

8 August 2008

The Ombudsman
Level 24 580 George Street
Sydney NSW 2000

Dear Sir/Madam,

Re: Complaint re Misuse and Abuse of Emergency Lock Down Powers by NSW Police

On 13 July 2008, NSW Police inappropriately authorized the use of emergency "anti-riot" powers against Climate Camp protesters in Newcastle. Not only was the authorisation of the powers unjustified, the police applying these powers used both excessive and unlawful force when policing the event.

The Climate Camp Legal Support Team are a collective formed to provide legal information and support to protesters engaged in actions over the 10-15 July 2008 Climate Camp in Newcastle NSW.

We are composed of lawyers, law students and volunteers.

We write to lodge a complaint to the NSW Ombudsman about the decision on 13 July 2008 to authorise the use of Emergency powers under Part 6A of the *Law Enforcement Powers and Responsibilities Act 2002*, ("the Act") against Climate Camp protesters as well as to complain about the policing strategies adopted by the NSW Riot Squad during the event.

Under section 87O of the *Act*, the NSW Ombudsman is required to scrutinise the exercise of powers conferred on police officers under Part 6A and understand that this requires scrutiny of both the decision to authorise the powers under Part 6A and then the subsequent conduct of officers once the authorisation is made.

We request that you take our concerns into account in your scrutiny of this incident.

We understand that other complaints may be submitted to your office by individuals and groups and we request that these complaints be each given weight in your consideration and that this complaint be treated as supplementing other complainants.

Purpose of the Climate Camp

According to the Climate Camp website, the purpose of the camp was to protest against the government's inaction on cutting coal exports. The climate camp website reads as follows:

"Coal exports are Australia's biggest contribution to climate change. The greenhouse pollution from our coal exports exceeds all of our domestic pollution combined (that is, the pollution we produce within our borders – our official contribution to climate change). Every power station, every landclearing operation, every car, truck, train, and bus, every source of greenhouse pollution in Australia combined is eclipsed by the pollution from our coal exports.

Newcastle, in NSW, is home to the biggest coal exporting facility in the world, with a capacity of about 100 million tonnes of coal per year. As the world faces a climate change emergency, it is imperative that Australia begins to phase out coal, but the exact opposite is happening. Every coal port in Australia is upping its output, with support from all levels of government, and both major political parties. Last year the NSW Government gave coal companies permission to more than double their exports from Newcastle to 211 million tonnes per year. This decision was made despite a major community campaign against the expansion – a campaign which is only growing stronger since it was approved."¹

The Climate Camp website continues:

"Peaceful direct action and civil disobedience are a fundamental part of our democracy. The reason we have weekends is because of labour movement protests. Women have the vote because the Suffragettes took to the streets. The anti-slavery movement, Gandhi, Martin Luther King and the civil rights movement all used civil disobedience to win fundamental freedoms that we now take for granted. It is now clear that people power will be the only effective counterbalance to the vested interests of the coal and fossil fuel industry who are effectively writing climate change policy and who are threatening our future. After twenty years of inaction, non-violent direct action increasingly becomes a moral duty."²

Negotiations between Police and Climate Camp Organisers

NSW Police were well informed about the intentions of the climate camp through police liaison, the climate camp website and through their own covert surveillance.

Police were informed of the:

- ❖ Non-violent, family nature of the protest.
- ❖ The open intention for non-violent direct action to be used as a strategy by some protesters to communicate their serious concerns about government inaction on impending climate catastrophe.

¹ <http://www.climatecamp.org.au/why-newcastle-exports>

² <http://www.climatecamp.org.au/why-direct-action>

Legal Protection for Protesters

Protection under International Law

Peaceful protest is a legitimate form of political expression protected under the *International Covenant of Civil and Political Rights*. Australia became a signatory to this covenant in 1980. Rights relevant to protesters include:

- Article 9, the right to liberty and security of the person,
- Article 12, the right to liberty of movement,
- Article 17, the right to privacy and to not be subject to unlawful attacks on honour or reputation,
- Article 18, freedom to manifest ones beliefs,
- Article 19, right to hold opinions without interference,
- Article 21, right of peaceful assembly
- Article 22, freedom of association,
- Article 25, the right to directly take part in the conduct of public affairs.

Constitutional Protection

Freedom of political expression is also an implied right under the Commonwealth Constitution: *Coleman v Power* [2004] HCA 39, *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

NSW Legislation

Under section 197 *NSW Law Enforcement (Powers and Responsibilities) Act 2002*, section 197 Police have the power to give a direction to a person in a public space to move if the police officer believes on reasonable grounds that the person is, for example causing an obstruction or fear in person of ordinary firmness. Failure to comply with a direction results in the person committing an arrestable offence.

Under section 200 of the *Act*, the power to give a direction to a person in a public space does not authorise a police officer to give directions in relation to:

- (a) an industrial dispute, or
- (b) an apparently genuine demonstration or protest, or
- (c) a procession, or
- (d) an organised assembly.

Under the *Summary Offences Act 1988* an assembly can become authorised by given notice in writing to the police commissioner of the proposed route of the procession and the numbers of people anticipated as being in attendance.

Authorisation protects participants from facing obstructing traffic charges.

It also ensures that the participants, in exercising their democratic rights to protest are protected from otherwise operating police powers to direct people in public spaces.

Though its police liaison, climate camp organisers obtained authority from the police and were thus protected from obstruction charges and police directions.

Emergency Lock-Down Powers

In response to the notorious Cronulla Riots in Sydney, December 2005, on 15 December 2005 NSW Parliament introduced emergency crowd control police powers. His Honourable John Della Bosca, Member of Parliament referred to the powers as being intended to deal with “thugs and hotheads”. In the same speech, Della Bosca stated, “these powers are not intended for use in respect of peaceful protests, union demonstrations and the like.”³

In the NSW Ombudsman’s September 2007 “*Review of Emergency Powers to Control Disorder*”⁴ your office stated, in relation to the effect of this law on protests: (footnotes omitted)

“In the Parliamentary debate on the Part 6A emergency powers, there were unequivocal assurances that they would not be used to police peaceful rallies and demonstrations. The Premier’s opening remarks noted:

These powers are not intended to be used in respect of peaceful protests, union demonstrations and the like.

“The Special Minister of State repeated these assurances in the Legislative Council and, in response to arguments that police could perceive some peaceful demonstrations as disorderly or use the power to quell civil disobedience and industrial disputes added:

...the Government has made quiet clear in the second reading speech that these new powers are in no way designed to target any peaceful protest, union marches, or the like. I reiterate that to put at rest the concern in the mind of the honourable member and others who might be concerned about that aspect of the legislation.

“The Legislative Review Committee, whose role includes considering whether legislation introduced by Parliament unduly trespasses on personal rights and liberties, reviewed Part 6A after it was introduced, and later reviewed the Crimes Legislation Amendment (Gangs) Act 2006 that inserted

³ <http://www.parliament.nsw.gov.au/Prod/Parlment/Hansart.nsf/V3Key/LC20051215006>

⁴ <http://www.ombo.nsw.gov.au/show.asp?id=447>

into Part 6A the section 87MA power for police to disperse groups. The Committee found that the right to peaceful assembly and the right to privacy were affected, and referred two questions to Parliament for further consideration:

- ❖ *Whether the terms of the legislation unduly trespass upon the right to peaceful assembly, and*
- ❖ *Whether the absence of any reasonable suspicion requirement in the search powers constitutes an undue trespass on a person's right to privacy.*

“The Committee noted that the right to peaceful assembly is a ‘right established by long custom at common law’ and recognized by statute in NSW. It is also a core principle in international law.

“In its submission on whether the powers could be used to police protests and assemblies, the NSW Police Force argued that the current provisions effectively precluded this possibility:

It is difficult to see how a peaceful assembly could ever fit into the definition of “public disorder”. A peaceful assembly could never be categorized as a ‘riot or other civil disturbance giving rise to a serious risk to public safety’. The limited occasions on which the powers have been used and the circumstances in which they were, indicate the fear of police misuse to deal with legitimate protests has not been realized.

“The police spokesperson for public order issues added: “Peaceful assemblies do not pose a serious risk unless such assembly becomes unlawful.”

“The NSW Police Force guidelines for officers considering the appropriateness of seeking or granting an authorization include the following advice:

The second reading speech makes it clear that ‘public disorder’ is not intended to include peaceful protests. It is restricted to riots or similar situations. The mere fact that there are a lot of people at an event such as a football match, where there may be fights between opposing fans, would not be sufficient to amount to a large-scale public disorder.”

Application of the emergency powers to the Climate Camp procession on 13 July 2008

Prior to the protest, the police liaison team understood police had no intention to use lock down powers.

A Commissioner, Deputy or Assistant Commissioner can give an authorization declaring a lock down if he/she

(a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and

(b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder.

Once authorisation is granted and the emergency powers are operable, police have the power within the area covered by the authorization to:

1. Create a road block
2. Stop and search vehicles
3. Request identities
4. Seize and detain things including mobile phones if such seize will assist in controlling the public disorder
5. Give a direction to a person or a group to disperse immediately.

Under section 87H of the *Act* the powers must be exercised for the purpose of the authorisation. Under section 87E the purpose of the exercise of the powers is to prevent or control a public disorder. Under 87D the public disorder is referred to as “large scale”.

On Sunday 13 July 2008, just before the march, lead by children and parents, was to take off, protest organizers were informed that police had given an authorization and that the area was subject to lock down powers.

It is submitted that the authorisation obtained by police against the Climate Camp March is contrary to the intentions of the Parliament of NSW and undermines the legislative and international human rights protections in the International Covenant on Civil and Political Rights that apply to protesters.

The Climate Camp march was lawful, non-violent and peaceful. There was nothing in the march that could meet the descriptions of “large scale public disorder” or a riot that could be used as a basis for lawfully obtaining the authorisation.

While it was the stated intention of some of the protesters to cross onto the train tracks, police had sufficient powers to line the fence and act when trespasses occurred.

The characterization of the procession itself as a large scale public disorder, or threat of one, is an extraordinary leap beyond the intention and scope of the *Act*, and is a clear example of the fears raised during Parliament question time about prospect for police misuse of the powers coming into reality.

If a person commits an offence, then normal arrest powers are available.

Anticipated acts of peaceful and non-violent civil disobedience are not a riot, or of a nature against which emergency powers were intended to be invoked.

The *Act* must be read as consistent with Australia's obligations under international law: *Coco v R* [1994] HCA 15, and may not abrogate fundamental rights and freedoms unless clearly intended to do so.

Protesters who did not cross onto the tracks committed no offence. Those who did, did so peacefully, without violence and for the purpose of drawing attention to the failure of government to act to avert dangerous climate change.

By authorizing the emergency powers, police subjected citizens exercising their democratic right to protest and assemble to the risk of arbitrary searches, directions to disperse, removal of phones, and to provide their identity. Ordinary citizens became subject to laws intended for "thugs and hotheads."

It is a great concern to us that these powers can be authorized without judicial oversight. Without such oversight, the potential for abuse, such as in this case is great. It is worth noting that even under the anti-terror laws, police must obtain authority from the Supreme Court before the additional powers are available.

How did the police use their powers?

The people participating in the march were surrounded by police. At the back of the march, police formed a row and using their horses and themselves exercised force to contain and push demonstrators along.

Numerous people reported being pushed and shoved by police if they stopped moving. Some protesters lay down on the ground in protest against the police tactics.

They were pushed and shoved until they moved on again.

<http://www.youtube.com/watch?v=N3ZaRbLdo8I>

People who had stopped to perform circus tricks were forced onwards. The same physical pressure was applied to people stopping for water or to set up their drums. The pressure applied was both dangerous and frightening.

Is the police use of force in these situations justified under law?

Under 87MA of the Act (the emergency powers), Police are authorized to disperse groups. The section reads as follows:

(1) If a group of persons are assembled within an area that is the target of an authorisation, a police officer may give a direction to those persons, or to any of them, to disperse immediately.

(2) For the purpose of complying with section 201 (1) (c), the police officer giving the direction must inform the person or persons to whom the direction is given that the direction is given for the purpose of preventing or controlling a public disorder.

(4) A person must not, without reasonable excuse, refuse or fail to comply with a direction given in accordance with this section.

Maximum penalty: 50 penalty units.

(5) A direction under this section is **to be given orally** and, if given to a group of persons, is to be given in such a manner as is likely to be audible to all persons in that group, or to as many of them as practicable.

(6) If a direction under this section is given to a group of persons, it is not necessary for the police officer to repeat the direction, or to repeat the information and warning required to be given under section 201, to each person in the group.

(7) However, just because the police officer is not required to repeat any such direction, information or warning does not in itself give rise to any presumption that each person in the group has received the direction, information or warning.

This section permits police to orally direct a person to disperse to prevent a public disorder.

Rather than directing people to disperse, police were acting to contain and force people on. Furthermore they were not simply giving oral directions for people to walk, they were **using force** to get people to walk on.

There is no power in the provisions for the police to push people to continue moving in a protest.

Indeed the constant pushing by police itself constituted a public disorder, and a considerable safety risk. This is particularly the case given the use of police horses.

The force used in these circumstances constitutes an assault and an infringement of freedom of movement, liberty and assembly.

Did the police have power to push protesters under the common law “breach of the peace” provisions?

Breach of the Peace

Under the common law, police have a duty to prevent breaches of the peace. Section 232 of the *Act* authorises police to use force to exercise a duty.

In *Kuru v The State of NSW [2008] HCA 28* the High Court noted in *obiter*:

“Both parties in the present case accepted that police officers in New South Wales are duty bound to “keep the peace”. A statutory source of that duty

was not identified in argument but it may be that it is to be found in the then provisions of regs 8 and 9 of the Police Regulation 2000 (NSW), coupled with ss 6 and 201 of the Police Act. Regulation 8 prescribed a form of oath or affirmation to be taken by a police officer under s 13 of the Police Act. The prescribed form of oath or affirmation contained a promise to "cause Her Majesty's peace to be kept and preserved", and a promise by the declarant to "prevent to the best of my power all offences against that peace". Regulation 9(1) provided that police officers were "to comply strictly with the Act and this Regulation and promptly comply with all lawful orders from those in authority over them". Section 6 of the Police Act stated the mission and functions of the Police Service. Those functions included providing police services for New South Wales and "police services" was defined in s 6(3) as including "services by way of prevention and detection of crime" and "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way". And as noted earlier, s 201 of the Police Act made it an offence to neglect or refuse to carry out any lawful duty as a police officer."

It is submitted, that police also have an implied duty to protect and promote individual rights and freedoms, including the constitutional right to freedom of political expression.⁵ The European Court of Human Rights has stated of the right to freedom of expression:

"It is the duty of member states to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully" Pfattform *Arzte für das Leben v Austria* (1988) 13 EHRR 2004, para 35.

Where police duties are in conflict, police must act with great caution to ensure their actions are lawful.

It is our submission that police have no power, under common law breach of the peace provisions, to move a non-violent, protester who is exercising their fundamental right to freedom of political expression.

The common law term "breach of the peace" refers to an offence that operates in circumstances in which harm occurs AND additionally where harm is imminently and reasonably anticipated. This 'preventative' offence, developed through a long line of decisions by courts in the United Kingdom was set out in *R v Howell*⁶ and accepted in Australia⁷ as follows:

"..there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of

⁵ Other sources of rights include Article 19 & Article 21 of the ICCPR.

⁶ [1982] QB 416

⁷ *Innes v Weate* [1984] TR 14 at p 22 per Cosgrove J,

the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant.”⁸

Breach of the peace is an offence frequently cited to justify arrests during protests⁹, but is equally used as a basis for arrest in private conflicts¹⁰.

The offence received a recent analysis in a case decided in the House of Lords on 13 November 2006 of *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, where the court made it resolutely clear that a breach of the peace had to be both reasonably and more importantly, “imminently” apprehended in the mind of the person who does something about it before it becomes an actionable offence.

How does Breach of the Peace apply to non-violent protesters?

Is interesting to speculate how non-violent protesters, walking in a procession neither assaulting, threatening to assault nor damaging or threatening to damage could in anyway trigger this offence.

In *Laporte*, the House of Lords stated:

“Any prior restraint on freedom of expression calls for the most careful scrutiny.”¹¹ “...where ever possible, the focus of preventive action should, on any view, be on those about to act disruptively, not on innocent third parties.”¹²

In *Innes v Weate*, the Tasmania Supreme Court stated:

“[The] power to restrict liberty only arises when it is or appears to be necessary to do so. It is necessary to restrict only when the risk of injury to property or persons, measured by the twin tests of probability of injury and the nature of the threatened injury, is such as to warrant the proposed degree of restraint. It is always a question of balance but basically restriction of liberty is for a constable the last resort.”¹³

⁸ Ibid at p 427.

⁹ See for example *Reid, Vickers and Forbutt* (No 2) (1981) 2 A Crim R 28

¹⁰ See for example *Panos v Hayes* (1987) SASR 148

¹¹ *R (on the application of Laporte) (FC) Original Appellant and Cross-Respondent v Chief Constable of Gloucestershire (Original Respondent and Cross-appellant)* [2006] UKHL 55, 13 November 2006 at Para 37 per Lord Bingham of Cornhill

¹² *Laporte* at para 149 per Lord Mance

¹³ *Innes v Weate* [1984] Tas R 14 at 22 per Cosgrove J as quoted in Bronitt and Williams *ibid*.

It is the view of the Climate Camp Legal Team that police use of force to move people along constitutes an unlawful assault on the protesters and, that the purpose (to contain, not disperse) further constitutes an unlawful exercise of power outside the terms of the legislation.

The Climate Camp Legal Team requests that the Ombudsman review the decisions made by police to use these tactics.

Other examples of force used by police are reported to have occurred when police used their horses to force people, including, we understand, children away from a fence. At the time of the use of force, people were listening to speeches. Many had their back to the fence and were shocked to suddenly find a horse barging down on them. The risks posed by police in this situation are considerable and far out weigh any threat the people present were posing. Onlookers were very distressed by the risks created by police during this incident.

The attached video is an example of the unpredictability of the horses (courtesy of the Human Rights Monitors website <http://www.humanrightsmonitors.org/>).

<http://www.youtube.com/watch?v=cVIY8SJyBo>

During the protest and well away from where the riot squad were harassing peaceful, lawful and non-violent marchers, about 55 protesters peacefully made their way on the railway lines. Some locked themselves to the trains and tracks, others, scaled the coal carriers and unfurled banners across the bridges and carriages.

All these protesters were arrested. While the majority did not report concerns about police treatment, at least 8 voiced concerns to the Legal Team about their treatment during the arrest process.

Individual complaints

We provide two examples of the complaints raised with the Legal Support Team.

Wrist compliance hold

The Legal Support Team received a report from one woman who described walking along with an arresting officer. She was fully co-operating with the officer. She was then passed to another officer with whom she also co-operated. The second officer placed her wrist in a pain compliance hold and told her to hold her head down on her chest and continue walking with that officer. When she raised her head slightly, the pressure on the pain compliance hold was increased

and she dropped her head. She reports being forced to walk across a street in this position. She reported distress at this unnecessary and humiliating treatment of her while in police custody.

Police may use reasonable force to arrest a person. However, the use of a pain compliance hold to enforce an oppressive, unnecessary and humiliating head position is excessive and disproportionate.

Excessive force during an arrest constitutes an assault. It also engages Articles 2,3 & 5 of the [United Nations Code of Conduct for Law Enforcement Officials](#) as well as Article 7 & Article 10 of the [International Covenant on Civil and Political Rights](#).

Code of Conduct:

- ❖ **Article 2** In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
- ❖ **Article 3** Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.
- ❖ **Article 5** No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment .

ICCPR:

- ❖ **Article 7** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
- ❖ **Article 10** 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Assault by Punching/Racially motivated degradation

A man who was in police custody reported to the Legal Team that he was punched 5 times in the face while handcuffed after rolling away from an Officer who had apparently arrested him. He was told, "You cunt, I told you not to fuck around. I'll bash you." He was also told, in a degrading manner by the same officer while being processed off site in a police bus, "You've adapted well to the

Australian environment haven't you", or words to this effect. The man is indigenous-looking. He describes the police treatment as humiliating, involving excessive force, with constant comments and slurs voiced as well as excessive twisting of his arms and rough treatment through-out.

He attempted to lodge a complaint with the police but was told to go away.

There is no justification for punching the face of a handcuffed man. The treatment reported by this man is an assault. Furthermore, his reports of excessive and degrading treatment constitutes degrading and ill-treatment under International Human Rights Law.

In addition to these reports we received reports such as people being roughly treated and bruised by riot officers, a person having their mobile phone deliberately broken, police injuring a person's arm such that she required hospital treatment, police removing film footage from a person, protesters being forced to kneel and wait for police while having their hands bound behind them.

It is possible that further reports will be made to your office concerning some of these incidents.

Thank you for your consideration of our concerns. We look forward to your response.

Yours sincerely,

Climate Camp Legal Support Team 2008
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