ANNOYING LAWS
The World Youth Day Challenge

STEPHEN BLANKS

It is rare to have an opportunity to make a constitutional challenge to a law; even rarer to have virtually the whole community with you. In recent years the community has yearned for security at any price, and additional laws have bestowed extraordinary powers on state agencies. It has made civil libertarians advocating against these laws feel like we are in a very small and very elite minority.

The challenge to the World Youth Day (WYD) laws was, however, an exception to the recent trend. In an instant, the community understood that a law against causing annoyance was a law aimed at them — not just at some minority whom they did not need to care about.

As is well known, the Federal Court upheld the rights of the protesters to engage in all of their proposed protest activities, some of which were deliberately designed to annoy the pilgrims. The Court did so by reading down regulations which controlled the sale and distribution of certain products in World Youth Day areas so that they did not apply to the items which the protesters intended to hand out to pilgrims, such as condoms. The Court also held that the regulation-making power in the *World Youth Day Act 2006* was not specific enough to authorise a regulation which potentially criminalised 'causing annoyance', but that it did authorise a regulation which potentially criminalised 'causing inconvenience'. The Court reached its conclusion without needing to resort to its constitutional armoury. This was disappointing to those who wanted to make constitutional law through this case.

It is my purpose here to record some of my personal experiences of being involved in the challenge.

Firstly I should note that my participation in challenging the laws was mixed, if not deeply conflicted, with other interests. My daughter was singing in the junior choir at the Pope's Welcoming Mass at Barangaroo, and my duty was obviously to support her enjoyment of that experience without controversy. I was also hosting pilgrims in my home during the World Youth Day event, and I had every intention of playing the hospitable host.

However, when the opportunity came to be involved in the legal challenge, it proved irresistible. My duties as a lawyer trumped those of parent and host. Fortunately, both my daughter and my guests accepted my position with good grace.

The World Youth Day Regulations 2008 were made on 25 June 2008, and published in the *NSW Government Gazette* on 27 June 2008. The regulations included the now-notorious regulation giving 'authorised persons' power to give directions to anyone in a World Youth Day declared area, so they would cease engaging in conduct that caused annoyance to a participant in a 'World Youth Day Event', and making it a criminal offence not to comply with such direction.

Surprisingly, some people read the *NSW Government Gazette*. By Monday 30 June the media was widely reporting the annoyance regulation, and broadcasting reactions to it — including critical comment by Cameron Murphy, president of the NSW Council for Civil Liberties.

The origin of the regulation merits detailed scrutiny. Who came up with the strategy of creating the key criminal offences as 'regulations', so they would not be subject to parliamentary scrutiny? Who came up with the idea that they should be promulgated only days before the commencement of the World Youth Day events, so that there might not be time for public scrutiny? Who came up with the idea that 'authorised officers' included not only police, but also volunteers with the rural fire service and state emergency service? And who came up with the idea that the laws should authorise giving directions to people causing annoyance to pilgrims, but not to pilgrims causing annoyance to each other or to members of the public? These are all questions which must be answered.

Before the regulations were promulgated, I doubt that there were too many people interested in using the World Youth Day event as a vehicle for protest activity. Certainly, the NSW Council for Civil Liberties had not been contacted by anyone who felt that their ability to protest was being impaired.

But there is no more effective means of generating protest activity than by trying to outlaw it.

By Wednesday 2 July, NSWCCL was receiving emails from people encouraging us to challenge the laws. By then, the NoToPope Coalition had formed which included activists from the refugee-support movement, GLBT (Gay Lesbian Bisexual and Transgender) rights groups and socialist organisations. There were also respectable lawyers against the laws, including the President of the NSW Bar Association, Anna Katzmann, who pointed out that the laws unreasonably interfered with freedom of speech and freedom of movement, and respectable Catholics, such as Frank Brennan, who said they were contrary to Catholic teaching on human rights.

On Thursday 3 July, the *Sydney Morning Herald* had settled on its weapon of choice against the laws — promoting the wearing of t-shirts with messages designed to annoy pilgrims. Meanwhile, Cameron Murphy and I went to see former NSW Attorney-General Jeff Shaw, to discuss possible grounds for a legal challenge. Jeff Shaw is a good friend of civil liberties, and always ready to provide expert advice on possible legal strategies.

By the end of Thursday, a suitable client had been identified — that is, a person with a clear intention to engage in protest activities which might be prohibited by the new laws and who would therefore have standing to bring Court proceedings, but who was without assets that could be at risk if an adverse costs order was made.

On Friday morning, 4 July, the NoToPope coalition held a media conference in the Domain, a park behind NSW Parliament House, announcing their intention to protest during WYD. I spoke at the press conference to announce that a legal challenge would be mounted, but was unable to say which Court it would be in, who the applicant would be, who the lawyers for the applicant were, or what the grounds of challenge were. In truth, these were matters yet to be decided.

The legal team and the applicants coalesced over the remainder of the Friday, and feverish activity over the weekend saw us prepare the court documents and an outline of the legal points. By Monday we were ready to file. The Federal Court pulled out all stops, and arranged for a full court to hear the matter on Friday 11 July.

The case was very nearly derailed, however. In the course of preparation, counsel asked me to find out what events were 'World Youth Day events' for the purpose of the regulation. For an event to qualify for the purposes of the regulation, it needed to be determined to be an 'event' by the World Youth Day Authority. My initial calls to the Authority elicited the helpful information that the events would be published in the *Daily Telegraph*. Further calls to the Authority seeking the official determination were eventually referred to the NSW Crown Solicitor, who was acting for the government in support of the regulations. In Court on 11 July, just four days before the WYD event started, it finally emerged why the determination had been difficult to track down — the determination was only made on 10 July, and in such haste that it included the full itinerary of the Pope, much of which was presumably intended to be security-protected.

Thus it was very nearly the case that, but for the legal challenge to the regulation, there would have been no official 'events' at which authorised officers could have given lawful directions.

In any case, the regulations were completely unnecessary. After the Federal Court decision, the NSW Police Commissioner said that police would not have used the annoyance regulations because they were too uncertain.

Which is good news — because there are at least 16 other NSW regulations which give police and others similar powers. Now we know that police will not use them, perhaps they can be repealed?

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