rights. The Australian Capital Territory has recently enacted the first genuine Bill of Rights in any Australian jurisdiction with the passage of the *Human Rights Act 2004* (ACT). Although this legislation does not have invalidating force in the way that a constitutionally based Bill of Rights may have, it is still significant in that it adopts the range of rights established under the *International Covenant on Civil and Political Rights* (*ICCPR*) as the basis for the

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1 Mr Bob Carr, New South Wales, House of Representatives, *Parliamentary Debates (Hansard)* 13 November 2002.

legislated rights contained within the Act.[2] Queensland too has a weak form of a Bill of Rights. The *Legislative Standards Act 1992* (Qld) identifies a set of rights and liberties with which statutory enactments are meant to comply. The irony is that Queensland's legislation came about because of Queensland's past experiences with the harsh suppression of civil liberties during the years of the Bjelke Petersen Government, lessons it seems NSW has yet to learn. Whilst both the Queensland and the Australian Capital Territory enactments can be criticised for their lack of invalidating force, they do at least establish a benchmark against which current and future legislative enactments in those jurisdictions can and will be measured. NSW is a long way from achieving the standard of these neighbouring jurisdictions, and on the state's current political trajectory is heading in a direction that is incompatible with a broad acceptance of the most basic rights recognised either at common law or internationally under the *ICCPR*.

In the absence of any legislated benchmark in NSW, the task of assessing the state's civil liberties trajectory depends upon comparing existing legislation to a range of benchmarks drawn from the common law, international instruments, and the standards of neighbouring jurisdictions. While such an analysis does not provide any basis to challenge the offending laws, it does at least provide a basis for challenging the Premier's assurances about the state's legislative record on human rights.

Although the common law tradition is often cited as a great protector of civil liberties,[3] and a justification for opposition to Bills of Rights, it remains extremely difficult to generate a definitive list of the important civil and political liberties the common law recognises. The most general expression of the common law approach to civil liberties is that the subject is free to do anything not prohibited by law. This can prove to be an extremely weak and even illusory protection in the face of legislative enthusiasm for ever-expanding police powers and prohibition. Even where common law values have been positively elucidated by the courts, the principle of parliamentary sovereignty renders them totally vulnerable to the force of express legislative

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2 *Human Rights Act 2004* (ACT) Part 3.

3 See, for example, the discussion of common law protection of personal liberty in the recent Queensland Supreme Court case of *Attorney General (QLD) v Fardon* (unreported) SC (Qld), No 5346 of 2003, 2 October 2003. See also the joint judgement of Mason and Brennan JJ in *Williams v The Queen* (1986) 161 CLR 278.

intent. Nonetheless, a loose set of common law presumptions in favour of civil and political liberty has emerged: these do at least contribute some standards by which to measure current NSW laws.

Because the traditional approach of the courts is inherently libertarian (citizens are seen to have the right to do anything not proscribed by law), rights do not arise from an express guarantee, but rather they result from the fact that the particular liberty has never been questioned. For example, the right to freedom from arbitrary search and seizure is nowhere stated as an express right, but flows from the fact that without specific powers enabling police to search a person, any such act constitutes a trespass for which a civil remedy is available.

In *Plenty v Dillon*[4] the High Court stated:

> If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official.

Specific rights and privileges implicitly recognised by common law include: protections against arbitrary search and seizure; the privilege against self-incrimination; the right to silence; the presumption of innocence, and the presumption that serious criminal offences include an element of guilty intent (*mens rea*). Despite grand pronouncements by courts elucidating these rights, in practice they have become little more than interpretive presumptions that easily yield to a contrary legislative expression. In NSW, modern legislation is increasingly expressly contradicting these few established principles. The result is a system of criminal law in which arbitrary police power is becoming more commonplace.

International instruments are more explicit than the common law in identifying specific rights that are fundamental to a fair and just legal system. The most reliable and comprehensive statement of important civil and political rights relevant to Australia is to be found in the *ICCPR*, to which the Australian Government is a signatory. Although it does not have binding force in relation to NSW (or any state's)

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4 *Plenty v Dillon* (1990) 171 CLR 635 at 655 per Gaudren J & McHugh J.

legislation, the *ICCPR* nevertheless provides a useful statement of accepted national and international values in relation to civil and political rights. The fact that the Australian Capital Territory has seen fit to specifically refer to the *ICCPR* in its *Human Rights Act 2004* underscores the importance of this covenant as an internationally recognised benchmark.

The *ICCPR* specifically identifies a privilege against self-incrimination, a protection from arbitrary search, seizure or interference with privacy, the presumption of innocence, protection from torture or cruel or degrading treatment, and a general assumption that accused persons will not be denied liberty pending trial. Existing NSW legislation breaches each of these guarantees either in whole or in part.

Rather than attempt to elucidate the complex and often overlapping principles that can be drawn from the sources identified above, this article will identify those specific recent enactments in NSW that are of most concern from a civil libertarian perspective. It will then analyse them to expose the ways in which they breach identifiable standards.

At present, the legislative enactments of most concern occur in relation to three main areas. These are drug law enforcement, increased police powers for the maintenance of public order, and the suppression of political dissent, including recent anti-terrorist laws.

Drug law enforcement in NSW, the slippery slope to a police state?

Successive NSW Governments have enthusiastically engaged in the rhetoric of “the war against drugs”. The result has been laws, particularly with respect to drug law enforcement, that have introduced a number of quite novel provisions which challenge traditional ideas about civil liberties.

Drugs Misuse and Trafficking Act 1985 (NSW)

Section 29 of the *Drugs Misuse and Trafficking Act 1985* (NSW) creates the offence of “deemed supply” in relation to any person found in possession of more than the trafficable quantity of a prohibited drug.

In so doing, the section removes the presumption of innocence by deeming a person to be guilty of supply without requiring the prosecution to prove the elements of supply. This is achieved by reversing the onus of proof and requiring defendants to prove that they had possession of the drug otherwise than for supply. Such a requirement clearly offends against the presumption of innocence, for many years a fundamental value of the common law.

For example, in the classic case of *Woolmington v DPP,*[5] the House of Lords stated:

> Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. … No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it can be entertained.

The deeming provision in s 29 also effectively abrogates the right to silence, as silence by a defendant in this situation would lead to an adverse conclusion in relation to supply.

The general common law position on the right to silence was stated by the High Court in *Bridge v The Queen*:[6]

> An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything.

In addition to breaching these fundamental common law principles, the deeming provision is also inconsistent with Article 14 clauses 2 and 3 (g) of the *ICCPR* which affirm both the presumption of innocence and an accused person's right to silence.

Section 25A of the Act creates the offence of "supplying prohibited drugs on an ongoing basis", thereby enabling police to accumulate potential charges against a targeted person without that person's knowledge. This raises the possibility of victimisation, and potentially

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5 *Woolmington v DPP* [1935] AC 462 at 481-482.

6 *Bridge v The Queen* (1964) 118 CLR 600 at 615 per Windeyer J.

offends against a person's right to be promptly informed of charges against her/him.

This section is inconsistent with Article 14 clause 3 (a) of the *ICCPR*, which guarantees a person the right to be informed promptly of the nature and cause of a charge against her/him.

Police Powers (Drug Premises) Act 2001 (NSW)

Section 12 of the *Police Powers (Drug Premises) Act 2001* (NSW) creates an offence of strict liability for any person found "on, entering or leaving drug premises". In so doing, it abrogates the general assumption in the common law that persons do not commit a crime unless they have a guilty intent. The section goes even further by placing the burden on defendants to satisfy the court that they were "on, entering or leaving the drug premises for a lawful purpose or with a lawful excuse." This represents yet another "deeming provision" reversing the onus of proof and abrogating the right to silence.

Police Powers (Internally Concealed Drugs) Act 2001 (NSW)

Sections 7 and 8 of the *Police Powers (Internally Concealed Drugs) Act 2001* (NSW) give police and justices the power to compel an internal search of any suspect over the age of ten years, provided the requirements for a reasonable suspicion exist. This is a disturbingly dramatic wind back of the recognition by the common law of the sanctity of a person's body, and a person's right to security of the person and protection from trespass. Such a power offends against both the *ICCPR* and the *Convention on the Rights of the Child*. Specifically, compelling internal searches offends against Article 7 of the *ICCPR*, which provides that no one shall be subjected to cruel or degrading treatment. The detention powers in the Act also offend against the guarantees against arbitrary detention in Article 9 of the *ICCPR*.

Police Powers (Drug Detection Dogs) Act 2001 (NSW)

This legislation permits the use of sniffer dogs to conduct drug searches. Section 5 authorises arbitrary search by defining "general drug detection":

> For the purposes of this Act, general drug detection is the detection of prohibited drugs or plants in the possession or control of a person, except during a search of a person that is carried out after a police officer reasonably suspects that the person is committing a drug offence.

Justifying search in situations where there are no reasonable grounds for suspicion amounts to an express legislative enactment of a power of arbitrary search. Its effect is to continuously treat each and every citizen of NSW as a drug suspect. As such, the legislation offends against the protection from arbitrary interference with privacy contained in Article 17 of the *ICCPR*.

Bail Act 1978 (NSW)

Persons accused of drug offences of a commercial scale are in a worse position in NSW than alleged rapists or armed robbers as far as entitlement to bail is concerned. Serious drug offences were the first offences in NSW for which there was a presumption *against* bail. The creation of a category where there is a presumption against bail is disturbing enough in relation to drug law enforcement, an area known for extreme and novel provisions. However, recent experience shows that once legislated in one area, such 'novel' incursions into traditional legal protections become a legislative template for a more widespread practice. Presumptions against bail now exist in NSW for repeat offenders for a variety of common offences.[7] Clearly, the exception is becoming increasingly less 'exceptional'.

The presumption against bail graphically contradicts the presumption of innocence at common law and in Article 14 of the *ICCPR*. It also offends against the provision in Article 7(3) of the *ICCPR* that "it shall not be the general rule that persons awaiting trial shall be detained in custody."

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7 *Bail Act 1978* (NSW) ss 8A, 8B, 8C, 9C & 9D. These extensions of the presumption against bail now cover those accused of murder, certain weapons offences, and repeat offenders in relation to serious violence or serious property offences.

Listening Devices Act 1984 *(NSW)*

This Act provides for a general protection of privacy from listening devices unless a warrant is obtained, but specifically excludes investigation of serious drug offences from the matters requiring a warrant. An indirect result of this is that no citizen can be sure that her/his private communications are not being monitored. The Act thus offends against the protection against arbitrary interference with privacy in Article 17 of the *ICCPR*.

Law Enforcement (Controlled Operations) Act 1997 *(NSW)*

This legislation was specifically drafted to overcome the decision of the High Court in *Ridgeway v The Queen*.[8] In that decision the High Court held that evidence could be excluded where, in order to establish the drug offence with which the defendant was charged, the evidence was obtained through unlawful activities by the police. The legislation renders lawful activities that for any other citizen would be a breach of the criminal law, provided they are undertaken by police in a "controlled operation". This overrides the traditional common law expectation that police must act lawfully when collecting evidence against accused persons. It effectively ratifies a style of policing that has grown alongside drug prohibition: a style whereby police entrap people into committing crimes by participating in the illegal transactions themselves.

Confiscation Of Proceeds Of Crime Act 1989 (NSW)

Criminal Assets Recovery Act 1990 (NSW)

These two enactments provide for the assessment of accused persons' assets even before their conviction. As such, they offend against the presumption of innocence. The latter Act goes further than the former by providing that assets can be seized even where a person has been tried and acquitted. The statutes deem such proceedings to be civil proceedings not criminal proceedings, thereby depriving the person whose assets are seized from the usual protections of the criminal law,

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8 *Ridgeway v The Queen* (1995) 184 CLR 19.

such as the higher standard of proof in criminal proceedings. Some commentators have also argued that these provisions effectively deprive people accused of serious drug offences of the real chance of obtaining quality legal representation by attacking the funds they need for their defence.[9]

The suppression of political dissent

Whilst drug prohibition has been a primary vehicle for the wind back of civil liberties in NSW, this process has also occurred steadily in relation to rights of expression of political dissent. The erosion of civil liberties during times of international or domestic instability is not, of course, without precedent. Recent anti-terrorism laws in NSW are symptomatic of the steady decline in civil liberties that has taken place over the past 30 years. Popular resistance to the Vietnam War in the early 1970s triggered a legislative response from the NSW Government under which general rights of assembly and protest became increasingly restricted.[10] More recently, the successful use of non-violent direct action in the battle over the logging of native forests has resulted in the introduction of increasingly draconian laws.[11] In yet another example of the way in which apparently 'novel' provisions tend to reappear, the regulations introduced to outlaw protests in NSW forests became a template for similar laws designed to prevent protests at the site of the Olympic Games in Sydney in 2000.[12]

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9 See, for example, Finkleman P "The Second Casualty Of War: Civil Liberties And The War On Drugs" (1993) 66 *Southern California Law Review* 1389, pp 1389-1452.

10 See, for instance, the *Summary Offences Act 1970* (NSW). See also the discussion of governmental responses to anti-Vietnam war activism in Brown D et al, *Criminal Laws, Materials and Commentary on Criminal Law and Process in NSW*, 3rd ed, Federation Press, Sydney, 2001, p 945.

11 See, for example, the *Forestry Regulations 1999* (NSW), reg 11, which empowers an authorized officer to remove any person who causes an "annoyance or inconvenience". This regulation specifically enables political activists to be removed from a site regardless of whether they have committed any other offence.

12 See the *Homebush Bay Operations Act 1999* (NSW) which enacted regulations almost identical to the *Forestry Regulations* mentioned above for the control of political activists at the Olympic site. See also the *Olympic Arrangements Act 2000* (NSW). For a discussion of these pieces of legislation, see Head M, "Olympic Security" (2000) 3 *Alternative Law Journal* 131.

The Homebush Bay site (where the Olympics were held) has become an ongoing venue for meetings of world governance bodies such as the World Trade Organisation. The special laws in force in both NSW forests and at the Homebush Bay site provide police and other security officials with powers to arbitrarily remove and charge any person simply on the basis that the person's presence constitutes an annoyance or inconvenience. Presumably, the expression of political views may be the kind of 'annoyance' covered by these laws.

Other general public order powers extended to police also impact upon political expression. Police powers under s 28F of the *Summary Offences Act 1988* (NSW), to give directions to individuals or groups to move on or disperse where an officer reasonably believes their presence "is obstructing another person or persons or traffic", are ideally suited to the suppression of public political dissent. Police power to grant or refuse permission to hold public assemblies also threatens the right to peaceful assembly in NSW, and the police in NSW have been selective in their administration of this power. They specifically refused permission for a peaceful march in protest against the meeting of the World Trade Organisation in Sydney in 2002. The protest later regrouped at the Homebush Bay site, where the meeting was being held, and there of course the protesters were subject to the special regulations applicable to that site. It was in relation to criticisms concerning these events that the NSW Premier made his statement in parliament denying that NSW was a "police state".[13]

Anti-terrorist legislation

The NSW Government's new anti-terrorist legislation has not been subjected to the level of scrutiny which accompanied the passage of the Commonwealth legislation through Federal Parliament. However, in some respects it goes further than the Commonwealth legislation, and it certainly goes further than the other states have. The *Terrorism (Police Powers) Act 2002* (NSW) creates sweeping new powers which permit senior police officers or the Police Minister to declare a virtual state of emergency whenever they are satisfied that a terrorist threat exists in a particular area. Once the special police powers are activated, police can search any homes, persons or vehicles in the target area without the need for a warrant. One of the most worrying

13 Note 1.

aspects of the legislation is that the courts are entirely excluded from having any role in reviewing the decision to activate the powers. Section 13 provides that authorisations and decisions by the Police Minister under Part 2 of the Act "may not be challenged, reviewed, quashed or called into question on any grounds whatsoever, before any court, tribunal, body or person in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus."

Such a provision is contrary to the whole principle of the separation of powers. There are no safeguards at all in this kind of legislation, and it begs the question of why the NSW Government is so fearful of supervision by the Supreme Court. Such an emergency power is, for example, more far reaching than the state of emergency powers activated by the Bjelke Petersen Government in Queensland in the early 1970s.

Conclusion

It is easy to see why there would be significant political resistance in NSW to the enactment of legislative safeguards similar to those in place in both Queensland and the Australian Capital Territory. Clearly, the NSW Attorney General would be left with much to explain if, as is the case in the Australian Capital Territory, the Supreme Court were empowered to declare a particular law incompatible with legislated human rights[14] or, as is the procedure in Queensland, the Parliamentary Counsel were empowered to report to the parliament on the impact of a proposed law upon "fundamental legislative principles".[15]

Whilst the Australian Capital Territory effectively legislates to give substantial effect to the *ICCPR*, the Queensland legislation defines fundamental legislative principles as "principles relating to legislation that underlie a parliamentary democracy based on the rule of law",[16] and the *Legislative Standards Act 1992* (Qld) includes the following provision:

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14 *Human Rights Act 2004* (ACT) s 32.

15 *Legislative Standards Act 1992* (Qld) ss 4 and 7.

16 *Legislative Standards Act 1992* (Qld) s 4.

> Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:
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> (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
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> (b) is consistent with principles of natural justice; and …
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> (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
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> (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
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> (f) provides appropriate protection against self-incrimination; and …
>
> (k) is unambiguous and drafted in a sufficiently clear and precise way.[17]

On the foregoing analysis NSW demonstrably falls short of each of the above standards extracted from the Queensland Act, as well as being substantially in breach of numerous articles of the *ICCPR*, and a number of traditional common law protections. Given that the Queensland legislation specifically lists these standards as appropriate to a "parliamentary democracy based on the rule of law", the question must be asked: "What kind of a state has NSW become?"

Despite Premier Carr's recent assurances that NSW is not a "police state", it is abundantly clear that a number of fundamental rights are not protected under existing NSW legislation. The problem with a term like "police state" is that it is in essence a rhetorical term seeming to mean whatever the speaker at the time intends it to mean. However, an analysis of the current state of NSW legislation clearly reveals a state in which not even the parliament considers itself morally constrained by fundamental rights accepted at common law, internationally, and in neighbouring jurisdictions. It must be recognised that even given well intentioned legislation, human rights abuses can and do occur at the hands of enforcement agencies and officers of various kinds. The Royal Commission into Aboriginal

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17 *Legislative Standards Act 1992* (Qld) s 4(3).

Deaths in Custody[18] made that fact abundantly clear. However, it must also be recognised that even on the face of its legislative enactments, NSW does not achieve compliance with established standards.

The NSW Parliament routinely enacts legislation that reverses fundamental common law principles, contradicts international standards, and falls well short of the legislative standards of neighbouring jurisdictions. The most disturbing question is just how far along its current trajectory NSW is prepared to travel. In modern NSW, citizens may lawfully be subjected to arbitrary search both in the street and in their homes. Citizens attempting to express political views in the forests or at the Homebush Bay site can be arrested on charges so ambiguous as to amount to an arbitrary power in the hands of police to suppress political expression. The drug laws contain numerous provisions reversing the onus of proof, abrogating the right to silence, and contradicting the presumption of innocence. Police "move on" powers make the right to peaceful assembly merely a privilege subject to untrammelled police discretion, and the presumption in favour of bail is being increasingly replaced by a presumption against releasing accused persons pending trial.

Legislators in NSW will no doubt continue to insist that recent legislative enactments have not produced a "police state". However, it is demonstrable that NSW has become a state in which the day to day observance of a significant number of important human rights and civil liberties standards is dependent upon official discretion rather than upon clear legislative or judicial principles. It is not the intention of this analysis to make any final judgment on the classification of NSW as a "police state". This is not only because the term has no accepted meaning. It is also because, disturbingly, NSW's current political and civil liberties trajectory shows no sign of easing, let alone reversing, in the near future.

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18 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991).