



Victorian Council for Civil Liberties Inc
Reg No : A0026497L

GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

PRESIDENT

George A Georgiou SC

SENIOR VICE-PRESIDENT

Jessie E Taylor

VICE-PRESIDENTS

Jamie Gardiner

Michael Stanton

Thomas Kane

PAST PRESIDENT

Prof Spencer Zifcak

PATRON

The Hon. Michael Kirby AC CMG

www.libertyvictoria.org.au

11 August 2016

Liberty Victoria comment

SHOULD MASKS BE BANNED AT PROTESTS?

1. The Victorian Police Minister has foreshadowed laws to ban masks at protests. There have been reports that such laws may be of two kinds:
 - a. Laws making it an offence to wear masks at protests and demonstrations;¹ and
 - b. Laws that would result heavier prison sentences for those who have committed disorder offences while wearing masks.²
2. The response is unsurprising in light of recent violent clashes between masked protesters at rallies. However, in Victoria police officers already have sufficient powers to unmask and arrest disorderly protesters.
3. Further, to introduce mandatory or prescriptive sentencing models would cause injustice.

¹ ABC News, "Coburg clashes: Police Minister calls for face masks to be banned", 30 May 2016, internet reference, <http://www.abc.net.au/news/2016-05-30/call-for-face-mask-ban-after-clashes-at-coburg-rallies/7457796>.

² Peter Mickelborough, "Thug protesters to face up to 14 years jail under tough new laws to stop protest battlegrounds", Herald-Sun, 25 June 2016, internet reference, <http://www.heraldsun.com.au/news/law-order/thug-protesters-to-face-up-to-14-years-jail-under-tough-new-laws-to-stop-protest-battlegrounds/news-story/d8dc46bdd319d2ec4fb6ec55c5842a39>.

PART 1: BANNING MASKS AT PROTESTS

Existing Police Powers Are Sufficient

4. If a person is reasonably suspected of having committed a crime, including disorderly conduct, a police officer can arrest and charge that person, and the person must identify themselves.³
5. It is already a crime in Victoria to be disguised with “unlawful intent” under s 49C of the *Summary Offences Act 1966* (Vic). If a police officer has a reasonable suspicion that a masked protester is going to commit a violent act, he or she can arrest and unmask the protester.
6. Further, the Chief Commissioner of Victoria Police can declare the site of a protest to be a “designated area” granting police the power to conduct searches for weapons without needing reasonable suspicion.⁴

The Charter of Human Rights and Responsibilities

7. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the *Charter*”) provides that we all have the rights of privacy, freedom of expression, and peaceful assembly and association.⁵ The *Charter* provides that those rights can be subjected to reasonable limits - those limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁶ That is, rightly, a high bar.
8. To require a violent protestor to remove a mask is a proportionate limitation of that person’s rights. The law is appropriately confined to a person that is suspected of committing a crime; it protects the rights of others to protest free from violence.
9. However, to ban all masks at rallies is to treat all protesters as potential criminals. It would constitute a significant expansion of the power of the state against the individual in public spaces.

³ *Crimes Act 1958* (Vic), s 458, s 456AA.

⁴ *Control of Weapons Act 1990* (Vic), s 10G.

⁵ Sections 13(a), 15(2) and 16.

⁶ Section 7(2).

Masks as Political Speech

10. Protests are public spectacles, often designed to attract media attention. A costume, including a mask, is a visual way to express a political viewpoint. That is why Anti-Iraq protesters constructed paper mache masks to ridicule Bush, Howard, and Blair; why supporters of the band pussy-riot, imprisoned in Putin's Russia, donned balaclavas to protest the band's sentence; and why occupy wall street activists adopted the Guy Fawkes mask recently popularized by the film V for Vendetta. These protesters were not violent. They used masks to ridicule politicians, express solidarity, or communicate an idea.
11. Anti-mask laws seem attractive when directed against extremists known for political violence. The lack of sympathy for extremists who appear to relish brawling in the streets is understandable, but new anti-mask laws will not simply apply to these groups. They will apply to peaceful as well as violent protests. They will apply to the balaclava clad thug, and the pink-stocking wearing pussy-riot fan. They can be used by police to break up a violent rally, but also to shut down a protest where authorities disapprove of the message.

The Desire for Anonymity

12. Protesters may have legitimate reasons for wanting to conceal their identity. Protesters may not wish to be subject to police surveillance. They may also fear surveillance from other counter-protesters. That fear is not hypothetical. Far-right extremist groups have used social media to try to identify some counter-protesters, attracting comments making threats of violence. In those circumstances it is understandable that some people might want to protect their identity at such rallies without having any intention of engaging in criminality. The right to protest should not be contingent on consent to surveillance.
13. Further, the banning of masks will necessarily raise an issue as to the limits of the law. Where is the line going to be drawn— what about the niqab, hijab, a motorcycle helmet, or a scarf covering the mouth and chin? This will just create another flashpoint as protestors inevitably test the boundaries of any ban.

Conclusion

14. Existing laws are sufficient to address violent conduct by masked protesters. A law that prohibits masks at protests would be a disproportionate restriction on human rights as protected by the *Charter*.

PART 2: MANDATORY AND PRESCRIPTIVE SENTENCING MODELS

Mandatory and Prescriptive Sentencing Models

15. As noted above, some reports have suggested there will not be a total ban on masks, but rather increased penalties for those who commit crimes while wearing masks. The Herald-Sun reported that it can "...reveal that under proposed changes, those found guilty of public disorder would face prison for 12 months and up to two years if they wear a mask. And for the offence of violent disorder, thugs wearing face masks would get an additional four years on the existing maximum penalty of 10 years behind bars."⁷
16. This is deeply troubling. It follows a well-worn path of policy by press-release, without the detail of such proposed laws being made available to the public and subjected to proper scrutiny. If the Herald-Sun quote is accurate, are we going to see mandatory sentences of at least 12 months and in some circumstances 4 years' imprisonment for those wearing facemasks who have been found to have engaged in disorder offences?
17. It is concerning that such severe penalties can apply to conduct that is simply "disorderly". There is a real potential for injustice because the meaning of "disorder" is extremely subjective. It may result in sentences that are completely disproportionate to the underlying criminal act merely because someone has chosen to wear a mask. Under such a law a person wearing a mask, who has engaged in neither violent nor dangerous conduct, could be subject to significant prison term.
18. In addition, we note that the possibility of severe sentences for innocuous conduct may deter law abiding Victorians from participating in protests. It may also have a chilling effect on expressive conduct at protests, be it masks or other costumes, which activists fear police may find offensive.

⁷ Supra n 2.

19. The recent Sentencing Advisory Council report on Sentencing Guidance in Victoria from June 2016 noted that mandatory sentencing carries with it the grave risk of injustice.⁸

20. The Law Institute of Victoria has warned:⁹

Mandatory sentencing does not fulfill its stated aims; mandatory penalties do not provide a significant marginal deterrent effect, reduce crime rates, or provide consistency in sentencing. By their very nature, mandatory sentencing regimes and the 'one size fits all' approach to sentencing leads to unjust outcomes, as offenders with unequal culpability and circumstances are sentenced to the same minimum sentence of imprisonment, or more.

21. This government appears wedded to mandatory and prescriptive sentencing models despite warnings over many years from the above organisations, the Law Council of Australia, human rights groups, and those with practical experience of the criminal justice system; both as prosecutors, such as former NSW Director of Public Prosecutions Nicholas Cowdery AM QC, and defence lawyers.

22. After the catastrophic failure of the previous government's baseline sentencing regime, this government has now committed to introducing a "standard" sentencing scheme despite clear warnings from the legal community and the Sentencing Advisory Council about the move towards prescriptive sentencing models. It is difficult to think of any other area of public policy where government would simply ignore such a chorus of criticism from the people with the real practical experience in the field.

23. The government appears committed to these policies despite research clearly showing that, when fully informed of the circumstances of the given case, the public thinks that judicial officers get sentencing right in the vast majority of cases.¹⁰

24. We can see in the Northern Territory the result of a criminal justice system that relies too heavily on mandatory sentencing and incarceration – do we really want to go down the same path here? Such an approach may attract a headline, temporarily sate the tabloid media, and provide some short-term political gain, but are we prepared to trash fundamental legal principles in the process?

⁸ Sentencing Advisory Council, Sentencing Guidance in Victoria, June 2016, p 26.

⁹ Ibid, p 296.

¹⁰ Ibid, p 307.

Conclusion

25. We were all shocked by images of violence from recent rallies – but the test for this government is whether it will respond in a responsible and measured manner without treating all protesters as potential criminals.

26. Simply banning all masks at protests would be a broad brush “one size fits all” approach that undermines our civil liberties when the case has not been made as to why such laws are necessary and proportionate. To the same end, to introduce a mandatory or prescriptive sentencing model for those who commit disorder offences while wearing masks would cause injustice and represent a further erosion of judicial discretion in sentencing. Any bill that proposes such measures should be opposed.

Should you wish to discuss any aspect of this submission further, please contact Liberty Victoria Vice-President Michael Stanton or info@libertyvictoria.org.au. This is a public submission and is not confidential.

Yours sincerely

Liberty Victoria