

Scrutiny of Acts & Regulations Committee
Parliament of Victoria
Spring St
EAST MELBOURNE VIC 3002.

Attention: Andrew Homer
Andrew.homer@parliament.vic.gov.au

Thursday 30 January 2014

Submission to the Scrutiny of Acts and Regulations Committee regarding the Summary Offences and Sentencing Amendment Bill 2013

Dear Committee,

The Flemington Kensington Community Legal Centre wishes to make the following submission to the Scrutiny of Acts Committee to outline our concerns with the Summary Offences and Sentencing Amendment Bill 2013 (Vic) (Bill No.7) currently before parliament.

We believe that the Bill in its current form should be delayed for further consultation and review and request an opportunity to discuss the following points with the committee in person as an upcoming meeting.

1. By expanding the grounds upon which police and PSO's can exercise move-on powers under section 6 of the Summary Offences Act, the Bill fundamentally impacts upon the following rights protected under the *Charter of Human Rights and Responsibilities Act 2006 (Charter)*:
 - Right to privacy (s 13)
 - Freedom of expression (s 15)
 - Peaceful assembly and freedom of association (s 16)
 - Freedom of movement (s 12)

And

 - Freedom of thought, conscience, religion and belief (s 14)
2. A human right may be subject under law only to such reasonable limits as can be demonstrable justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors (see s 7(2) of the Charter).

3. We believe that the Statement of Compatibility tabled by the Hon Attorney General Clark on 12 December 2013 , does not adequately address the potential impacts upon rights as set out in the Charter nor the International Covenant of Civil and Political Rights (ICCPR) and does not set out adequate justifications for reasonable limitations under s7(2) of the Charter.
4. In the Statement of compatibility to the Bill, the Attorney-General asserts that *“the Bill includes a range of safeguards that minimise effects on the relevant charter act rights and ensure any limitation is reasonable”*.
5. We believe that the safeguards referenced by the Attorney-General do not provide for the reasonable limitation on the rights to freedom of association and freedom of speech, rather the Bill seeks to make historically important forms of protesting a criminal offence and to deter and limit protesting from occurring.
6. We believe that the nature and scale of the limitations imposed by this Bill warrant far-reaching and comprehensive community consultation beyond that provided by the Statement of Compatibility submitted by the Attorney General.
7. The current Summary Offences Act balances police and PSO 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. No proper reason is put forward in the Statement of compatibility tabled in parliament with respect to the bill, for departing from these safeguards.
8. In *Brooker v Police* [2007] NZLR 91, a case which examined Freedom of expression protected under the New Zealand Bill of Rights, the Chief Justice of the Supreme Court of New Zealand, commented that:
9. *“speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest. **A tendency to annoy others, even seriously, is insufficient to constitute a disruption to order which may make restrictions upon freedom of speech necessary.**”* [21]. [Our emphasis]
10. The levels of inconvenience and disruption to people generated by the vast majority of citizen protest activity in Victoria involving forms of obstruction, such as human lines, blockades, sit-ins and picketing is minimal and often very limited in duration. As described below, inconvenience is most often limited to a short time that is often similar to a workplace fire drill or other pedestrian forms of disruption to work places such as construction or building works.

11. This inconvenience and disruption does not constitute the 'measures necessary to protect public order, public safety and the rights and freedoms of others' that justifies such severe and ongoing limitation of the rights of Victorian citizens.
12. Powers to limit freedom of expression, the right to peaceful assembly, freedom of movement and association; rights which are the underpinning of a democratic society, are serious powers that should not be employed lightly.

Discretionary application

13. Yet under this Bill, there is a serious risk that such powers will be employed subjectively by police and PSO's as a grab bag to sweep up any behaviour that an officer finds annoying or objectionable, noisy or inconvenient.
14. There are no safeguards in this Bill for such discretionary application.

Freedom of thought, conscience, religion and belief

15. The Statement of Compatibility fails to make mention of how the bill may impact upon freedom of thought, conscience, religion and belief, for example upon street preaches, protest activity of a religiously based or conscientious nature, congregations that may be held in public spaces that causes 'undue obstruction to another person or traffic', or 'impedes someone else'.

Historical and contemporary role of protest activity

16. The Bill and Statement of Compatibility fails to recognise the long historical role and importance of protest activity in the development of our democratic society and modern system of government, a contribution that continues today.
17. Protest involving some form or level of 'obstruction' or direct intervention has a long history in social movements throughout the Western World and is a prominent form of protest type within contemporary pro-democracy movements globally.
18. Dr Gene Sharp, of the Albert Einstein Institute in the United States is the author of the seminal, three- part, 1974 *Politics of Nonviolent Action*¹, and widely recognised as one of the most influential theoreticians on nonviolent politics. He identifies *Nonviolent Intervention* as the third major category of nonviolent action according to his groundbreaking typology which includes: 1) Protest & Persuasion, 2) Noncooperation and 3) Nonviolent Intervention.
19. Nonviolent interventions are generally considered to be actions which 'intervene in an injustice occurring'. The famous 1989 image of the Chinese student standing defiantly in front of a column of tanks at Tiananmen Square remains a popular and inspirational example of this sort of nonviolent action. Pilipino nuns were saying their rosaries whilst standing in front of Marcos regime tanks in 1986. Emmaline Pankhust chained herself to the gates of

¹ *The Politics of Nonviolent Action*. 902 pp. Introduction by Thomas C. Schelling. Prepared under the auspices of Harvard University's Center for International Affairs. Boston: Porter Sargent. 1974 paperback edition in 3 vols.: I, *Power and Struggle*. 114 pp.; II, *The Methods of Nonviolent Action*. 348 pp.; III, *Dynamics of Nonviolent Action*. 466 pp. Boston: Porter Sargent.

the British Prime Ministers residence in 1906 when voting rights for women were refused. Civil rights activists sat-in at segregated lunch counters to deliberately force change to racist laws. There are many other famous examples.

20. Nonviolent interventions generally are the least-used tactic of social movements due to the fact that intervention-style actions, such as sit-ins, blockades, pickets and civil disobedience involve higher levels of commitment from practitioners, greater personal risks and actions such as these often attract the most severe forms of legal penalties.
21. Actions which are designed to intervene, block or obstruct are generally chosen by people when formal and institutional channels of protest have been exhausted or blocked, or for situations of urgency when an perceived injustice is to take place immediately. For example, community members may decide to stand in front of bulldozers after their pleas to save a heritage building have failed. Citizens may blockade a forest area after petitions, meetings with government and pleas have failed to halt destruction of a particular high-value area. Unionists may decide to picket a workplace when talks with management have failed. Multiple basic rights, and wages and conditions we now take for granted, along with many national parks, community spaces, landmark and heritage buildings throughout Australia have been saved through the actions of people 'standing in the way'.
22. These forms of protest constitute political expression that demonstrates a person's clear commitment to a goal or oppositions to an action or policy.
23. Nonviolent interventions have featured within the women's suffrage movement, the civil rights movements in the US, UK and in Australia, peace, anti-nuclear and anti uranium and environment movements have all applied nonviolent interventions as a part of their respective campaigns for social change.
24. A famous and influential theorist of civil disobedience in the western world was Henry David Thoreau. Thoreau refused to pay a poll tax and spent one night in jail. He argued that the tax supported slavery and the aggressive US war against Mexico, both of which he opposed.
25. Thoreau's essay, *On the Duty of Civil Disobedience* (1849), influenced Gandhi, Martin Luther King, and countless other activists. He said;
26. "It is not desirable to cultivate a respect for the law, so much for the **right Law** never made men a whit more just; and by means of their respect for it, even the well-disposed are daily made the agents of injustice. . . the demands of conscience are higher than the demands of the law."
27. The argument that the demands of conscience are sometimes higher than the demands of the law is central to all civil disobedience.
28. Importantly, magistrates in Victoria have generally recognised the socially minded, and conscientious nature of these sorts of civil disobedience and intervention protests in their deliberations about and sentencing of people found guilty of charges such as trespass, obstructing traffic and hinder police under the Summary Offences Act (Vic).

29. Magistrates have often recognised the peaceful nature of these activities, the conscientious and victimless nature of the offences and the wider social goals involved in the protest and have generally handed down minimal sentences for such activities.
30. This may be frustrating for police at times but does not justify the introduction of substantial new powers to respond to similar circumstances that have been adequately responded to by our police and courts for over a century.

Delays and inconvenience caused by protest

31. In almost all of these historical and contemporary cases some people have been temporarily delayed, obstructed or inconvenienced by these actions. However, in almost all of these cases, the person to person and nonviolent nature of the actions has served to minimise any direct infringement on the rights of those people. Nonviolent blockades, sit-ins and pickets are spaces of *negotiated social conflict* where people on opposing side of a social issue can and often do discuss and debate the issues at hand. That is part of the social change impact of these sorts of nonviolent actions. Citizens greatly concerned about an injustice or an issue are able to demonstrate the depth of their concern by 'standing in the way', and people involved in or associated with the perceived injustice become involved in the issue.
32. The nature of such events allows for human to human compromises and negotiations. Blockades allow ambulance through, staff from unrelated companies are negotiated through human picket lines. Most are time-limited so the inconvenience is limited to an hour or several or shorter if police decide to intervene and arrest.
33. The staff of segregated lunch counters in the southern United States were certainly feeling intimidated by the African-American students in their establishment and were inconvenienced during the sit-ins. Many closed rather than serve the African-Americans. Staff at Lendlease in Melbourne and other companies were recently inconvenienced by East-West Tunnel picketers. But this inconvenience is the equivalent, or at least not much longer than that of a fire drill.
34. Many people have been inconvenienced by community pickets, student occupations, rallies, and protest marches through our streets.
35. To argue though, as is asserted by this Bill, that the competing rights of people temporarily obstructed from entering a workplace by a peaceful picket or a building sit-in are equivalent to and justify the removal of fundamental and historically grounded civil rights of association, assembly, and expression is disingenuous and misleading.
36. Temporary obstructions or disruptions to citizens going about their lives occurs regularly due to traffic management, traffic jams, road works, construction and public, social, political and religious events. Victoria citizens generally accept these disruptions as part of modern life and we believe strongly that the vast majority of Victorians would accept the rare minor inconvenience or disruption caused by protests as a small price to live in a robust democracy with a vibrant civil society.

Conduct causing 'reasonable apprehension of violence in another person'

37. The Bill introduces new provisions which empower a police officer or protective services officer to make a move on direction if the officer suspects on reasonable grounds that the conduct of the person or persons is causing a reasonable apprehension of violence in another person;
38. This discretionary clause is highly subjective, open to wide interpretation and likely to further conflate peaceful protest with violence.
39. Move on provisions in the Bill broaden the scope of power granted to police based upon their subjective predictions of future behavior made by individual police officers and therefore make these previously raised concerns raised above more acute.
40. Nonviolent intervention is a physical activity and involved using bodies to stand in the way even though there is no direct threat against another person. For this reason, it is often poorly understood by police, media or misinterpreted, sometimes deliberately, by observers and, even if entirely peaceful and nonviolent, can be conflated with 'aggression' and threat.
41. It can certainly be 'intimidating' to be confronted by a line of people standing linked arms across your workplace even when there is, as stated above, little actual threat. But this is often how physical nonviolent intervention is interpreted rather than an actuality.
42. This is a broad and discretionary power, and is liable to be applied in a discriminatory way according to the biases held by the officer.
43. Although the Attorney-General's statement in the second reading speech that these provisions would create certainty, we strongly believe that the subjective nature of ss3(2)(e) and (f) would in fact generate uncertainty around what behavior could result in a move on order from police.
44. Whilst some protests have certainly been rowdy, noisy, accompanied by chanting or slogans, by far the vast majority of these sorts of protest actions in Victorian history have been entirely nonviolent.
45. As the Chief Justice of the Supreme Court of New Zealand stated "*A tendency to annoy others, even seriously, is insufficient to constitute a disruption to order which may make restrictions upon freedom of speech necessary.*" [see full quote in 8 above]
46. Where violence or aggression has occurred during protest activity, police already have an array of offences available to charge if they deem appropriate.
47. Victoria is free from the sorts of political violence associated with less free, more authoritarian and non-democratic countries elsewhere. We have succeeded in balancing concerns about disruptions and violence during protests with the right to freedom of movement, freedom of expression, peaceful assembly and freedom of association so far in Victoria.
48. Nonviolent interventions in all their forms are the last form of protest action for Victorian citizens who feel that, according to their conscience and beliefs, they need to make a stand and put their bodies, as it were, 'on the line'.

49. We may not agree with all of the reasons for a particular protest and we can argue the facts back and forth as any good democratic society should. But generally, and as history has most often proven, they are good and courageous people and if we criminalise the option of intervening in an injustice occurring we reduce the role of these brave people throughout our history who have dared stand up to greed, destruction, injustice or exploitation.

Discretion and standard of proof

50. The Summary Offences and Sentencing Amendment Bill 2013 (Vic) curtails the ability of judges to use discretion in sentencing. For example, the proposed amendments to the Sentencing Act 1991 provide that a court *must* make an alcohol exclusion order in respect of an offender if satisfied *on the balance of probabilities* that at the time of the ‘relevant offence’ the offender was ‘intoxicated’ and the offender’s intoxication significantly contributed to the commission of the ‘relevant offence’.

51. We note that the standard of proof proposed is a civil standard of proof, not criminal (which would require the judge to be satisfied beyond all reasonable doubt). The standard of proof proposed to be employed is concerning, particularly when the bill itself states that the test ‘is intended to *ensure* that there is a clear connection between a person having consumed liquor and the commission of a relevant offence that would justify the making of an alcohol exclusion order.”

52. Such concern is compounded by the fact that key terms are poorly defined and an order has a duration of 2 years, which is a significant period of time that curtails freedom of movement.

53. For example, ‘intoxicated’ has been defined in a way that means whether someone is intoxicated or not is based on subjective opinion (rather than for example, an objective assessment on the basis of evidence that a person was breathalysed and blew over .05). It is also not clear what offences fall under the definition of a ‘relevant offence.’

54. The punishment for breaching an alcohol exclusion order is also offensively disproportionate to any deterrence and punishment that could be justified for such a breach – in that a person can be subjected to 7 years of imprisonment for consuming liquor in a place prohibited under such an order.

55. Such a penalty is greater than the maximum penalty that can be imposed, for offences recklessly causing injury, knowingly possess child pornography, possession of a drug of dependence (trafficable quantity), going equipped to steal and possession of a drug of dependence.

Conclusion

56. In light of the *serious* impacts that this bill will have of fundamental human rights, protected by the Charter of Human Rights and Responsibilities Act 2006, it’s important that there be an extensive public consultation process where community groups and individuals have the opportunity to provide considered responses to the bill.

57. This is particularly important given the very short time frame between the bill's tabling and the proposed date for the bill to be debated before the houses.
58. Victorians value their rights to freedom of expression, to privacy, to movement and to peaceful assembly and to freedom of thought, conscience, religion and belief.
59. We consider it imperative that Victorians' views on legislative reform that will curtail those rights should be heard and respected.
60. We also recommend that interested community groups and agencies be invited to make further submissions or to appear before the SARC.
61. Our centre requests an opportunity to present its concerns to the committee in person at its forthcoming meeting.

For further information about this submission, please contact:

Anthony Kelly
Executive Officer
(03) 9376 4355
0407 815 333
ceo@fkclc.org.au

About Flemington and Kensington Community Legal Centre

The Flemington and Kensington Community Legal Centre has been an invaluable part of the inner west for over 30 years, providing free legal services to the most vulnerable in our community. We have a migration service for humanitarian offshore refugees, widely recognised for its professional, compassionate and dignified service delivery.

We run a groundbreaking *Police Accountability Project* which advocates for victims of human rights abuses by police and has resulted in the recent 'Equality is not the Same' report which outlines a 3-year action plan to respond to concerns about racial discrimination by Victoria Police.

Further information about **Flemington and Kensington Community Legal Centre Inc:**
www.communitylaw.org.au/flemingtonkensington