



## Précis Paper

### Removal of Rights in New South Wales

It is a discussion of recent New South Wales legislation – *Crimes (Serious Crime Prevention Orders) Act 2016*, *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016*, *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016*, *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016*, *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Inference) Act 2016*.

We plan to present alternate views to those expressed by Stephen. Stephen's presentation is very powerful. This new legislation should be spoken to by those who support it.

#### Discussion Includes

- Serious crime prevention orders
- Public safety orders
- Anti-protest legislation
- Counter terrorism legislation

## Précis Paper

### Removal of Rights in New South Wales

1. In this edition of BenchTV, Stephen Blanks (Solicitor) and Jaimee Burke (Solicitor) discuss four Bills that remove various rights which have been recently passed by NSW Parliament with very little notice and community consultation. Blanks, as President of the NSW Council for Civil Liberties, argues that these four bills are each highly oppressive and raise serious concerns for civil liberties in NSW.

*Crimes (Serious Crime Prevention Orders) Act 2016 (NSW) and the Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016 (NSW)*

2. The *Crimes (Serious Crime Prevention Orders) Act 2016 (NSW)* and the *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016 (NSW)* are two of the Acts mentioned above which relate to police powers. The *Crimes (Serious Crime Prevention Orders) Act* allows police to obtain orders from a court to control an individual's life, for example requiring them to live at a particular place, banning them from particular employment, restricting their right to movement, or imposing curfews. These orders can be obtained in circumstances where there is no suggestion that the person has committed a crime, rather there only needs to be a police concern that they may be involved in criminal activity. Moreover, police do not need to prove this involvement to the court and the court, in making the order, is not directed to consider the strength of the police case or wider community concerns about restricting people's rights, freedoms and liberties. Mr Blanks believes that this is effectively a regime which is going to make it completely unnecessary for police to go to the lengths of actually prosecuting people for offenses since they can restrict people's lives without the trouble of having to prove a case in court.
3. Under the *Criminal Legislation Amendment (Organised Crime and Public Safety) Act*, the police do not need to go to a court at all. The police themselves can impose effectively non-reviewable restrictions on a person's life, for example directing a person not to go to particular place, for a period of up to 72 hours. The orders can be imposed in such a way that the 72-hour period reoccurs weekly. This might extend to preventing someone from participating in religious services, such as attending a particular church or mosque every weekend. Mr Blanks believes that this is quite possibly one of the intended uses of the Act, since police think that particular mosques are promoting radical thinking and this is a law that effectively allows those mosques to be shut down by preventing people from attending them, all without court supervision, right of review or right of appeal. Mr Blanks suggests that it is the most radical kind of power to give to the police in a free society.

### *i. Abuse of Police Power*

4. Mr Blanks notes that when police are given powers which are capable of abuse, it creates an environment in which police corruption and abuse of power can occur. This has been seen in every State in Australia, including NSW, Queensland and Victoria, where police have had extraordinary powers. According to Mr Blanks, this is a "recipe for court corruption".

### *ii. Expected Constitutional Challenge*

5. As the two Acts are both inconsistent with fundamental freedoms such as the privilege against self-incrimination and the right to freedom of association and movement, Mr Blanks expects that there will be constitutional challenges to both laws. It will be interesting to hear the response of the High Court of Australia and determine whether these fundamental freedoms are, in fact, protected in Australia.

### *iii. Process of Passing the Laws*

6. Mr Blanks believes the process in which these laws were enacted is quite unsatisfactory. In NSW, unlike Victoria and the ACT, there is no charter of human rights and this means NSW does not have any processes for proper review of legislation as it comes through Parliament. Mr Blanks believes these laws should have been subject to community consultation, review by a joint party committee to Parliament, a report to Government after the consultation with the public and proper consideration in Parliament. Rather, the bills were not released publicly before they were introduced to Parliament, and there has been no opportunity for the community to discuss them. The Law Society of New South Wales and the Bar Association of New South Wales both issued very strong statements condemning the legislation and calling for proper consultation, but they were ignored.
7. Mr Blanks understands that the ideas in the bills came out of the police department without any signaling. The passing of the bills demonstrates that the police agenda is 'swamping' the Attorney General's responsibility for preserving justice and the rule of law. This is likely enabled by the fact that in NSW the Deputy Premier and Minister for Police is more senior in cabinet than the Attorney General.
8. Mr Blanks believes it is a very dangerous situation when Parliament passes laws at the behest of the police, while utterly ignoring or discounting the views of those bodies whose role it is to take an interest in the rule of law and proper judicial processes. The end result is that NSW is looking more and more like a police state and not a State where the rule of law applies.

#### *iv. Similar Legislation in the United Kingdom (UK)*

9. Aspects of the NSW legislation are similar to legislation which has been implemented in the UK. The UK experience is that the laws, in practice, set people up for failure with serious criminal consequences. People who have not been convicted previously of any criminal offences have these orders imposed on them that severely restrict their ability to live their lives, and the police are onto them as soon as there is any kind of breach, no matter how trivial. They can then face very serious criminal penalties, not for an actual crime, but for non-compliance with the orders that have been imposed on them. The consequences of criminalizing a section of the community which has not previously had criminal records can be quite serious, as once people start accumulating criminal records, they are excluded from more and more parts of society and dependents are similarly excluded. This leads to social and economic disadvantage of a not insignificant portion of the community as a result of the operation of these laws.

#### *v. Concerns for the Muslim Community*

10. While the Muslim community would like to see effective de-radicalisation programs that reduce community hostility to the Muslim community and increase everyone's safety, Mr Blanks believes that these laws will in contrast drive people into the hands of those who want to radicalise them and turn them against greater society. Mr Blanks notes that you cannot defend the values of a free society by taking away freedoms.

#### *vi. Other Concerns*

11. If these laws are determined to be constitutional, they highlight the significant problems Australia has without any effective and entrenched human rights legislation. Mr Blanks believes that these are the kind of powers that one might see in a state of emergency or wartime, but rather these powers are being introduced on a permanent basis, without any sunset clauses, contrary to international human rights standards. Mr Blanks thinks that this makes Australia very vulnerable to attack, isolating Australia from the international community and raising the prospect that there will be international criticism of Australia's legal system, which is all counter-productive to Australia's true interests.

#### *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Inference) Act 2016 (NSW)*

12. The *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Inference) Act 2016* (NSW) (hereafter "*Inclosed Lands Act*") greatly restricts the right to protest. One part of the Act extends the existing restrictions on protest in relation to mining activity to activities which are not true mining activities, such as coal seam gas (CSG) exploration and drilling. As CSG

drilling occurs in a very confined area and doesn't involve the same public safety issues that a full mining operation does, Mr Blanks believes that there is no justification for restricting the right to protest in relation to CSG other than to give commercial advantage to CSG explorers and exploiters. It is very disturbing that the legislation is designed to protect private business interests against expressions of public opinion against their activities as one thing the Government should be absolutely neutral on is disputes between public and private interests.

13. In addition, the *Inclosed Lands Act* gives police officers extensive rights to prohibit people from going to particular places, to search people, to confiscate equipment and items from people. These police powers can even be used against people who are on private land with permission of the owner of the private land and are used in a wide variety of circumstances. For example, there have been regular protests against the West Connex project in Sydney recently and the latest tactic has been for the building contractors to erect a fence around the protestors and then have them arrested for being in enclosed lands, since the definition of enclosed lands is land enclosed by a fence. This demonstrates the lengths that police will go to in order to shut down legitimate protests. Mr Blanks hopes that this will be challenged in the court system. By restricting the right to protest, instead of providing people who are unhappy with a particular issue a fair opportunity to express their argument in a public way, the result is going to be more civil disobedience.
14. Additionally, there is potential for the government to be embarrassed by any charges or arrests that are brought. For example, Bob Brown was recently arrested in Tasmania for protesting a forestry issue against laws which were specifically brought in to protect forestry interests from protest, and he launched a High Court challenge against the laws. Without explanation, the charges resulting from his arrest were dropped. Thus in Tasmania, the laws remain on the statute books but they could well be unlawful because they infringe the constitutional and private freedom of political communication and a challenge to the High Court would very likely succeed, yet the government is not prepared to enforce the laws in accordance with their terms and simply drops the charges against a high profile person like Bob Brown. Mr Blanks believes it is highly unsatisfactory that laws are on the books which potentially criminalise people and yet the government does not prosecute.
15. The Council of Civil Liberties has always been concerned about the right to protest and the need to ensure that laws provide a fair and proper opportunity for protest to occur as there will always be situations where members of the public want to assemble in order to protest against a particular activity or issue.

16. Mr Blanks notes that it is only "early days" as the laws have only just been passed in NSW and there has not been any police action under the laws as far as he knows. Nonetheless, many are on the lookout for a case which is viable for a High Court challenge.

*Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016 (NSW)*

17. Since 2004, the police have had a power to detain people where there is an imminent threat of a terrorist attack and the detention is necessary to prevent the attack from occurring. Mr Blanks believes it is a very draconian power for police to be able to remove people off the street and place them into custody without criminal charges and without having to prove to a court that the removal is necessary. One of the safeguards against the abuse of that power was that it provided for preventative detention only, without the ability of the police to question the detainee.
18. This power has been little used since it was created. In fact, a report by the national monitor of intelligence security legislation recommended that this power be dropped since it is little used and is of little utility since it does not enable the police to advance their knowledge of the situation by being able to ask questions. However, instead of following that recommendation and dropping this draconian power, the decision was made to give police the power to question those people who are detained. Thus, the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016 (NSW)* effectively removes the safeguard that was contemplated for the power in 2004.
19. Police can now detain someone and question them for up to 14 days. Although after 4 days police need approval from a court to continue, the courts are put in a situation where they will pretty automatically renew the detention if police ask for it. The Act creates an offence not to answer questions and one might expect the questions to involve the activities of family members and close friends. These people who are detained are without any right not to answer questions and the privilege against self-incrimination does not apply. In addition, the power can be exercised in relation to people as young as 14. Thus, in practice, police can potentially take in a 14 year old from school, bring them into detention without the knowledge of their family and question them about their family members. Mr Blanks believes that this is the most dangerous type of legislation, yet it has been passed through the NSW Parliament without any public discussion.
20. This legislation is contrary to the Convention on the Rights of the Child that Australia has signed up to, as well as being contrary to a whole list of other rights in the International Covenant on Civil and Political Rights. Mr Blanks notes that if there was human rights protection in Australia and not such a primacy of police over those parts of government responsible for the integrity of the legal system, this type of legislation would never have

been passed. Mr Blanks believes that we will see these powers being used and abused, and every use of these powers will alienate a section of the community, which likely helps those groups who wish to encourage radicalisation.

21. Mr Blanks notes that it is very difficult to know what this legislation was intended to achieve other than an avoidance of all the normal processes that the criminal justice system has put in place to ensure people who have engaged in criminal activity are properly brought before the judicial system, given the right to defend themselves fairly, and are acquitted if the State cannot prove its case against them. This legislation completely undermines that process as the criminal justice system does not have to be involved.

## **BIOGRAPHY**

### Stephen Blanks

President, NSW Council of Civil Liberties – Sydney

Stephen Blanks was admitted as a Solicitor in 1985. He has been the Principal of SBA Lawyers since 1991, specialising in corporations law, intellectual property and commercial litigation. He has been president of the NSW Council for Civil Liberties since October 2013, after previously serving as secretary from 2005.

### Jaimee Burke

Solicitor, AR Conolly & Company Lawyers – Sydney

## **BIBLIOGRAPHY**

### Legislation

*Crimes (Serious Crime Prevention Orders) Act 2016* (NSW)

*Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW)

*Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Inference) Act 2016* (NSW)

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