

31 January 2014

The Hon Richard Dalla-Riva
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House, Spring Street
Melbourne VIC 3002

By email: richard.dalla-riva@parliament.vic.gov.au

Dear Mr Dalla-Riva

The LIV writes to the Scrutiny of Acts and Regulations Committee (the Committee) to express its concerns with the Summary Offences and Sentencing Amendment Bill 2013 currently before the Victorian Parliament.

The Bill seeks to amend the *Summary Offences Act 1966* (Vic) (the Summary Offences Act) to “give police clearer and more effective move-on powers and to create longer lasting exclusion orders”.¹

The LIV is disappointed by the lack of consultation by government with respect to the Bill, which significantly extends the scope of police ‘move on’ powers and proposes to limit important exceptions to ‘move on’ powers in the case of picketing places of employment, protesting and public demonstration.

The LIV’s key concern with the Bill

The legal effect of the Bill, if enacted in its current form, would be to limit the ability of individuals and groups to assemble and protest in public. It would remove existing and important protections against move on orders for individuals and groups engaging in picketing, protesting and public demonstration, and by introducing provisions which allow for arrest for breaches of a move on direction, increase criminalisation of direct protest action in Victoria.

A healthy democracy is one that values people coming together to protest and freely express their ideas and opinions. Laws that restrict freedom of movement, peaceful assembly, association or expression require a clear and demonstrated justification by government or else they risk undermining not only the fundamental democratic values that strengthen our society but also the most basic rights of people and groups in our community. A healthy democracy must allow for more than symbolic protest. Other forms of direct action, that move beyond the purely symbolic, are a prominent form of protest in liberal democracies and have a long historical role in enabling citizens to challenge a perceived injustice. Direct action provides an opportunity for citizens to champion shared views, generates a sense of solidarity and is usually successful in attracting the attention of the media. Public protest is one of the few democratic tools individual citizens have at their disposal outside the normal channels of the electoral system.

Specifically, any restriction imposed by law on freedom of movement, peaceful assembly or freedom of association, being human rights recognised under international convention as well as the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter), must be demonstrated by government to be necessary to protect national security or public order, public health or morals or the rights and freedoms of others and must be consistent with rights of individuals protected under international convention and the Charter.ⁱ The distinct right of freedom of expression explicitly includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [a person’s] choice”.ⁱⁱⁱ It is expressed to carry with it special duties and responsibilities and therefore may be subject to certain restrictions provided by law that are necessary either for the respect of the rights and reputations of others or the protection of national security or of public order, or of public health or morals.^{iv} Section 7(2) of the Charter expressly requires any limitation on rights protected by the Charter only to be such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The Charter directs Parliament to give consideration to “any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve”.^v

Rights analysis

The LIV is concerned that the Bill does not strike the proper balance between the right to freedom of movement, freedom of expression, freedom of peaceful assembly and freedom of association and the protection of the rights and freedoms of others. The rights and freedoms of others would necessarily include other people’s personal security and safety and freedom of movement as well as their privacy, property and commercial rights.

The LIV draws attention to the fact that under Victorian law limitations on basic human rights must only be “such reasonable limits as can be demonstrably justifiable” in accordance with the requirements of s7(2) of the Charter. In the Statement of Compatibility to the Bill, the Attorney-General states that “the Bill includes a range of safeguards that minimise effects on the relevant charter act rights and ensure any limitation is reasonable”.^{vi}

The LIV respectfully submits that the safeguards referenced by the Attorney-General do not provide for the reasonable limitation on the relevant rights, particularly to freedom of association and freedom of speech. Rather, the Bill would in its practical application make protesting a criminal offence in all but the most symbolic of protests and deter and limit protesting from occurring.

The current Summary Offences Act balances police and protective services officers’ powers to move people on from a public place carefully against these fundamental rights, by making it explicit that such powers cannot be used against people picketing a place of employment, demonstrating or protesting about a particular issue, or speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person’s view about a particular issue.^{vii}

The amendments proposed by clauses 3(5) and (6) of the Bill would mean that the move on powers in section 6(1) of the Act could now be used by officers in cases of:

- (a) picketing a place of employment; or
- (b) demonstrating or protesting about a particular issue; or
- (c) speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person’s view about a particular issue.

except not based on the grounds of a person or persons:

- (i) breaching, or likely to breach, the peace (current ground (a)); or
- (ii) causing, or likely to cause, an undue obstruction to another person or persons or traffic (new ground (f)).

The LIV is concerned with these amendments as no proper justification is given in the statement of compatibility as to why each of the new policing powers are in fact necessary to protect the rights of others or preserve the peace,^{viii} given that the Act currently permits a member of the police force, or a protective services officer on duty at a designated place to make a move on direction if the member or officer suspects on reasonable grounds:

- (a) the person is or persons are breaching, or likely to breach, the peace; or
- (b) the person is or persons are endangering, or likely to endanger, the safety of any other person; or
- (c) 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.

Further the LIV is concerned that:

- The statement of compatibility assumes that "lawless behaviour" is occurring on the streets, from which the community needs protection. Neither the statement nor the Second Reading Speech identifies what this behaviour is, how it is lawless or why it cannot be addressed by current police powers. The need for the restrictions on rights has been assumed, but not been established.
- The statement of compatibility does not consider any less restrictive means available to "protect the community from [the allegedly] lawless behaviour on [the] streets".^{ix}
- In relation to the proposed new ground (e), the power to make a move on direction is expressed to be based on an individual officer's assessment of the effect of one person's behaviour on another person's subjective apprehensions. This is a broad and discretionary power, and has the potential to be applied in a subjective or impressionistic manner. It also has the potential to be applied in a discriminatory way according to biases held by individual officers, for example, the provisions could be seen to be used against the homeless on the assumption that those persons are present to buy or sell drugs as per new ground (g). This is particularly concerning in light of recent findings that there remains a strong perception in the community of racial profiling by police.^x
- Groups that not infrequently engage in activism via protest such as unions and environmental activists could be unfairly targeted by the new powers under ground (h).
- The LIV expresses no particular view on the proposed new grounds (d) and (g). In relation to proposed new ground (d), however, as currently drafted it refers to a person or persons having "committed within the last 12 hours, an offence in the public place". It is highly unlikely that the charge for the offence committed 12 hours previously will have been heard by a court at the time the police officer is determining to make a move on direction. The police officer will be acting on a mere allegation of an offence having been committed. This highlights the subjective nature of the power, and raises significant concern that police officers will be empowered to exercise the discretion to make a move on direction without a clear evidentiary basis. It also seems problematic as to how this power might be exercised given that the range of "offences" is not defined.
- In determining an application for an exclusion order under clause 6E, the Court is required to consider whether the making of an order would be a reasonable means of preventing further move on directions being made against the person.^{xi} Again, this assessment is based on a subjective assessment of future conduct.
- The Bill also amends s6(2) to provided that a move on direction may apply not just to an individual person but also to a group of persons.^{xii} Again, this may be problematic. Not only may an individual in a group not hear an oral direction given, but police officers may not be able to identify individuals in a group to whom such a direction may have been given. This raises the practical risk of subsequent wrongful arrest and failed prosecutions. There are also practical concerns with how this ground will be enforced, given that the Bill does not define the term "group" and provides no direction as to how a police officer is to assess an individual's association with a group. It could be seen that a collection of individuals present on a particular

day could be considered to constitute a group. If this is the case, there are significant public surveillance implications as to how individuals congregating in a public space will be monitored to assess their attachment to the group.

- The Bill provides that an individual who is told to move on three times in six months may be subject to an exclusion order at the discretion of the Magistrates Court which would ban an individual from a public place for a specified period.^{xiii} If an exclusion order is breached, the offender faces two years imprisonment. The LIV is concerned that the term 'public place' allows for a wide interpretation that could have the effect of banning an individual from a large geographical area. The effect of this could be the severe limitation of an individual's freedom of movement.
- Under current Victoria Legal Aid Guidelines, funding for legal representation would not be available for individuals who are subject to an application for an exclusion order under proposed new Division 1B. It is likely, therefore, that individuals will appear unrepresented in court. For many of the reasons already mentioned, the new provisions will not be straightforward for the courts to apply and will involve consideration of a range of legal and factual issues, including but not limited to proof that a person was part of a group given a move on order, and arguments about whether the conditions precedent were objectively met. It can be foreseen that without legal representation readily available to assist individuals served with notice of an application for an exclusion order, the number of individuals unnecessarily being made the subject of exclusion orders will increase. We note the introduction of a justice impact assessment process, as previously advocated by the LIV and the Law Council of Australia, would allow for the consideration of social and economic consequences of new legislation, including the impact on the workload of courts and the criminal justice system as a whole.^{xiv}
- The Bill restrains the use of discretion in sentencing. Clause 6G of the Bill, which makes it an offence to contravene an exclusion order, carries a penalty of two years imprisonment. While we acknowledge that the determination of applications for exclusion orders involve the supervision of the Magistrates' Court, the LIV is concerned that the Bill does not offer the Court alternative penalties for contravention of an exclusion order, for example, set penalty units.
- Contrary to the Attorney-General's statement in the second reading speech, the LIV expresses concern that the proposed amendments to move on powers serve to create uncertainty around what behaviour would result in a move on order from police.

Recommendations

The LIV urges against the Bill being passed in its current form. The LIV would welcome the opportunity to engage in a consultative process with the government to ensure legitimate concerns about conduct during protests will be carefully balanced with the right to freedom of movement, freedom of expression, peaceful assembly and freedom of association. The LIV strongly recommends that the Committee seek further community responses in regard to the Bill and would welcome the opportunity to speak in person to the Committee at their next meeting.

Please contact Courtney Guilliat on (03) 9607 9375 or cguiliatt@liv.asn.au in relation to this submission.

Yours faithfully,



Katie Miller
President Elect
Law Institute of Victoria

ⁱ Second reading speech, Hansard, 12 December 2013, p4680.

ⁱⁱ See International Covenant on Civil and Political Rights (ICCPR) art 12(3), art 21 and art 22, regarding permissible restrictions on the right to freedom of movement, peaceful assembly and freedom of association under international law. Section 12 of the Charter protects freedom of movement and ss16(1) and (2) protect the right to peaceful assembly and freedom of association under Victorian law.

ⁱⁱⁱ See ICCPR art 19(2).

^{iv} See ICCPR art 19(3). Section 15 of the Charter likewise protects freedom of expression under Victorian law, "whether within or outside Victoria". It permits lawful restrictions in a similar manner to the ICCPR, stipulating that such restrictions must be "reasonably necessary" for purposes expressed. It is to be noted that under international law, freedom of expression is understood in the context of ICCPR art 20 which also requires "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" to be prohibited by law.

^v See Charter, s.7(2)(e).

^{vi} See statement of compatibility, Hansard, 12 December 2013, p4680.

^{vii} S6(5) of the Summary Offences Act.

^{viii} The statement of compatibility merely makes the very general statement that "*The new grounds for the use of move-on powers are aimed at protecting public safety and order and the rights and freedoms of others. The grounds ensure there is an appropriate balance between the right to freedom of movement, freedom of expression, peaceful assembly and freedom of association of one individual and the protection of the rights of others, including the rights of others to freedom of movement, privacy, property rights and security. These are important objectives that are sufficient to justify the bill's careful and safeguarded provisions and any limitations those provisions may impose on these charter act rights*".

^{ix} Second reading speech, Hansard, 12 December 2013, p4681.

^x See *Equality is Not the Same*, Victoria Police response to community consultation and reviews on field contact policy and data collection and cross cultural training, December 2013, p7, available at:

http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=99361. We note that in LEAP data analysed by Professor Ian Gordon during the case of *Haile-Michael & Ors v Konstantinidis & Ors* (2013), it was found that Africans in the Flemington and North Melbourne area were found to be 2.4 times more likely to be stopped by police than other groups in 2005 - 2008 despite having a lower crime rate. See Flemington Kensington Community Legal Centre, *Summary of Professor Gordon's and Dr Henstridge's First Reports*, available at: http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/Summary%20of%20Experts%20report.pdf.

^{xi} Clause 6E(1)(c) of the Bill.

^{xii} Clause 3(4) of the Bill.

^{xiii} New s6D of the Act to be inserted by clause 5 of the Bill.

^{xiv} See, for example, Law Council of Australia, Review of the Australian Government's Regulatory Impact Assessment Process (2012) available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2567%20Review%20of%20the%20Australian%20Government's%20Regulatory%20Impact%20Assessment%20Process.pdf>.