

3 February 2014

Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
East Melbourne VIC 3002

By email: andrew.homer@parliament.vic.gov.au

Dear Committee Members

Summary Offences and Sentencing Amendment Bill 2013 (Vic)

We refer to the Summary Offences and Sentencing Amendment Bill 2013 (**the Bill**), currently before the Victorian Parliament.

The Bill amends the *Summary Offences Act 1966* (Vic) (**Summary Offences Act**) by expanding the powers of police and protective services officers (**PSOs**) to direct people to move-on,¹ and introducing 'exclusion orders' which could see people excluded from public places for up to 12 months.²

As a legal service that provides free legal assistance to people experiencing or at risk of homelessness, Justice Connect Homeless Law (**Homeless Law**) has significant concerns that the changes proposed by the Bill will have a disproportionate and negative impact on homeless Victorians.

Based on the concerns identified in this letter, Homeless Law submits that the Scrutiny of Acts and Regulations Committee (**SARC**) should recommend that the Bill not be passed in its current form.

Our three key points in relation to the Bill are:

- 1. The Bill will have a harsh and negative impact on people experiencing homelessness** – the Bill's expansive powers, broad discretion and limited safeguards create a significant risk that the changes will impact disproportionately on people experiencing homelessness. Because they are carrying out their lives in public places, homeless Victorians are more likely to be directed to move-on. A lack of safe and secure accommodation makes it difficult to comply with move-on orders and creates an increased likelihood that homeless people will be caught up in the criminal justice system and will be the subject of exclusion orders banning them from public places for up to 12 months. Excluding people experiencing homelessness from public places close to areas where they access services and supports increases the already high risks to health and safety that come with homelessness. If the exclusion order is breached, the person could be jailed for up to two years.

¹ Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 3.

² Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 5.

2. **The Bill unjustifiably and unreasonably limits rights** – the Bill proposes significant limitations on the right to freedom of movement protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) (and may also limit the rights to freedom of peaceful assembly, freedom of association and freedom of expression). While rights can of course be permissibly limited, it is not clear that these limitations are reasonable or demonstrably justified. The Bill is identified as intending to ‘better protect the community from lawless behaviour on our streets’.³ Concerningly, the Bill creates powers for police and PSOs to direct people to move-on and to arrest people for contravening the move-on direction when there is no suggestion of jeopardised public safety (for example, where a person has littered in the area, possessed an open container of liquor or jaywalked). The limitations on rights are serious for all members of the community, but particularly for people experiencing homelessness.
3. **The Bill will increase the burden on services and the criminal justice system** – the Bill has the potential to see vulnerable people caught up in the criminal justice system for protracted periods. In addition to impacting harshly on struggling individuals, the proposed changes will rely heavily on legal services to assist respondents to navigate the complicated legal process. Ultimately, the proposed changes will place a significant strain on the already stretched resources of the criminal justice system, including courts and legal services.

The Bill proposes significant changes to the operation and powers of police and PSOs in Victoria and it should not be passed into law without further consultation with individuals and organisations about what the consequences of these changes are likely to be.

1. Homelessness and public places

There are 22,789 homeless Victorians including those staying in refuges, temporary accommodation or rooming houses, sleeping in cars or couch surfing and 1092 people who sleep rough.⁴ At any given time, there are estimated to be between 100–120 people sleeping rough in the City of Melbourne.⁵ Homelessness services are overwhelmed with demand and Victorian services turn away 86 people per day.⁶

Recent events, including the heat wave and the death of Wayne ‘Mousey’ Perry, have reminded us of the hardship and danger facing homeless members of our community.⁷ A recent study by the City of Melbourne of the city’s rough sleeping population found that: ‘throughout their lives, many of the participants had experienced violence, sexual abuse, poverty, neglect, incarceration and exposure to drugs or alcohol from a young age ... the pathways into homelessness are complex and individual. These are people whose lives have been defined by disadvantage’.⁸

Through our work providing free legal services to people experiencing or at risk of homelessness, Homeless Law sees that homeless Victorians have a disproportionate amount of contact with police and PSOs when compared with people in safe and secure housing.

³ Second Reading Speech, *Hansard*, 12 December 2013, 4681.

⁴ Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2011*, Australian Government, Canberra (2012).

⁵ City of Melbourne, *Street Count 2013: Living Rough in Melbourne* (2013).

⁶ Australian Institute of Health and Welfare, *Specialist Homelessness Services* (2012–2013).

⁷ See for example: ‘Murder charge laid over the death of Wayne “Mousey” Perry’, *The Age* (7 January 2014) (available at: <http://www.theage.com.au/victoria/murder-charge-laid-over-death-of-wayne-mousey-perry-20140107-30e5l.html>); ‘A death on our streets is one too many’, Editorial, *The Age* (7 January 2014) (available at: <http://www.theage.com.au/comment/the-age-editorial/a-death-on-our-streets-is-one-too-many-20140106-30dh9.html>); ‘Family and friends mourn Wayne “Mousey” Perry’, *The Age* (10 January 2014) (available at: <http://www.theage.com.au/victoria/family-and-friends-farewell-wayne-mousey-perry-20140110-30mc3.html>).

⁸ City of Melbourne, Media Release: Finding a Way Out: New Study into Homelessness (29 January 2014) (available at: <http://www.melbourne.vic.gov.au/AboutCouncil/MediaReleases/Pages/Findingawayoutnewstudyintohomelessness.aspx>).

People without safe and secure accommodation conduct their lives in public places and may experience one or more of the acute hardships that can accompany homelessness (including poverty, mental illness, disability or substance dependence).⁹ As a result they are highly visible to police and PSOs. They are also more likely to be fined or charged for 'public space offences', including begging, being drunk in public, possessing an open container of liquor, littering, using offensive language, and conduct on public transport (for example, not having a ticket, smoking on the platform or having feet on the seats) (**Public Space Offences**).

Between 1 July 2012 – 30 June 2013, Homeless Law opened 166 new matters for clients needing legal assistance in relation to Public Space Offences.

The obvious reality is that homeless Victorians are frequently in public places and are therefore more likely to have interactions with police and PSOs. Accordingly, the Bill's more expansive move-on powers, very broad discretion and limited safeguards have significant potential to disproportionately impact on people experiencing homelessness.

2. The risks of more expansive move-on powers

In 2009, Homeless Law, along with a number of other organisations, expressed concern about the introduction of the existing move-on powers, which are set out in section 6 of the Summary Offences Act.

Section 6 already provides police and PSOs with broad discretion to direct people to leave a public place. A member of the police force or PSO can direct an individual to leave a public place and not return for up to 24 hours where they believe on reasonable grounds that:

- the person is or persons are breaching, or likely to breach, the peace; or
- the person is or persons are endangering, or likely to endanger, the safety of any other person; or
- the behaviour of the person or persons is likely to cause injury to a person or damage to property or is otherwise a risk to public safety.¹⁰

The Bill proposes to extend section 6 of the Summary Offences Act so that a member of the police force or a PSO can direct a person to leave a public place and not to return to it for up to 24 hours if he or she suspects on reasonable grounds that (amongst other things):

- the person has committed an offence in the public place within the last 12 hours;¹¹
- the person is causing, or likely to cause, an undue obstruction to another person or traffic (in determining whether the obstruction is 'undue', the police officer or PSO must consider the duration of the obstruction and the conduct that is causing the obstruction);¹² or
- the person is intending to unlawfully procure a drug of dependence.¹³

⁹ A recent review of over 400 of the HPLC's files revealed that of our clients: 24% have severe mental health issues; 23% have drug and alcohol dependence issues; and 17% have multiple complex needs. For the purposes of the file review, 'multiple complex needs' referred to more than one of: severe mental health issues, drug and alcohol dependence, cognitive impairment, domestic violence and challenging behaviour. We note that these needs are likely to be under reported as they were only recorded if the client's needs were expressly identified on the file in the context of legal assistance provided.

¹⁰ *Summary Offences Act 1966* (Vic) s 6.

¹¹ Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 3(2) inserting s 6(1)(d) into the Summary Offences Act.

¹² Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 3(2) inserting s 6(1)(f) into the Summary Offences Act.

Under section 6(4) of the Summary Offences Act, it is an offence to contravene a move-on direction without a reasonable excuse. The Bill proposes new sections 6A and 6B in the Summary Offences Act, which provide that a police officer or PSO may arrest a person without a warrant if he or she believes that the person is committing or has committed this offence (i.e. contravening the move-on order). The member of the police force can detain a person in custody if he or she reasonably believes that the detention is necessary:

- to ensure the attendance of the arrested person before a court of competent jurisdiction; or
- to preserve public order; or
- to prevent the continuation or repetition of the offence; or
- for the safety or welfare of members of the public or of the arrested person.

Based on our experience providing legal assistance to homeless clients, Homeless Law submits that, under the new laws, people experiencing homelessness will be:

- **more likely to be directed to move-on** – for example, because they (a) have committed a minor offence such as littering or possessing an open container of liquor in the last 12 hours, (b) are seen to be unduly ‘obstructing’ other members of the public, or (c) are suspected to be intending to acquire a drug of dependence;
- **at greater risk of contravening the move-on order** – because, unlike other members of the public, they do not have private places to return to avoid contravention. Also, people experiencing homelessness often spend time in public places that are proximate to the services they need to access including, health services, mental health services or pharmacies;¹⁴ and
- **more likely to be detained** – because it is believed that the offence will be repeated or continued (for example, the person will again be drunk in the public place because of their lack of accommodation).

The Bill will cause people experiencing homelessness to enter the criminal justice system for behaviour that is directly related to their homelessness.

3. Exclusion orders and homelessness

Section 5 of the Bill will mean that if a person is directed to move-on three times in a six month period or five times in a 12 month period, a member of the police force can apply to the Magistrates’ Court for an exclusion order which would exclude a person from a public place or part of a public place for up to 12 months.¹⁵

Homeless Law points out that, for people living in public places 24 hours a day, seven days a week, the threshold of being directed to move-on three times in six months is incredibly low. Importantly, under the proposed provisions, a person is not required to have contravened the move-on orders for them to be the subject of an exclusion order application. They may have been asked to leave an area because of public drunkenness and complied with this direction. Two months later, they may be seen littering and directed to leave the area. Again, they comply with this direction. A further two months later, while trying to engage with drug and alcohol services, the person could again be directed to move-on because of public drunkenness. Despite complying with this order,

¹³ Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 3(2) inserting s 6(1)(d) into the Summary Offences Act.

¹⁴ See City of Melbourne, above n 8, 26 referring to ‘transience and moving around’.

¹⁵ Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 5 inserting s 6E into the Summary Offences Act.

a member of the police force could then apply to the Magistrates' Court for an order excluding the person from that area – the same area where they are engaging with drug and alcohol treatment and medical support – for up to 12 months. If they breach the exclusion order, the person can be jailed for up to two years.

For people experiencing homelessness who may have various support needs, including physical and mental health services, excluding them from a public place in an area where there is a high concentration of services could have serious consequences and place them at risk of harm.

Although the Bill includes a provision permitting a Magistrate to consider the impact of an exclusion order on the person concerned, they must balance this against the impact on any other person affected by the conduct which formed the basis of any previous directions and against public safety and order.¹⁶ Not only is this a vague test, the Bill states that Magistrate 'may' take those factors into account. This means that under the Bill, Magistrates are not required to consider the impact of exclusion orders on a person subject to the order when making such an order.

The case study below considers how the proposed amendments might impact a Homeless Law client.

Case study: the impact of the proposed amendments on people experiencing homelessness

Background

Scott was homeless and suffered from depression and anxiety, an acquired brain injury and chronic alcohol dependence. When he approached Homeless Law for assistance, Scott had received a number of fines for being drunk in a public place, six of which had become infringement warrants.

The evidence from Scott's support workers and health professionals referred clearly to his acute hardship and the links with his offending. He had suffered from alcohol dependence for over 20 years and had been homeless on and off for a decade. Because of his homelessness, Scott's addiction was highly visible.

Homeless Law represented Scott at a hearing in the Special Circumstances List of the Magistrates' Court, where the Court ordered that the matter be adjourned without conviction subject to Scott undertaking to be of good behaviour and continuing to engage with drug and alcohol counselling.

Scott could be imprisoned or excluded from a public place where he accesses services and feels safe

If the amendments to the Summary Offences Act had been law when Scott was incurring fines as a result of his failure to cope with homelessness and alcohol dependence, the outcome may have been very different.

For example, Scott could have been directed to move-on for committing an offence in a public place: being drunk in public. This would have required Scott to leave a public place where he felt safe and had access to services and not return for up to 24 hours. If Scott left for a few hours in response to the direction, but returned to the place where he usually slept within the 24 hour period, he could have been arrested.

If Scott had been directed to move-on three times in a six month period, even if he complied with those directions, the amendments to the Summary Offences Act provide that he could be excluded from a public

¹⁶ Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 5 inserting s 6E into the Summary Offences Act.

place for up to 12 months.

For someone with Scott's numerous vulnerabilities, excluding him from a public place in an area where there is a high concentration of services could have serious consequences and place him a risk of harm.

In addition to the obvious hardship this places on Scott and his recovery, it would also see him caught up in the criminal justice system for a prolonged period, and requiring significant resources from legal services and the courts to deal with the exclusion order (see part 4 below).

In the event that Scott failed to comply with the exclusion order, he could have faced prison for up to two years.

4. A burden on the justice system and legal services

Under the proposed powers, the police will have to record and monitor their move-on directions. When the threshold is reached (i.e. three in six months or five in 12 months), they can apply to the Magistrates' Court for an exclusion order.

As mentioned above, there are very limited safeguards built into the exclusion order process i.e. the Court *may* take into account the likely impact of the exclusion order on the person (as well as the impact on any other person affected by the conduct and public safety and order). The Court may also make an exclusion order that allows the person to enter a public place for a specified purpose if the Court considers that there is a good reason why the person should be allowed to enter the place and that it is appropriate in all the circumstances.

These very limited safeguards will have little or no impact if the respondent does not have access to legal advice and representation to help convey their position to the Court. In light of the significant resource burden already facing the community legal sector and Victoria Legal Aid (including as a result of the current fines and infringements system),¹⁷ it is difficult to know where the resources to provide this advice and representation will come from.

Furthermore, where an exclusion order is made, both the applicant and the person subject to an order have the right to apply for revocation or variation of the order.¹⁸ While this is a welcome component of the proposed amendments, it will have significant resource implications for the courts and legal services.

Overall, the amendments will place an additional strain on the already stretched resources of the criminal justice system and increase the burden on the services that assist disadvantaged members of the community to navigate the legal system.

5. The limits to rights are not justified

The Statement of Compatibility accompanying the Bill does not identify that the limitations on the rights to freedom of movement are reasonable or demonstrably justified.¹⁹

¹⁷ See, eg, Justice Connect Homeless Law, 'Fines, Infringements and Homelessness: Submission to the Sentencing Advisory Council Fines and Infringements Project' (October 2013) (available at: http://www.justiceconnect.org.au/sites/default/files/HPLC%20Submission%20-%20SAC%20Fines%20and%20Infringements%20Project%20%28October%202013%29_0.pdf).

¹⁸ Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 5 inserting s 6G into the Summary Offences Act.

The Statement of Compatibility justifies the limits to the right to freedom of movement on the basis that the Bill is ‘... aimed at protecting public safety and order and the rights and freedoms of others’.²⁰ However, as the Bill stands police and PSOs can direct people to move-on and arrest people when there is no suggestion that their conduct jeopardises public safety (for example, where a person has littered in the area, possessed an open container of liquor or jaywalked). Magistrates can also make exclusion orders banning people from public places when there is no allegation that the person has caused a risk to public safety.

Homeless Law submits that there is a significant risk that the Bill will mean people are required to move-on or are excluded from public places without engaging in conduct that harms others. Homeless Law is particularly concerned that homeless Victorians will be disproportionately affected by move-on powers.

These wide-reaching powers are a disproportionate response to the concerns about public order that they seek to address. The limitation on rights cannot be justified in these circumstances.

6. Request for community consultation

We strongly encourage the Government to consult with individuals and groups likely to be affected by the Bill before it is enacted.

A consultation process would provide an opportunity for those who will be affected by the Bill and their representatives to make constructive suggestions to ameliorate the harshest aspects of the Bill.

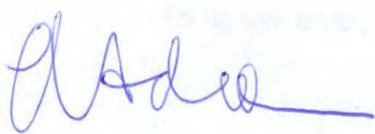
7. Recommendation

Homeless Law submits that SARC should recommend that the Bill should not be passed in its current form.

Homeless Law also respectfully requests to appear in person before the Committee at your next meeting to discuss our concerns in more detail.

Please contact Lucy Adams or Chris Holt on (03) 8636 4408 if you have any queries about the issues identified in this submission.

Yours sincerely



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¹⁹ Second Reading Speech, *Hansard*, 12 December 2013, 4680.

²⁰ *Ibid.*