



Summary Offences and Sentencing Amendment
Bill 2013 (Vic)

Submission to the Scrutiny of Acts and Regulations Committee

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About the Human Rights Law Centre

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1. Executive Summary

1. The Summary Offences and Sentencing Amendment Bill 2013 (**the Bill**) amends the *Summary Offences Act 1966* (Vic) by expanding the grounds on which move-on directions can be given¹, and introducing 'exclusion orders' which may be used to exclude people from a particular public place for up to 12 months².
2. These proposed amendments limit an individual's right to freedom of movement, and may limit the rights to freedom of expression, freedom of assembly and freedom of association, which are enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).
3. The Human Rights Law Centre (**HRLC**) is concerned that these limitations are not reasonable and demonstrably justified under section 7 of the *Charter* because the Government has not demonstrated:
 - a) in a specific and individualised fashion the nature of the threat that each of the broader powers seeks to address;
 - b) that the proposed amendments are necessary, especially in light of existing offences and existing police powers; and
 - c) that the proposed measures are the least intrusive measures necessary to achieve permissible purposes, and are proportionate to the rights that the Bill seeks to protect.
4. We are concerned that the expanded move on powers are too broad and vague, conferring substantial discretion on individual police officers and protective services officers (**PSOs**) without appropriate safeguards. This creates significant risks that the laws will be applied in arbitrary or discriminatory ways, and will capture conduct that falls well outside the very broadly stated purpose for the laws.
5. The HRLC submits that the Scrutiny of Acts and Regulations Committee (**SARC**) should recommend that the Bill not be passed in its current form, given that it includes unreasonable and disproportionate limitations on human rights.
6. The Bill also introduces other amendments to the *Summary Offences Act* and *Sentencing Act 1991* (Vic), which this submission does not address.

¹ Amendments to section 6, *Summary Offences Act 1966* (Vic) (**Summary Offences Act**).

² Insertion of new Division 1B of Part I into the *Summary Offences Act*.

2. Concerns with existing move-on powers

7. When the existing move-on powers under section 6 of the *Summary Offences Act* were initially introduced in 2009³, the HRLC and other organisations expressed serious concern that the powers were inconsistent with the rights of freedom of movement, association, expression, assembly in the *Charter*⁴. We reiterate our concerns that the test for the exercise of the existing powers is too broad and vague, and as such the existing powers are prone to being applied in arbitrary or discriminatory ways.
8. Rather than amending the *Summary Offences Act* to address these concerns to ensure compatibility with human rights, this Bill seeks to *expand* these already problematic powers, increasing the potential to further erode human rights.

3. Inadequate evidence to justify limitations on rights

9. There is inadequate evidence to justify the Bill's limitations on freedom of movement, freedom of expression, freedom of association and the right to peaceful assembly.
10. Rights enshrined in the *Charter* may be limited in accordance with the requirements in section 7 of the *Charter* which requires that any limit be reasonable and demonstrably justified in a free and democratic society.
11. The Statement of Compatibility that accompanies the Bill⁵ identifies the objectives of the Bill as being to protect "public safety and order and the rights and freedoms of others". It relies on the internal limitations in the relevant rights under the *International Covenant on Civil and Political Rights*⁶, from which each relevant *Charter* right is derived, which provide that the rights can validly be restricted "where necessary to protect public order, public health or morals, and the rights and freedoms of others"⁷.

³ By the Summary Offences and Control of Weapons Acts Amendment Bill 2009.

⁴ See for example submissions to the Scrutiny of Acts and Regulations Committee by the Human Rights Law Centre available at http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_09/Submissions/summary%20offences%20-%20HRLRC.pdf; Federation of Community Legal Centres available at http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_09/Submissions/summary_offences%20-%20FCLC.pdf; and Fitzroy Legal Service available at http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_09/Submissions/summary%20offences%20-%20fitzroy%20legal.pdf.

⁵ Statement of Compatibility in Hansard, 12 December 2013, p 4680 (**Statement of Compatibility**).

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) (**ICCPR**).

⁷ The Statement of Compatibility refers to "article 12(3) on freedom of movement, article 19(3) on freedom of expression, article 21 on peaceful assembly and article 22 on freedom of association", all contained in the ICCPR.

12. The United Nations Human Rights Committee (**HRC**), which oversees the ICCPR, has stated:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat⁸.
13. Where the Government wants to pass a law that infringes these human rights, it must provide a specific, evidence-based justification for its actions⁹. It must be able to demonstrate the precise nature of the threat to which the new measures are directed, so that it is possible to assess whether the limitations are directed towards a permissible purpose, and whether they are proportionate to the interest to be protected¹⁰.
14. The language of the material supporting the Bill is vague but broad, stating that the Bill makes changes to “better protect the community from lawless behaviour on our streets” and that the “move-on powers provide police and PSOs with a useful tool for safeguarding the peaceful enjoyment of public spaces by all, as well as defusing situations that threaten public order and safety”.
15. Protecting public safety and order and the rights and freedoms of others are clearly legitimate purposes, but any legislative response to “lawless behaviour” should be targeted at the actual threats to public safety, and not simply a way of providing police and PSOs with an additional “useful tool” for use in a broad range of situations. Much more evidence is needed to justify the introduction of each of the expanded move-on powers, particularly given the very broad drafting of the powers, the lack of safeguards and the consequent risks of the powers being misused.
16. Where there is mention of particular circumstances and behaviours that the proposed move-on powers and exclusion orders will address, there is inadequate explanation of how these behaviours currently present a risk to public safety or order, or cogent evidence of the nature and magnitude of those risks. Moreover, the move-on and exclusion powers are drafted so as to apply far more broadly than to the circumstances specifically identified.
17. Some of the proposed additional bases on which a move-on direction can be given are not even linked to any specific, articulated risk. For example, the Bill will allow a move-on direction to be given where a police officer reasonably suspects a person has committed an offence in a public place within the last 12 hours. There is no requirement that the person is considered likely to commit another offence, or likely to pose any other kind of threat by virtue of their ongoing presence in that public place¹¹. This broad power appears to allow a police officer to

⁸ HRC, General Comment 34 (Article 19: Freedom of opinion and expression), 12 September 2011.

⁹ See section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [144] – [156] (per Warren CJ).

¹⁰ HRC, General Comment 34.

¹¹ Proposed section 6(1)(d).

move someone on if the officer suspects the person, for example, has jaywalked, dropped litter or failed to validate their Myki card. There is no requirement in the Bill for any connection between the offence and the threat to public safety or order that might justify the limitation on that person's right to movement, assembly and potential freedom of expression.

18. This power also applies in protest situations. In the Second Reading Speech, the Attorney-General stated that move-on powers could be used where "protesters go beyond legitimate expression of views and instead resort to threats of violence or seek to impede the rights of others to lawfully enter or leave premises"¹². As set out below, there are already a range of offences and existing police powers to deal with these forms of protest. Further, the expanded move-on and exclusion powers in the Bill extend well beyond these situations.

4. Unnecessary limitation on rights

19. In order to be permissible, limitations on the relevant human rights must conform to the strict test of necessity¹³. It has not been shown that existing police or PSO powers are inadequate to deal with the threats to public order and safety identified in the material accompanying the Bill, and therefore that the proposed broader move-on powers and new exclusion orders are necessary.
20. There are a range of offences that can already apply in protest situations including trespass, obstruction, besetting, breach of the peace, unlawful assembly, property damage, offensive language and behaviour and a range of local law offences. Police have broad powers to enforce suspected breaches of these offences including powers to arrest, detain, charge and require a person's name and address. Police have used these powers in numerous protests in Victoria over the past decade and beyond.
21. The Statement of Compatibility does not contain any analysis of why the powers in the Bill are necessary to address threats that cannot be dealt with using existing powers. The HRLC submits that the expanded move-on powers and new exclusion order are not necessary.

5. Measures are too broad and disproportionate

22. The HRC has stated that permissible restrictions on the right to freedom of expression¹⁴ "must not be overbroad... they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected"¹⁵.

¹² Second Reading Speech, in Hansard, 12 December 2013, p 4682.

¹³ General Comment 34, para. 22; HRC, General Comment 27: Freedom of movement (Art. 12), 2 November 1999, paras. 11, 14, 16.

¹⁴ Article 19, ICCPR, which is reflected in article 15 of the Charter.

23. There is no analysis in the Statement of Compatibility of whether these powers are the least intrusive measures necessary to achieve permissible purposes. The powers are referred to as a “useful tool” rather than a tailored measure that seeks to limit rights no more than is necessary to achieve a legitimate aim.
24. The Statement of Compatibility states that the Bill includes a range of measures to “ensure any limitation is reasonable”. In relation to the power to issue a move-on direction or make an exclusion order, these measures are:
- a) police and PSO discretion to tailor a move-on direction;
 - b) judicial discretion to make and determine the scope of an exclusion order; and
 - c) limited exclusion of move-on orders on grounds in section 6(1)(a) and (f) where a person is picketing a place of employment, demonstrating, protesting or publicising his or her view about a particular issue.
25. Far from providing a “safeguard”, the Bill grants broad discretionary powers to individual police officers, such as the power to issue move-on directions on the basis of anticipated future conduct or on the basis on a suspicion of person committing minor offences unrelated to any ongoing public safety or order problem.¹⁶ This creates serious risks that the expanded move-on powers will be misused – either being applied in an arbitrary or disproportionate way, or used discriminatorily against marginalised and disadvantaged groups.
26. In relation to freedom of movement, the HRC has stated: “The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution”¹⁷. We also note that SARC's functions set out in section 17 of the *Parliamentary Committees Act 2003* (Vic) include reporting on whether a bill “makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers.”
27. The limited protesting or picketing exception for move-on directions on certain grounds is not sufficient to ensure that freedoms of movement, association, expression and assembly during peaceful protests are not unreasonably restricted. The Explanatory Memorandum accompanying the Bill acknowledges that the wide scope of the remaining move-on grounds effectively mean that the exception may be circumvented:

Police members and PSOs may rely on subsection (1)(b), (c), (d), (e), (g) or (h) as the basis for giving a move-on direction even if the circumstances involved could also have justified a move-

¹⁵ General Comment 34, para. 34.

¹⁶ For example where someone is “likely to cause” an unreasonable obstruction to others, in proposed section 6(1)(f).

¹⁷ General Comment 27, para. 13.

on direction under subsection (1)(a) and (f) if those subsections had not been excluded by subsection 6(5)¹⁸.

28. The Government has not shown that the limitations posed by move-on directions and exclusion orders on the rights to freedom of movement, expression, assembly and association are proportionate to the asserted need to protect public safety and order.
29. The HRLC submits that as the Government has failed to provide evidence-based justification for why the laws are necessary or proportionate, SARC should conclude that the Bill contains limitations which are not reasonable and which are not demonstrably justified, as required under section 7 of the *Charter*. SARC should therefore recommend that the Bill not be passed in its current form.

¹⁸ Explanatory Memorandum to the Summary Offences and Sentencing Amendment Bill 2013, p 3.