



The right to protest

By Benjamin Baxter



All Australians should have the right to 'annoy', protest, or otherwise express their views with respect to international special events such as APEC 2007 and World Youth Day.

In the growing political concern over issues such as climate change, global poverty, war, same-sex marriages, homosexuality, world peace and inequality, Australian cities such as Melbourne and Sydney have, and will continue to attract, special events with large demonstrations and, as a consequence, significant media coverage. The attitudes represented in Australian Parliament, within the Australian police force and by the Australian media toward protest at large-scale special events shape Australian public confidence in the general right to protest.

The lack of an *explicit* right to freedom of communication in Australia has generated a prevailing negative attitude toward the right to express views at these special events, which is in turn discouraging Australians from protest.

THE RIGHT TO EXPRESS VIEWS IN PUBLIC

The right to express views in public is of great importance to Australians. The right to express one's opinion in public is a mechanism of social progression. It initiates and sustains the evolution of ideas. John Stuart Mill (1806-1873), an esteemed 19th century philosopher, saw the 'evil' in 'robbing the human race' of this mechanism.¹ He said:

'[i]f the opinion is right ... [those finding the opinion disagreeable] ... are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception & livelier impression of the truth, produced by its collision with error.'²

Australian protests offer a forum for the expression and criticism of ideas. In the Constitution debates of 1897, Sir Edmund Barton resolved that the purpose of the Australian Constitution would be 'to enlarge the powers of self-government of the people of Australia'.³ Despite the lack of this exact wording within the Constitution, the High Court of Australia has acknowledged by implication that '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates'.⁴ Moreover, in a recent ruling concerning a protest at APEC 2007, the Supreme Court of NSW acknowledged '...the very substantial public interest in the staunch maintenance of

the rights of lawful assembly and freedom of speech...' and stated that:

'a certain degree of disruption and public inconvenience is the price that we must pay as a free society to enable fundamental rights to be exercised ... [and that it] ... would ... [not] ... be right to prevent an assembly ... [just] ... because absolute safety to persons, or property, cannot be guaranteed'.⁵

In 2008, the Federal Court of Australia ruling concerning the World Youth Day 2008 special event acknowledged the comments of Blackstone as to the paramount importance of the 'right to free speech'.⁶

With growing Australian interest in issues such as climate change, global poverty, war, same-sex marriages, homosexuality, world peace and inequality, Australians need a forum for public discussion. The right to freedom of communication is of paramount importance to Australians yet, troublingly, this importance is not translated into the attitudes of the Australian Parliament, the Australian police and the Australian media.

AUSTRALIAN PARLIAMENT

The Australian government ratified the International Covenant on Civil and Political Rights (ICCPR) on 13 August 1980, but has failed to implement it into domestic law. Australia is thus in contravention of international law⁷ being without an *explicit* right to freedom of communication. The lack of a clear right to freedom of communication undermines the respect it commands from the Australian Parliament.

Recently, the NSW Parliament expanded police powers for APEC 2007.⁸ It did not adequately address the need for rigorous discussion in the debate over the *APEC Meeting (Police Powers) Bill 2007*. The Bill was passed, despite the failure to address the human rights concerns of both the Greens and the Legislative Review Committee.⁹ The majority of the House was content to enact maximum measures of safety for the people of Sydney, without precise justification, with respect to the importance of the right to freedom of communication.¹⁰ Michael Callacher saw the *APEC Meeting* >>

(*Police Powers*) Bill as ensuring that 'protestors will not get within a bull's roar of APEC delegates, who will not hear or see protesters or even know they exist'.¹¹ He also stated that the declaration of a regional free day was to ensure 'that as many people as possible stay out of Sydney'.¹² Clover Moore also stated that the expanded police powers 'provide reason for many to actively avoid declared areas'.¹³

Recently, an unconstitutional regulation criminalising acts causing 'annoyance' was authorised for World Youth Day 2008.¹⁴ In a rare action against legislative power, the Federal Court of Australia struck out this regulation, stating that there is no way 'causes annoyance' ... can be read down to save it as a valid expression of regulating power.¹⁵ In addition, the Australian police was not given clear interpretative instruction, as evidenced by a senior police officer's statement that police had not intended to use the annoyance powers because they had not been told how to interpret them.¹⁶

The lack of rigorous parliamentary discussion prior to the implementation of restrictive policy, along with the blatant enactment of an unconstitutional statutory instrument expanding police powers, express a lack of respect for the internationally and constitutionally recognised right to express views in public and, in turn, depreciates the importance of the fundamental right of all Australians to protest, without fear of recourse.

POLICE CONDUCT

Police are abusing the legislative powers conferred upon them for special events, demonstrating a lack of respect for the right to protest.

A report recently observed that:

'...the behaviour and strategies demonstrated by police at the World Economic Forum protests (Melbourne 2000), the World Trade Organization meeting (Sydney 2002), the Forbes Global CEO Conference (Sydney 2005) and ... the G20 protests do not bode well for the ability of Australian citizens to exercise their right to protest peacefully without at least some risk of force being applied against them by police.'¹⁷

The same report compiled the observations of Human Rights Observers, identifying gross abuses of police powers in contravention of international standards at the G20 economic conference in Melbourne in 2006.¹⁸ The report cited inappropriate baton charges leading to serious injury,¹⁹ arbitrary arrest and aggressive police tactics,²⁰ belligerent police attitudes,²¹ indifference toward protestor injury²² and complete lack of interest or co-operation with the Human Rights Observers.²³

Another report examined police conduct during the APEC summit in 2007 and recorded similar abuses.²⁴ Indeed, a much-publicised stunt by the popular TV series, *The Chaser*,²⁵ demonstrated that the police did not fully understand their extended APEC powers.²⁶

Police attitudes at special events have demonstrated a lack of concern for the welfare of protestors and protest. In a recent confidential settlement, \$700,000 was paid by the Victorian government to protestors injured by police

heavy-handedness at the World Economic Forum in Melbourne 2000.²⁷

These incidents demonstrate a lack of respect shown by police of their legislative powers exercised during public gatherings.

THE MEDIA

The Australian media demonstrate a lack of respect for the right of Australians to protest. In his 2005 report into the use of police emergency powers during the Cronulla riots, the Ombudsman noted the contribution of the media in fuelling the riots.²⁸ Similar claims of inflammatory media coverage in the lead-up to special events such as APEC 2007 have been made.

In the lead-up to APEC, the media released articles describing Sydney as soon to be under 'lock down';²⁹ that prisons were being cleared to make room for arrests during the protests;³⁰ and that 'mayhem involving every major protest group in Sydney [causing] mass CBD disruption' would ensue.³¹ This negative media portrayal of demonstrations continued until after the APEC event, with media emphasis on police brutality toward protestors.³²

Citing coverage of the G20 summit, the director-general of ASIO warned that protest incidents always make for sensational TV footage, which can at times distort the magnitude of the incidents.³³

Indeed, at G20 2006 it was observed that, despite the plethora of innocent protest activities from street theatre to art shows, from workshops to performances, it was the relatively insignificant violent activities that dominated the media.³⁴

Media preoccupations with the negative aspects of a demonstration detract from the peaceful aims of the majority of Australian protestors at special events.

THE IMPORTANCE OF THE RIGHT TO PROTEST

Unimpeded protest is of utmost importance in Australian society. A recent American study has indicated that protests impact dramatically on whether policies will be passed in representative government.³⁵ The negative attitude of Australian institutions toward protest at special events is suppressing and, in turn, discouraging Australians from general protest.

The number of protestors attending G20 2006 and APEC 2007 was much lower than expected.³⁶ The significant media exposure at special events has a dramatic effect on the right to express views in public. Prominent sociologist, Hugh McKay, when commenting on the Australian protest culture in the wake of APEC 2007, observed that Australians:

'...now realise there's going to be much, much tighter control over any attempt at public protest and in a way that takes the edge off it. If it's going to be too controlled, too regulated, then it's hardly a protest at all.'³⁷

Negative attitudes toward protest at special events cause a climate of control, suppression and, in the case of APEC, fear to surround general protest.

Indeed, violence – and no doubt, the skewed depiction of violence in protest – runs counter to the socially progressive

aim of protest. Without peaceful non-violent protest, the broadest cross-section of society cannot participate, the appeals to timeless national, cultural and human values cannot be made, and ordinary citizens inevitably feel threatened by the process.³⁸

Protesters who actively seek to engage violence at peaceful protest discourage Australians from exercising their legitimate right to express views in public by contributing to the reputation of protests as violent events. However, while protesters themselves share some of the blame for the violence and the climate of fear engendered, they are a small part of the problem. At APEC 2007, of the 5,000 demonstrators, 17 arrests with 11 charges faced were made.³⁹ At G20 2006, of the 3,000 demonstrators, 70 charges were made.⁴⁰ The attitudes that predominate in the institutions of the Australian Parliament, Australian police forces and the media are the major concern.

Parliament has the ability to drive the enactment of restrictive laws, such as the *APEC Meeting (Police Powers) Act 2007* and *World Youth Day Regulation 2008*, 'taking the edge of protest'.⁴¹ The excessive use of police force naturally suppresses protest or sparks violence. The subsequent media preoccupation with violence in turn fuels the depiction of protests as something to avoid.

CONCLUSION

Australians should have the right to protest. The right to protest at special events shapes the right to general protest. The prevailing attitude of the Australian Parliament, the Australian police, the Australian media and the Australian protesters toward protest at special events is currently very negative.

In the wake of the Constitutional ruling striking out the 'annoyance' regulation for World Youth Day, it was observed that the *ratio decidendi* was the need for greater legislative clarity in the enactment of restrictive policy, rather than greater legislative respect for the right to freedom of communication.⁴² The ruling was viewed as aiding the restriction on human rights rather than upholding them.⁴³

The lack of an explicit right to freedom of communication in Australia is generating a grave lack of respect toward the right and, in turn, 'robbing' Australia of a fundamental mechanism of social progression. ■

Notes: **1** John Stuart Mills, *On Liberty* (1859) at 15. **2** *Ibid.* **3** National Convention Debates, *Official Report of the National Australasian Convention Debates* (1897) at 17. **4** *Lange v Australian Broadcasting Corporation* [1997] HCA 25 at 40 (Gleeson CJ). **5** *New South Wales Police Commissioner v Bainbridge* [2007] NSWSC 1015 at [28] (Adams J). **6** *Evans v State of New South Wales* [2008] FCAFC 130 at [78]. **7** Combined Community Legal Centre Group (NSW), Kingsford Legal Centre *Protest, Protection and Policing: The Expansion of Police Powers and the Impact on Human Rights in NSW* Final Report at 10. **8** *Ibid.* at 8. **9** *Ibid.* at 28. **10** *Ibid.* at 30. **11** Michael Callacher, 'Second Reading APEC Meeting (Police Powers) Act 2007,' NSW Legislative Council *Hansard* and Papers, 21 June 2007 at 1504. <[http://www.parliament.nsw.gov.au/prod/parliament/hansard/nfs/V3ByKey/LC20070621/\\$File/541LC014.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hansard/nfs/V3ByKey/LC20070621/$File/541LC014.pdf)> accessed on 29 September 2008. **12** *Ibid.* at 1505. **13** Clover Moore, 'APEC Meeting (Police Powers) Bill 2007 Agreement in Principle,' NSW Legislative Assembly *Hansard* and Papers, 19 June 2007 at 1240. **14** *World*

Youth Day Regulation 2008 (NSW) cl 7(1)(b). **15** *Evans v State of New South Wales* [2008] FCAFC 130 at [83]. **16** Malcolm Brown, 'Condoms all around as annoying law dashed', *The Canberra Times* (16 July 2008). <<http://www.canberratimes.com.au/news/national/national/general/condoms-all-round-as-annoying-law-dashed/811699.aspx>> accessed 28 October 2008. **17** Federation of Community Legal Centres (Vic) Inc, *Human Rights Observer Report on the G20 Protests* (2007) at 6. **18** *Ibid.* at 24. **19** *Ibid.* at 20-23, 33. **20** *Ibid.* at 24-25, 27. **21** *Ibid.* at 29-31. **22** *Ibid.* at 32. **23** *Ibid.* at 36. **24** Combined Community Legal Centre Group (NSW), Kingsford Legal Centre, above n7, at 22-23. **25** Tracee Hutchison, 'Funny for some but reality for others' *Sydney Morning Herald* (September 8, 2007) <<http://www.theage.com.au/news/opinion/.../09/07/1188783492136.html?page=fullpage>> accessed on 27 September 2008. **26** *Ibid.* **27** ABC Radio, 'Vic Govt settles court case with injured S11 protesters', *The World Today*, 5 March 2007 <<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/worldtoday/content/2007/s1863241.htm>> Accessed 29 September 2008. **28** NSW Ombudsman *Review of Emergency Powers to Prevent or Control Disorder* (2007) at 68 <<http://www.ombo.nsw.gov.au/publication/PDF/Other%20Reports/Review%20of%20Emergency%20Powers%20to%20Prevent%20or%20Control%20Disorder.pdf>> accessed 2 October 2008. **29** AAP 'Police Defend Lockdown,' *The Sun Herald* (9 September 2007) <<http://www.smh.com.au/news/apec/police-defend-lockdown/2007/09/09/1189276520316.html>> accessed on 19 October 2008. **30** Kara Lawrence, 'Prisons emptied to make way for APEC arrests', *The Daily Telegraph* (24 August 2007). <http://www.news.com.au/dailytelegraph/story/0,22049,22295866-501371> accessed on 19.10.2008 **31** Kara Lawrence, 'APEC Protestors Target Sydney', *The Daily Telegraph* (22 August 2007) 2008, at: <<http://www.news.com.au/dailytelegraph/story/0,22049,22284976-5013719,00.html>> accessed on 19 October. **32** Danielle Teutsch and Daniel Dasey, 'Protesters no match as police rule streets', *The Sydney Morning Herald*, (9 September 2007) at: <<http://www.smh.com.au/news/apec/protesters-no-match-as-police-rule-streets/2007/09/08/1188783554824.html>> accessed on 19 October 2008. **33** Australia Security Conference, *The APEC 2007 Threat Environment* (2006). <http://www.asio.gov.au/media/Contents/APEC_security_conference_2006.aspx> accessed 01.10.2009. **34** Victoria Stead, 'G20 The Legal Aftermath', *Arena Magazine*, 94 (February 2007) at 34. **35** Jon Agnone, 'Amplifying Public Opinion: The Policy Impact of the US Environmental Movement', *Social Forces*, (June 2007) **36** Marc Moncrief 'Protesters fizzle as G20 ends' *The Age* (19 November 2006). <<http://www.theage.com.au/news/national/police-brace-for-more-protests/2006/11/19/1163871250442.html?page=fullpage#contentSwap1>> accessed 21 October 2008; Marc Moncrief, Dan Harrison 'G20 protesters throw urine' *The Age* (18 November 2006) <<http://www.theage.com.au/news/national/g20-protesters-throw-urine/2006/11/18/1163266813994.html?page=2>> accessed 21 October 2007. **37** ABC Radio, 'Sounds of Summer, Dissent on the Street', *A Current Affairs Special*, 26 January 2008. <www.abc.net.au/am/content/2007/s2145951.htm> accessed 09 October 2008. **38** Bill Moyer, cited by Ian Cohn, 'Second Reading APEC Meeting (Police Powers) Act 2007,' NSW Legislative Council *Hansard* and Papers, 26 June 2007, at 1664. <[http://www.parliament.nsw.gov.au/prod/parliament/hansard/nfs/V3ByKey/LC20070621/\\$File/541LC014.pdf](http://www.parliament.nsw.gov.au/prod/parliament/hansard/nfs/V3ByKey/LC20070621/$File/541LC014.pdf)> **39** David Braithwait, 'Dart lodged in head, court told' *The Sydney Morning Herald* (10 September 2007). <<http://www.smh.com.au/news/apec/dart-lodged-in-head-court-told/2007/09/10/1189276633584.html>> accessed 27 September 2008. **40** Australia Security Conference, above n33. **41** ABC News, above n38. **42** Nicola McGarrity on ABC Radio, *The Law Report*, 23 August 2008. <<http://www.abc.net.au/rn/lawreport/stories/2008/2308087.htm>> accessed 26 October 2008. **43** *Ibid.*

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