
About Fitzroy Legal Service

The Fitzroy Legal Service (FLS) provides legal services across a broad range of jurisdictions and provides legal advice and casework to in excess of an average 3000 people per annum. FLS operates a five night per week free legal advice clinic, has duty lawyers based at the Neighbourhood Justice Centre, runs a self-funding criminal, infringements, victims of crime, and family law practice for low income earners and persons eligible for grants of legal aid, a drug outreach lawyer and a taxi driver legal support service.

In addition, FLS serves the community through community legal education, policy/ advocacy work, and strategic litigation connected with the needs of the community. FLS hosts the following websites - Activist Rights, the NDIS Rights, Law 4 Education, Services Directory for Drug and Alcohol Users. FLS also publishes the Law Handbook Online, accessed by approximately 5,600 users daily.

Background

Following the enactment of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’), FLS engaged in a community development program (funded by the City of Yarra) to encourage a sense of ownership of, and empowerment through, the frame and discourse of human rights. These events involved partnerships primarily with community members, as well as local community based organisations, with a focus on people experiencing homelessness and human rights, roaming house residents and human rights, drug users and human rights, and local Aboriginal communities and human rights. Each event incorporated the theme, ‘Everyone has Human Rights’, engaging local performers, speakers, and peer supporters. For example, a free premier screening of a documentary ‘Bastardy – A Portrait of Jack Charles’ was promoted through community health services and needle syringe programs operating in the City of Yarra, and played to a packed house within a local art gallery venue provided at low cost with food preparation assisted by peers. A range of peer driven local advocacy initiatives evolved from that process.

FLS has made a number of submissions to the Scrutiny of Acts and Regulations Committee (SARC). FLS also intermittently relies on the Charter in advocacy and law reform submissions, and in litigation contexts. Education on the Charter is incorporated into hosted websites, as well as professional development and community legal education sessions run by FLS.
It is our experience that the language, symbolism, and core values of ‘human rights’ are accessible and meaningful to disenfranchised, stigmatized communities.

**Focus of this submission – Building a human rights culture**

At the outset, we make the frank submission from a service delivery perspective that ‘human rights culture’ in Victoria appears fragile and unpredictable, and is perceived in a cynical light by many of those concerned by breaches, as is the case in relation to ‘human rights’ culture nationally.

From both a legal case work and advocacy perspective, common law traditions that govern due process, generate balance between conflicting interests, acknowledge disparate power relations and duties of care, protect the individual from undue and/or unjust interference with rights by the State, and maintain separation of powers between the legislature, executive and judiciary, are perceived to provide a surer footing and bring greater gravitas to advocacy.

Whilst we acknowledge there are a number of aspects to growing a more robust legal culture in relation to human rights, it is the Parliamentary process that we seek primarily to address. We note the views of FLS have been put forward in other forums in relation to impediments to litigation. We endorse the submissions of our colleagues at the Human Rights Law Centre in relation to their submission, which we have had opportunity to review.

Before addressing parliamentary processes, we further make two submissions in relation to additional matters we believe would support the building of a human rights culture in Victoria.

**A. Community Education**

We submit that enhancement of human rights as an embedded cultural understanding requires commitment to community educative processes that place human rights discourse against an historical and political backdrop that informs the question ‘why’. The socio-political processes that accompany the degeneration of human rights protections, and provide the preconditions for gross violations, are repeated through time and regions. As a community we have the capacity, and a strong imperative, to promote learning and understanding of the lessons of history and the suffering/ loss of life that has accompanied these processes. Such community education would in our submission enhance meaningful participation in democratic processes by community insistence on transparency, accountability, equality, freedom of political communication, protection of fundamental freedoms and the rule of law.
Recommendation 1 – That investigation is made into educative programs focused on human rights in a socio-historical context, for example in relation to units related to the Second World War, that might be mainstreamed into high school syllabus in Victoria.

B. Access to Justice

From a community legal service perspective, we submit that access to legal advice and representation is fundamental to the protection of human rights. At the time FLS opened in December 1972, access to legal representation in civil and criminal matters was largely dependent on income. Litigants/ accused persons might self represent, seek ad hoc pro bono assistance, or if charged with a serious offence (essentially involving trial) seek assistance through state funded schemes (the Office of the Public Solicitor and the Victorian Legal Aid Committee).

Whilst significant inroads have been made through the operation of legal aid schemes and duty lawyer services, we submit recent changes to legal aid guidelines have had a significant impact on equitable access to justice. E.g. where criminal charges are pending, an immediate term of imprisonment must be likely in order to attract a grant of aid, with extremely limited exceptions; in relation to infringement matters, an individual must owe in excess of $5,000 and have confirmed special circumstances of homelessness, drug dependence, or a mental health diagnosis, in order to attract a grant; in relation to civil debt matters, where equality of arms is often a significant issue, it is our experience legal representation is rarely available.

As such, the vast majority of those on low income engaged with the Courts are reliant on duty lawyers (subject to capacity and guidelines), charitable pro bono schemes, and/or the assistance provided by under-resourced community legal services (often limited to advice only). Whilst statistically duty lawyers see large numbers of clients, in our submission the capacity to engage with the underlying causes of offending, make appropriate referrals, and provide detailed forensic analysis of briefs is compromised by volume. The commission of relevant evidentiary materials to be provided to the Court in mitigation of plea is also obviously compromised where no grant of aid can be obtained.

We submit the impact of economic disadvantage poverty on the right to a fair trial is a pressing issue upon which a range of other rights are entirely contingent. The narrow scope of eligibility criteria, and lack of weight given to the simple but layered circumstance of poverty, means that many with legitimate and highly entrenched disadvantage face further barriers in engagement with the justice system. We note that, whilst it remains the case that there is no right at common law to publicly funded legal representation, recent times have once again seen the stay of proceedings at the
direction of the bench due to concerns with access to adequate legal representation. Finally, from a community legal perspective, we note ‘low level’ offending does not generally attract attention in this discourse. The functional tendency to privilege the rights of recidivist offenders, as opposed to pursuing greater parity in provision to persons engaged with the legal system generally, has adverse impacts on early intervention and rehabilitation opportunities. Perhaps more importantly, it fails to acknowledge the potentially devastating impacts of any legal proceeding – commonly for example, crippling debt on a single parent, a criminal record for the family wage earner - and the importance of comprehensive legal advocacy to preserve and protect fundamental rights.

**Recommendation 2 – That enhanced eligibility to legal assistance for persons engaged with the justice system be considered integral to the building of a human rights culture in Victoria.**

C. Parliamentary processes

It is trite to say that the litmus test of human rights culture is the impact on the most economically and socially vulnerable and stigmatized communities. And yet it is historically and presently so. The two case studies we cite below provide a practical example of erosion of common law rights whilst the Charter has been in operation, with disproportionate impacts on economically and socially vulnerable communities. ‘Move on’ laws are examined as an example of parliamentary processes and the role of the Scrutiny of Acts and Regulations Committee (‘SARC’) in the passage of legislation impacting human rights; the infringements system and imprisonment in lieu are examined as an example of process driven legislation impacting human rights absent scrutiny of operational impacts by Parliament and Courts.

We submit as an overarching principle that rigorous, evidence based analysis of impacts of the law (in operation and effect), in a moral framework protective of human rights, is inseparable from building a culture committed to the meaningful protection of human rights. Central to this principle are the concept of proportionality, fairness, and substantive equality before the law. In our submission the investigation required by section 7 (2) of the Charter to date has been dealt with primarily by reference to political hyperbole. The role of the Scrutiny of Acts and Regulations Committee (SARC) in relation to this process is unclear, given the lack of clear guidance as to the relevance of ‘evidence’ and the professed prohibition on consideration of party policy. As outlined below, the relevance of the manner in which the SARC is constituted (parliamentary members), and the resourcing and time allocation available to SARC requires exploration also, given the current ambit of responsibility and authority with which it is ostensibly tasked.

The *Summary Offences and Control of Weapons Acts Amendment Bill 2009* (Vic) was introduced into the Legislative Assembly on 10 November 2009. The Statement of Compatibility read 12 November 2009 concluded 'the majority of the bill is compatible with the charter because, to the extent that some provisions may limit human rights, those limitations are reasonable and demonstrably justified in a free and democratic society'. The Statement of Compatibility further concluded that those aspects of the Bill incompatible would be proceeded with in the current form 'as there is considerable concern in the community about the pattern of weapons-related offending with which this legislation is considered'. The SARC report published 24 November 2009 failed to make an explicit finding of incompatibility. The reading of the Statement of Compatibility in the Legislative Council on 25 November 2009 confirmed the position of partial incompatibility. The Bill was passed without an override declaration, and as such, the exceptional circumstances ostensibly required by section 31 were not addressed.

Concern was raised in relation to lack of community consultation prior to the introduction of the bill from experts in the field, and those working with communities perceived likely to be over-represented in engagement with the proposed laws. Despite tight timelines, thirty three submissions were provided by stakeholders, including from the Law Institute of Victoria ('LIV'), the Office of the Victorian Privacy Commissioner and the Victorian Equal Opportunity and Human Rights Commission. Concerns of stakeholders are summarized in the SARC report, but included unjustified intrusion of privacy and dignity, broad discretionary powers, profiling, discriminatory impacts, criminal penalties for previously non-criminal conduct based on predictive perceptions of future conduct. Evidence was provided of interstate experience in relation to discriminatory impacts of 'move on powers'.

From an advocacy perspective, the legislation was the first to attract significant community concern subsequent to the introduction of the Charter. Neither the Statements of Compatibility nor the SARC report articulated meaningfully the evidence base justifying intrusion on protected rights, both in the balancing exercise where compatibility was found, and in the balancing exercise where incompatibility was found. In 2010, the Law Council of Australia summarized the LIV's concerns in relation to the Government's approach to this Bill as follows: 'It suggests that the Government can be selective about when to act compatibly with the Charter and can introduce laws that are incompatible with protected rights without issuing a formal override declaration, and without

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1. Attachment 1 - *Summary Offences and Control of Weapons Acts Amendment Bill 2009* (Vic)
2. Attachment 2 - Legislative Assembly Hansard Thursday 12 November 2009, see p 4024
3. Ibid.
4. Attachment 3 - Alert Digest No 14 of 2009, pp 33 - 46
5. Legislative Council Hansard Friday 26 November 2009, 5781
6. Attachment 3 - Alert Digest No 14 of 2009, pp 34-35
justifying the restriction of the protected right in accordance with the proportionality test under the Charter. Concern was also expressed by the LIV in relation to the absence of prior consultation, and the haste with which the Bill was introduced and debated.

The Summary Offences and Sentencing Amendment Bill 2013 (Vic) was introduced into the Legislative Assembly on 11 December 2013. The amendments greatly expanded the scheme introduced through amendments of 2009, including introduction of arrest powers, and imprisonment for repeat recipients of ‘move on’ directions. The brief Statement of Compatibility identified rights impacted, but maintained inbuilt protections provided the required balance. Ten submissions were received by the SARC, including from the LIV, the Victorian Council of Social Services and the Victorian Human Rights and Equal Opportunity Commission. FLS also made a joint submission to all Parliamentarians with community legal, health, and homeless agencies. To the broad range of stakeholders engaged, the unacceptable impacts on the most marginalised members of the community, and the undermining common law traditions protective of the most fundamental human rights, was evident. A research brief was generated by the Parliamentary Library and Information Service. The SARC report published 4 February 2014 made no reference whatsoever to concerns raised by stakeholders, other than to acknowledge receipt of submissions, and found the Bill compatible with the Charter on the basis of the previous SARC report of 2009. The members of the SARC were divided. A motion was moved (and defeated) to split the Bill on 20 February 2014. The Bill was passed by both houses on 12 March 2014, with a commitment from the opposition to repeal if brought to power.

In 2015 the Summary Offences Amendment (Move-On Laws) Bill was introduced. The amendments were found to be compatible with the Charter. Parliamentary debate focused on rights discourse, discriminatory impacts, and countervailing public interests.

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7 Law Council of Australia, Future Direction and Role of the Scrutiny of Bills Committee — Senate Committee for the Scrutiny of Bills, 6 April 2010, p 22-23
8 Ibid p 23
9 Attachment 4 - Summary Offences and Sentencing Amendment Bill 2013 (Vic)
10 Attachment 5 – Legislative Assembly Hansard Thursday 12 December 2013, pp 4680 - 4683
12 Attachment 6 – ‘Proposed Changes to the Law Impacting Clients of Community Sector Organisations’
13 Attachment 7 – Parliamentary Library and Information Service, ‘Summary Offences and Sentencing Amendment Bill 2013’, No 4 February 2014
14 Attachment 8 – Alert Digest No 1 of 2014, pp 24-26
15 Attachment 9 – Summary Offences Amendment (Move-On Laws) Bill 2015 (Vic)
16 Alert Digest No 1 of 2015, p 13
17 Attachment 10 – Legislative Council Hansard Tuesday 17 March pp 513-540
In relation to the above case study, it is difficult to identify from advocacy perspective how the Charter has strengthened human rights culture in the context of the Parliamentary process. It is deeply concerning that the Charter may in fact be relied on as a procedural vehicle to justify erosion of entrenched and hallowed common law rights through a ‘balancing exercise’ requiring nothing in the way of evidence.

FLS does not have expertise to identify the manner in which the SARC should ideally operate. However, we note the independence of the SARC is a matter requiring further investigation. Positioning along party partisan lines has been commented upon by the LIV amongst others. In addition to the above case study, see for example the 14 September 2011 SARC Charter review report, in which the coalition majority recommended limiting the Charter to parliamentary scrutiny. ¹⁸ We also note the time allowed and resourcing allocated to production of reports of the SARC, as well as the timing of this remittal being subsequent to the introduction of Bills, raise questions as to whether human rights discourse is being integrated in an optimal fashion into the parliamentary process.

In our submission the most fundamental question is as to the appropriate role and ambit of authority of the SARC. It would seem the balancing exercise envisioned by section 7(2) requires consideration of evidence and policy objectives. The approach of identifying compatibility in the absence of both is somewhat confusing. The exercise, from a bystander point of view, does not require summary of relevant precedent internationally, partnered with a non-critical reference to political rhetoric. It would seem the requirement to assess ‘reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ having regard to the enunciated factors requires localized analysis of evidence relating to the necessity and operational impacts, and existing common law precedent. We do not submit the SARC is the appropriate body to conduct the section 7(2) exercise, we merely note the role of the SARC is unclear. It may or may not be that the balancing exercise most appropriately remains within the political sphere.

We put forward the following as matters for investigation. The SARC is constituted in a manner ensuring independence, and its ambit is clearly identified to include/ exclude policy and evidence considerations. As such, either submissions on evidence and policy would be formally invited and considered, or, a thorough analysis of the existing state of law in the absence of evidence and policy is provided to inform parliamentary debate only. In the former instance, which would require

¹⁸ Law Institute of Victoria, ‘Government Interim Review – The LIV rates the Victorian Coalition Government on its performance so far on access to justice, sentencing and protection of rights’, Law Institute Journal, September 2013, p 21
greater resourcing, assessments of compatibility/incompatibility would result in override declarations preserving Parliamentary sovereignty, but providing a layer of transparency. In the latter instance, the process may be used to enhance discourse in the parliamentary and public realm regarding human rights, but the SARC would not generally be tasked with making an assessment on compatibility. Again, we reiterate, FLS as a community legal service does not have adequate expertise to advocate for a preferred model. However, we do put forward the recommendation below as within our experience.

**Recommendation 3** – The SARC be investigated in relation to ambit of role, independence, transparency, accountability, adequate resourcing, and optimal contribution to discourse regarding protected human rights.

b. Case Study 2 - Infringements

The most common legal issue dealt with by the FLS free legal advice clinic is infringements, the vast majority of which are issued, not by Courts, but by agencies such as local councils, toll road operators, and police. This reflects the global environment in Victoria in relation to financial penalties. For example, in 2012-13, 114,034 Court fines were imposed, whilst during the same time period close to 6 million infringement notices were issued by over 120 different agencies Victoria wide.19 Around one third of infringement notices are not paid and result in enforcement orders, with the value of warrants issued in 2012-2013 being $470,597,136.20

We note that Court fines (as opposed to infringements) are informed by ordinary sentencing principles, i.e. ‘that the punishment for an offence be proportionate to the offence committed, and that the law should have equal effect, regardless of a person’s financial position. The latter principle informs the requirement in sentencing that a Court must take a person’s financial circumstances into account when setting a fine amount.21 This is not the case in relation to infringement notices, which allow only extremely limited avenues to review of the principles of proportionate punishment and equality before the law.22 Generally, the Infringements Act 2006 (Vic) is concerned with procedurally ensuring payment of financial penalties and costs, through payment plans, powers to seize property, approval of community work, or facilitation of imprisonment in lieu. A specific exception arises

20 *Ibid* p 62
21 *Ibid* pp 36 - 37
22 In some infringement matters, specific defences may be raised, for example in relation to tolls under the *Melbourne City Link Act 1995 (Vic)* s 73(1).
where 'special circumstances' are present (homelessness, mental/ cognitive incapacity, serious drug addiction) such that legal capacity or mens rea in relation to the 'offending' conduct is not made out.\textsuperscript{21}

FLS routinely represents persons in the 'special circumstances' list, appeals against non-revocation of infringements, and penalty enforcement hearings. Poverty is not a consideration that can be raised in isolation until warrants are executed and imprisonment in lieu is being considered by the Court - Infringements Act 2006 (Vic) section 160. At that stage, consideration must be given as to whether 'having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh', and the Court may discharge the infringements in whole or part.\textsuperscript{24} Where section 160 has been relied upon, and a payment plan is in place, a default may result in immediate imprisonment without being brought before a Court. It is unclear at present whether the Court has power to vary such an order even where circumstances have materially changed. We attach a transcript of proceedings relating to this question\textsuperscript{25}, and a recent report published by Victoria Legal Aid relating to a client assisted by the FLS.\textsuperscript{26} In relation to the former matter, our client had become legally blind since the section 160 order was imposed, and as such was unable to continue to work and make repayments. In the latter matter, our client was in treatment for cancer at the time he defaulted on payment. His incarceration interrupted his treatment, and it was only due to the representations of his wife, who does not speak English and attended numerous times at our free legal advice clinic, that a Court hearing was able to be pressed.

From a community legal centre perspective, the overwhelming majority of those who appear before the Court on unpaid infringement matters are greatly disadvantaged through socio-economic circumstance. Without the advantage of funding for a car space, a bank account balance that can accept automatic top ups from toll roads, finance to drink in authorized establishments, the funds or foresight to ensure their myki cards are topped up, or the legal literacy to comprehend the complex regulatory framework in which we live, the impacts of the infringements system can be and are devastating to the communities we work with on a psychological, social, and economic level. As poverty does not attract a grant of legal aid, with the threshold requiring also proof of special circumstances and fines in excess of $5000, many community members proceed as self represented litigants or through the assistance of the duty lawyer present on the day. This is despite the

\textsuperscript{23} Infringements Act 2006 (Vic) - section 3
\textsuperscript{21} Ibid - section 160(3)
\textsuperscript{24} Attachment 11 – Victoria Legal Aid, 'When the law says you don’t need to ask why: how a cancer patient ended up in prison' Wednesday 10 June 2015
\textsuperscript{25} Attachment 12 – 'Magistrates court transcript in relation to Accused in Penalty Enforcement Hearing to vary/ revoke order previously made – Breach to attract imprisonment in lieu’
extraordinary quantum of debt frequently involved, and the manifest risks that present in relation to long term payment plans. Additionally, without aids of grant, evidentiary materials that might support exercise of discretion are difficult to obtain. It is the experience of the FLS lawyers that infringement matters are highly contested, as compared with criminal proceedings, with multiple prosecuting agencies present, and zealous submissions opposing the nexus between any extenuating or special circumstances and the ‘offending’.

It is our submission that the infringements system, which bears few of the hall marks of due process and substantive equality, raises significant human rights concerns - including the right to equality before the law, right to a fair trial, freedom from arbitrary detention. We note the report commissioned by the then Attorney General in early 2013, authored and published by the Sentencing Advisory Council in May 2014, identifies a range of considerations relevant to charter rights - proportionality, equality before the law, fairness, parsimony, parity - but does not, in close to 800 pages, reference the Charter itself.

**Recommendation 4 – That the Government assess the operation and effect of existing legislation against Charter rights, and explore a mechanism by which infringement might be investigated and reported upon.**

**Conclusion**

The FLS expresses gratitude for the opportunity to make submissions in relation to this review. We welcome queries or further discussion in relation to any matters raised herein through this process or otherwise.

Yours faithfully

Fitzroy Legal Service

Per

Meghan Fitzgerald

Principal/ Manager Social Action, Law Reform, Policy

Claudia Fatone

FLS Executive Officer
# Summary Offences and Control of Weapons Acts
## Amendment Act 2009
### No. 92 of 2009

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Summary Offences and Control of Weapons Acts Amendment Act 2009†

No. 92 of 2009

[Assented to 15 December 2009]

The Parliament of Victoria enacts:

PART 1—PRELIMINARY

1 Purposes

The main purposes of this Act are—

(a) to amend the Control of Weapons Act 1990 to provide police with enhanced powers to search for weapons, and
PART 2—AMENDMENTS TO SUMMARY OFFENCES ACT 1966

3 New Division 1A inserted in Part I

After Division 1 of Part I of the Summary Offences Act 1966 insert—

"Division 1A—Move-on powers

6 Direction by police to move on

(1) A member of the police force may give a direction to a person or persons in a public place to leave the public place, or part of the public place, if the member suspects on reasonable grounds that—

(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.

(2) A direction under this section may be given orally.

(3) A direction under this section may direct the person or persons not to return to the public place or part of a public place or not to be in that public place or part for a specified period of not more than 24 hours.

(4) A person must not without reasonable excuse contravene a direction given to the person under this section.

Penalty: 5 penalty units.
7 Power to serve infringement notice

(1) In section 60AA(1) of the Summary Offences Act 1966, for "section 18" substitute "section 6, 13, 14, 17A or 18".

(2) For the note at the foot of section 60AA(1) of the Summary Offences Act 1966 substitute—

"Note

Section 6 deals with persons who are in a public place and are directed to move on.

Section 13 deals with persons who are found drunk in a public place.

Section 14 deals with persons who are drunk and disorderly in a public place.

Section 17A deals with disorderly behaviour by a person in a public place.

Section 18 deals with offensive behaviour by a person in a motor vehicle in a declared area."

(3) After section 60AA(2) of the Summary Offences Act 1966 insert—

"(3) Despite subsection (1), an infringement notice cannot be served on a person for an alleged offence against—

(a) section 14, if an infringement notice has been served on that person for an alleged offence against section 17A arising out of the same incident;

(b) section 17A, if an infringement notice has been served on that person for an alleged offence against section 14 arising out of the same incident."
PART 3—AMENDMENTS TO CONTROL OF WEAPONS ACT 1990

9 New section 10 substituted

For section 10 of the Control of Weapons Act 1990 substitute—

"10 Search without a warrant

(1) If—

(a) a member of the police force has reasonable grounds for suspecting that a person is carrying or has in his or her possession in a public place a weapon contrary to this Act; and

(b) the member informs the person of the grounds for his or her suspicion; and

(c) the member complies with subsection (3)—

the member may, without a warrant—

(d) search the person and any vehicle or thing in his or her possession or under his or her control for the weapon; and

(e) seize and detain any item detected during the search that the member reasonably suspects is a weapon.

(2) For the purposes of subsection (1)(a), the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds for suspecting that the person is carrying a weapon or has a weapon in his or her possession.

(3) Before a member of the police force commences a search of a person under subsection (1), the member must—
11 Chief Commissioner to report on searches without warrant

After section 10B(a) of the Control of Weapons Act 1990 insert—

"(ab) the number of strip searches conducted under section 10G during that financial year; and".

12 New sections 10C to 10L inserted

After section 10B of the Control of Weapons Act 1990 insert—

"10C Definitions

In this section and in sections 10D to 10L—

designated area means an area in respect of which a declaration under section 10D or 10E is in effect;

thing includes any object, article or material;

weapon means—

(a) a prohibited weapon; or

(b) a controlled weapon; or

(c) a dangerous article.

10D Planned designation of search area

(1) The Chief Commissioner may declare an area to be a designated area if the Chief Commissioner is satisfied that—

(a) either—

(i) more than one incident of violence or disorder has occurred in that area in the previous 12 months that involved the use of weapons; or
(c) specify the powers that members of the police force are authorised to exercise in the designated area while the declaration is in force; and

(d) specify the period of operation of the declaration.

(6) A declaration under this section takes effect on the date and time specified in the notice which must not be less than 7 days after the date of the publication of the notice in the Government Gazette.

(7) A declaration under this section ceases to have effect at the time specified in the notice.

(8) If a declaration is made under this section in respect of an area, a further declaration under this section cannot take effect in respect of that area until after the end of the period of 10 days after the previous order ceases to have effect.

(9) Nothing in subsection (8) prevents a declaration being made under section 10E in respect of that area during that period.

(10) In this section, metropolitan area means the area or areas specified by the Governor in Council for the purposes of this section by Order published in the Government Gazette.

10E Unplanned designation of search area

(1) The Chief Commissioner may, in writing, declare an area to be a designated area if the Chief Commissioner is satisfied that—

(a) it is likely that violence or disorder involving weapons will occur in that area during the period of intended operation of the declaration; and
10G **Power to search persons in designated area**

(1) A member of the police force may, without a warrant, stop and search a person, and search any thing in the possession of or under the control of the person for weapons, if the person and, if applicable, the thing are in a public place that is within a designated area.

(2) Schedule 1 applies to the search of a person or thing under this section.

(3) A member of the police force must conduct the least invasive search that is practicable in the circumstances.

(4) A member of the police force may detain a person for so long as is reasonably necessary to conduct a search under this section.

10H **Power to search vehicles**

(1) A member of the police force may, without a warrant, stop and search a vehicle, and anything in or on the vehicle, for weapons if—

(a) the vehicle is in a public place that is within a designated area; and

(b) there is a person in or on the vehicle.

(2) A member of the police force may detain a vehicle for so long as is reasonably necessary to conduct a search under this section.

10I **Information to be given before search occurs**

(1) When a member of the police force detains a person or a vehicle under section 10G or 10H to conduct a search, the member must—
Summary Offences and Control of Weapons Acts Amendment Act 2009
No. 92 of 2009
Part 3—Amendments to Control of Weapons Act 1990

(d) it is offence for the person to obstruct or hinder a member of the police force in the exercise of a power to stop and search a person or a vehicle.

10J Seizure of suspected weapons

(1) A member of the police force may seize and detain any item detected during a search under section 10G or 10H that the member reasonably suspects is a weapon.

(2) If a member of the police force who seizes and detains an item under this section, determines after examination of the item that it is not a weapon, the member must return the item to the person from whom it was seized, without delay.

10K Power to obtain disclosure of identity

(1) A member of the police force may request a person who is to be subject to a strip search under Schedule 1 and whose identity is unknown to the member to disclose his or her identity.

(2) A person who is so requested to disclose his or her identity must not, without reasonable excuse, fail or refuse to comply with the request.

Penalty: 1 penalty unit.

(3) A person must not, without reasonable excuse, in response to any such request—

(a) give a name that is false in a material particular, or

(b) give an address other than the person's full and correct address.

Penalty: 1 penalty unit.
2 Definitions

In this Schedule—

*child* means a person under the age of 18 years;

*electronic metal detection device* means an electronic device that is capable of detecting the presence of metallic objects;

*impaired intellectual functioning* means—

(a) total or partial loss of a person's mental functions; or

(b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or

(c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour;

*initial electronic device search* means a search of a person or thing by passing an electronic metal detection device over or in close proximity to the person's outer clothing or the thing;

*strip search* of a person means a search of the person or of a thing in the possession or under the control of the person that may include—
3 Initial electronic device search

A member of the police force who is authorised to search a person or thing under section 10G may carry out an initial electronic device search of that person or thing.

4 Examination of things

(1) If, as a result of an initial electronic device search under clause 3, a member of the police force considers that a person may be concealing a weapon, the member may examine any thing in the possession or under the control of the person in accordance with subclause (3).

(2) A member of the police force who is authorised to search a thing under section 10 may examine the thing in accordance with subclause (3).

(3) The member of the police force may—
   (a) request the person—
      (i) to produce and empty of its contents any bag, basket or other receptacle; or
      (ii) to turn out his or her pockets; or
   (b) search through any bag, basket or other receptacle; or
   (c) search through and move the contents of any bag, basket or other receptacle; or
   (d) if the member considers it appropriate in the circumstances, pat down the area of the person's pockets; or
6 Preservation of dignity during outer search

(1) A member of the police force who searches a person under clause 5 must, as far as is reasonably practicable in the circumstances, comply with this clause.

(2) The member must inform the person to be searched of the following matters—

(a) whether the person will be required to remove clothing during the search;

(b) if the person will be required to remove clothing during the search, why it is necessary to remove the clothing.

(3) The member must ask for the person's cooperation.

(4) The member must conduct the search—

(a) in a way that provides reasonable privacy for the person searched, and

(b) as quickly as is reasonably practicable.

(5) The member must conduct the least invasive kind of search that is reasonably necessary in the circumstances.

(6) A search that involves running hands over the outer clothing of a person must, if reasonably practicable, be conducted by a member of the police force who is of the same sex as the person being searched.
(d) inform the person that the member intends to search the person for weapons and is empowered to do so under this Act.

(2) A member of the police force is not required to provide this information to a person if the member provided the information to the person under section 10(3) or 10f.

9 Rules for strip searches

(1) A member of the force who conducts a strip search of a person must comply with this clause.

(2) The member must inform the person to be searched of the following matters—

(a) as to whether the person will be required to remove clothing during the search;

(b) if the person will be required to remove clothing during the search, why it is necessary to remove the clothing.

(3) The member must ask for the person's cooperation.

(4) The member must conduct the least invasive kind of search that is reasonably necessary in the circumstances.

(5) The strip search must be conducted in a manner that preserves the dignity and self-respect of the person being searched.

(6) The strip search must be conducted in a private area and in a way that provides reasonable privacy for the person being searched.

(7) The strip search must be conducted as quickly as is reasonably practicable.
10 Examination of clothing

A member of the police force may search any item of clothing of a person removed during a strip search by examining the interior and exterior of the item and by passing an electronic metal detection device over or in close proximity to the item.

11 Rules for searches of children

(1) This clause applies if a member of the police force reasonably believes that a person to be searched by the member under clause 5 or 7 is a child.

(2) This clause does not apply to a search of a child under clause 5 that is a search by means of an electronic metal detection device.

(3) A search of a child must be conducted in the presence of—

(a) a parent or guardian of the child being searched; or

(b) if the child is mature enough to express an opinion and indicates that the presence of the parent or guardian is not acceptable to the child, in the presence of an independent person who is capable of representing the interests of the child and who, as far as is practicable in the circumstances, is acceptable to the child.

(4) Subclause (3) does not apply if—

(a) a parent or guardian is not then present; and

(b) the seriousness and urgency of the circumstances require the search to be conducted without delay; and
(c) the search is conducted in the presence of an independent person who is capable of representing the interests of the person to be searched and who, as far as is practicable in the circumstances, is acceptable to the person."
ENDNOTES

Minister's second reading speech—
Legislative Assembly: 12 November 2009
Legislative Council: 27 November 2009

The long title for the Bill for this Act was "A Bill for an Act to amend the Summary Offences Act 1966 and the Control of Weapons Act 1990 and for other purposes."
SUMMARY OFFENCES AND CONTROL OF WEAPONS ACTS AMENDMENT BILL

Statement of compatibility

Mr CAMERON (Minister for Police and Emergency Services) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Summary Offences and Control of Weapons Acts Amendment Bill 2009 (the bill). In my opinion, the bill, as introduced in the Legislative Assembly, is partially compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

1 Overview of bill

The bill amends the Summary Offences Act 1996 to enhance police powers to tackle violence and disorder. It confers on police a new power to direct people to move on from an area if they are, or are likely to become, involved in a breach of the peace or threat to public safety.

The bill also creates a new offence of disorderly conduct, empowers the police to arrest and lodge in safe custody a person who is found drunk and disorderly in a public place, and expands the list of offences for which infringement notices can be issued.

The bill amends the Control of Weapons Act 1990 to clarify and strengthen the existing power to search a person for weapons on reasonable suspicion that the person is carrying a weapon in a public place. It also provides the police with a new power to search persons for weapons in public places within temporarily designated areas. This new power is not premised on the police first forming a reasonable suspicion that the person to be searched is carrying a weapon. The bill regulates in detail the way in which the new search powers are to be exercised (and includes special protections as to the circumstances in which, and manner in which, strip searches can be conducted).

2 Human rights issues

The amendments to both acts raise a number of issues in terms of compatibility with the charter. In this statement, I deal first with the issues raised in respect of the Summary Offences Act 1966 because that conforms with the structure of the bill. In my view, however, the most significant charter issues arise in relation to the amendments to the Control of Weapons Act 1990.

Summary Offences Act 1996 — new police powers to move on

Clause 3 of the bill inserts new division 1A into part I of the Summary Offences Act 1966 to provide police with a 'move on' power. This power permits a member of the police to give a direction to a person or a group of persons to leave a public place or a part of a public place if the member suspects on reasonable grounds that the person or group of persons is breaching the peace or likely to breach the peace, that the person is endangering or likely to endanger the safety of any other persons, or that the person's behaviour is likely to cause injury to a person or damage property, or otherwise constitute a risk to public safety.

Section 12 — freedom of movement

Section 12 of the charter provides that every person lawfully within Victoria has the right to move freely within Victoria. As clause 3 allows police to compel a person to leave a public place and creates an offence for failure to comply, the right to freedom of movement is limited. However, I consider this limitation to be reasonable and justifiable under section 7(2) of the charter for the following reasons.

(a) the nature of the right being limited

It is generally recognised that the right to freedom of movement can be subject to restrictions. For example, the International Covenant on Civil and Political Rights expressly recognises that the right may be subject to restrictions that are necessary for the protection of national security, public order, public health or morals or the rights and freedoms of others.

(b) the importance of the purpose of the limitation

The purpose of the power to issue a 'move on' direction is to reduce violence and disorder. It is aimed at protecting public order and the rights and freedoms of others, including the rights to life, to security and to enjoyment of one's property. These are important objectives that are sufficient to justify limiting a charter right.

(c) the nature and extent of the limitation

The direction can only be made to members of the public reasonably suspected of breaching the peace, endangering safety or damaging property, or where there is a likelihood of one of those things occurring. The definition of 'breach of the peace' is settled at common law and contemplates situations where harm is done or likely to be done to a person or their property or where a person is in fear of being harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

Once a direction is given, the person or group of persons will be compelled to leave the place for a period of time not exceeding 24 hours. Anyone who fails or refuses to leave that place or part of that place is guilty of an offence carrying a maximum penalty of 5 units (the current value of a penalty unit being $116.82). The offence will also be enforceable by infringement notice with a penalty of two units.

(d) the relationship between the limitation and its purpose

The 'move on' power provides police with a pre-emptive tool to diffuse dangerous situations and to ensure the peaceful enjoyment of public spaces by the citizenry. In this way, there is a clear and rational connection between the limitation on the right to freedom of movement and the purpose of the provision.

(e) less-restrictive means reasonably available to achieve the purpose

Clause 3 is carefully tailored. The 'move on' power is only triggered if there is a reasonable suspicion of a breach of the peace, threat to safety, or threat of injury or damage (or of a likelihood of one of these things occurring) and is in effect for a limited period of time. Additionally, subclause (5) specifies...
that the power does not apply in relation to a person who is: 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. This means that activities with a high expressive content will generally be exempted from interference.

In the light of these limits on its operation, clause 3 restricts the right to freedom of movement no more than reasonably necessary to achieve the legislative purpose.

Section 15 — freedom of expression

For similar reasons, clause 3 does not breach section 15 of the charter. The exemption in subclause (5) for picketing, political demonstrations or protests and other attempts to publicise a viewpoint ensures that most behaviour with a high expressive content cannot be targeted. I accept that it is possible that some conduct targeted by clause 3 may nevertheless have an expressive content and thus engage the right to freedom of expression in section 15(2) of the charter. However, section 15(3) provides that the right to freedom of expression brings with it special duties and responsibilities and may be subject to lawful restrictions that are reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality. Accordingly, a provision such as this one that is carefully tailored to respond to behaviour that gives rise to a reasonable suspicion of a disruption or impeding disruption to public order does not breach section 15.

Section 16(1) — peaceful assembly

Section 16(1) of the charter provides that every person has the right of peaceful assembly. The right of peaceful assembly encompasses the right to privately and publicly gather or associate with others to attain a particular end and the right to organise and to participate in public demonstrations and marches. As is apparent from the terms of the right itself, it only protects participation in activities that are intended to be peaceful. Assemblies that are not peaceful or that lose their peacefulness through the use or threat of force do not fall within the protective scope of right. In my view, because the power is targeted at breaches of public order, the right to peaceful assembly is not engaged.

Summary Offences Act 1996 — new offence of disorderly conduct

Clause 6 of the bill inserts new section 17A into the Summary Offences Act 1996, which creates the offence of behaving in a disorderly manner in a public place. The offence carries a maximum penalty of five units, and can also be enforced through infringement notices carrying 2 penalty units.

Section 15 — freedom of expression

As disorderly conduct can have an expressive component, clause 6 clearly engages section 15(2) of the charter. It is well recognised that the right to freedom of expression protects the expression of ideas that offend, shock or disturb and covers behaviour that is irritating, contentious, heretical, unwelcome or provocative — provided, at least, that it does not tend to provoke violence. As has already been noted, however, section 15(3) of the charter provides that the right to freedom of expression can be subject to lawful restrictions that are reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality. The offence of behaving in a disorderly manner places limits on acceptable behaviour in public places in order to serve the legitimate purpose of protecting public order and the rights of others to the peaceful enjoyment of public spaces. The right to freedom of expression means that those limits should be generous ones that do not, for example, restrict a person’s behaviour simply because it offends or annoys others. However, the language in which the offence of behaving in a ‘disorderly manner’ is cast is maliable, allowing for it to be interpreted and applied narrowly so as to ensure consistency with the human rights framework. So, for example, the New Zealand Supreme Court recently considered the meaning of the equivalent New Zealand offence in the light of the right to freedom of expression found in the New Zealand Bill of Rights Act 1990 (Brooker v. Police [2007] 3 NZLR 91). Each member of the court formulated, in slightly different language, a test that he or she considered sufficient to protect the right — for example, behaviour that is ‘seriously disruptive of public order’, that creates a ‘clear danger of disruption rising far above mere annoyance’ or that causes ‘anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear’. It is to be expected that the Victorian police and, if necessary, the judiciary will likewise interpret and apply the new offence in a manner that is consistent with section 15(3) of the charter and that does not penalise behaviour simply because it annoys others.

Accordingly, I conclude that clause 6 does not breach section 15 of the charter.

Section 16(1) — peaceful assembly

In the majority of circumstances in which the new offence of behaving in a disorderly manner applies, the right to freedom of peaceful assembly in section 16 of the charter will not even be engaged. This will be either because the particular assembly is not ‘peaceful’ or because the people who are assembled have not come together for a common purpose (which is generally thought to be a precondition of the right of peaceful assembly).

It is possible, though, that there will be some cases in which the offence of disorderly conduct will nevertheless limit the right of peaceful assembly. That is because the concept of ‘disorderly’ is probably not synonymous with lacking ‘peacefulness’. Its ambit is somewhat wider and may include behaviour that causes a high degree of anxiety or disturbance but that is not violent.

I consider, though, that any limit on the right of peaceful assembly is justified under section 7(2) of the charter for the following reasons:

(a) the nature of the right being limited

The nature of the right to freedom of peaceful assembly has already been outlined.

(b) the importance of the purpose of the limitation

The purpose of the limitation is to protect public order and the rights of others to use and enjoy public spaces. This is an
important objective — though it is to be expected that any interference with the rights of others would need to reach a threshold of seriousness before it could be sufficient to justify limiting the right to freedom of peaceful assembly. As discussed above, the language in which the offence is cast is sufficiently malleable to allow the courts to ensure that an appropriate threshold is adopted, and there is case law from other jurisdictions to guide the Victorian courts in doing so.

(c) the nature and extent of the limitation

The measure will only limit a small category of behaviour coming under the fabric of 'peaceful assembly', that is, 'behaviour that is peaceful but nevertheless disorderly.'

(d) the relationship between the limitation and its purpose

An offence of behaving in a disorderly manner will clearly assist in protecting public order and the rights of others to the peaceful enjoyment of public spaces.

(e) less-restrictive means reasonably available to achieve the purpose

There is no obvious less-restrictive means available for providing the police with a general power to respond to behaviour that causes a high degree of anxiety or disruption to other citizens. Offences concerning disorderly conduct are found in a number of other common law jurisdictions. As discussed above, the malleability of the language in which the offence is cast ensures that it can be interpreted in a manner that inflicts no more than is necessary on protected rights, and there is guidance from other jurisdictions such as New Zealand as to how to do so.

Summary Offences Act 1966 — offences of drunk in a public place and drunk and disorderly

Section 13 of the Summary Offences Act 1966 makes it an offence to be found 'drunk in a public place' and section 14 makes it an offence to be found 'drunk and disorderly in a public place'. As the law currently stands, a person who contravenes section 13 may be arrested and lodged in safe custody. Clause 5(1) of the bill amends section 14 to similarly empower police to arrest and lodge in safe custody a person who contravenes section 14.

In practical terms, this amendment does not empower the police to do anything that they cannot already do. This is because any person who has contravened section 14 will also have contravened section 13 (and therefore already be eligible to be arrested and lodged in safe custody for that offence). The amendment will provide consistency between the two provisions. Nevertheless, as the amendment to section 14 provides the police with an additional power, I consider the charter issues raised by the provision briefly below.

Section 21 — liberty and security

Clause 5(1) engages the liberty rights found in section 21 of the charter and, most pertinently, the right not to be 'arbitrarily' arrested or detained (section 21(2)). The prohibition on 'arbitrary' interference has sometimes been said to require that a lawful interference must be reasonable or proportionate in all the circumstances; and has also been said to incorporate elements of inappropriateness, injustice and lack of predictability (United Nations Human Rights Committee, general comment 16, paragraph 4, Toonen v. Australia (communication no. 488/1992), Van Alphen v. The Netherlands (communication no. 305/1988)).

In my view, the power to arrest a person who is found drunk and disorderly in a public place and lodge them in safe custody is not arbitrary. It is for the legitimate purpose of protecting the safety of both the person themselves and others in the community by placing them in a safe environment until they have sobered up. Implicitly, it must be exercised for this purpose, and the person must not be detained for longer than is reasonably necessary for this purpose. A parliamentary report into public drunkenness in 2001 noted that the time taken depends on the level of intoxication but is usually for a period of four hours. The Victoria Police manual also contains detailed guidance for police about protecting the safety and welfare of persons who are drunk while in custody.

In deciding that this power is not arbitrary, I have also taken into account the fact that section 16 of the Summary Offences Act 1966 creates an offence of, while drunk, behaving 'in a riotous or disorderly manner in a public place'. That offence attracts the more serious penalty of 10 units or imprisonment for two months. Further, the police have the power available to them under section 458 of the Crimes Act 1958 to arrest a person for an offence against section 16. Such an arrest would not have the protective purpose of an arrest for lodgement in safe custody under section 14. Accordingly, in many cases, it will be in the interests of the drunk person for the police to have this less serious intervention available to them.

Section 15 — freedom of expression

Clause 5(1) also engages the right to freedom of expression in section 15 of the charter. That is because, as discussed above, 'disorderly' behaviour can have an expressive content. Clause 5(1) creates a detiment for a person who is found 'drunk and disorderly' by empowering the person's arrest and lodgement in safe custody. Additionally, the bill increases the penalty units for the offence from 1 to 5 units (clause 5(2)). However, it also makes provision for the offence to be dealt with by infringement notice with a maximum penalty of 2 units (clauses 7 and 8).

I have already concluded above that the more serious new offence of behaving in a disorderly manner (new section 17A) is compatible with the right to freedom of expression. It follows that clause 5(1) is also compatible. As just mentioned, it provides police with a significantly less intrusive power for dealing with disorderly conduct than arresting and charging the individual with an offence against section 16.

Control of Weapons Act 1990 — new search powers

Part 3 of the bill amends the Control of Weapons Act 1990 to enhance the powers available to police officers to search for weapons in public places.

As currently enacted, section 10 of the Control of Weapons Act 1990 empowers police officers to search members of the public without a warrant where they suspect, on reasonable grounds, that the person is carrying a 'prohibited weapon' or a 'controlled weapon' or a 'dangerous article'. Clause 9 of the bill amends section 10 in order to address efficacy problems that have arisen due to uncertainty over whether police officers are empowered to seize a suspicious object if it is concealed beneath clothing (and therefore cannot be positively identified or recovered as a result of a pat down
search) or if the officer is unsure which of the three categories of weapon are involved. As amended by clause 9, section 10 empowers a police officer to conduct a search if he or she reasonably suspects that the person is carrying a ‘weapon’ (defined as an object falling into any one of the above categories) and to seize any object that he or she reasonably believes to be a weapon. This means that it is no longer necessary for the police officer to positively identify which category of weapon the object falls into. Additionally, the amended section 10 (read together with new schedule 1 to be introduced by clause 13 of the bill) empowers police, where necessary in order to uncover a suspicious article, to proceed beyond a pat down search or search of a person’s outer clothing to a strip search.

Clause 12 extends the police’s search powers by empowering the police to stop and search persons and vehicles in public places that fall within areas that have been temporarily designated. The new search power is not permitted on the police having first formed a reasonable suspicion that the person is carrying a weapon but is permitted, instead, on there being a likelihood of weapons-related violence occurring in the designated area.

New sections 10D-10F (as inserted by clause 12) empower a senior police officer (ranked inspector or above) to declare an area to be a designated area for a maximum period of 12 hours. There are two forms of designation — ‘planned designations’ and ‘unplanned designations’. Planned designations may be made where there has already been more than one incident of weapons-related violence or disorder in the proposed area over the last 12 months, or where weapons-related violence or disorder has been associated with a particular event or celebration on previous occasions (section 10D). Additionally, the officer making the designation must be satisfied that there is a likelihood that such violence will recur. Unplanned designations are to deal with the situation where the police receive intelligence that an incident involving weapons-related violence has occurred or is about to occur. An unplanned designation can be made where the officer is satisfied that it is likely that violence or disorder involving weapons will occur in the area and that it is necessary to designate the area for the purposes of enabling the police force to exercise search powers to prevent or deter the occurrence of that violence or disorder (section 10E).

New sections 10G-10L authorise the police, in public places that fall within a designated area, to stop and search for weapons: persons and things in their possession or control (section 10G), and also vehicles (section 10H). The police are empowered to seize any item detected during the search that they reasonably suspect is a weapon (section 10I).

Clause 13 inserts new schedule 1, which provides detailed instructions to police on the manner in which searches of the person under sections 10 and 10G are to be conducted. In the case of searches within designated areas under section 10G, police are to begin with a search using an electronic metal detection device (schedule 1, clause 3) and to progress to a pat down search, search of outer clothing and close examination of the person’s belongings only if, as a result of the initial search, the member considers that the person may be concealing a weapon (schedule 1, clauses 4 and 5). In the case of a search on reasonable suspicion under section 10, the member may proceed immediately to a pat down search, search of outer clothing or search of belongings without being required to first utilise an electronic metal detection device.

In either case, however, the police can only proceed to a ‘strip search’ if, having conducted the less intrusive search, they form a reasonable suspicion that the person has a weapon concealed on them; and they believe on reasonable grounds that it is necessary to conduct a strip search for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out (schedule 1, clause 7). The power to ‘strip search’ enables the police to move beyond a search of outer clothing and to take the minimum measures necessary to recover a suspicious object that appears to be concealed underneath the person’s clothing. Consistent with the principle of minimal intrusion reflected throughout the bill (for example at schedule 1, clause 9(4) and (14)) it is highly unlikely that, in the majority of cases, this phase of the search will require the person being searched to remove all of their clothing. Schedule 1 also provides extensive protections with respect to the conduct of all searches, which I outline further below.

New section 10K (as inserted by clause 12) requires individuals who are subject to a strip search to disclose their identity.

New section 10L (as inserted by clause 12) makes it an offence for a person, without reasonable excuse, to obstruct or hinder the police in the exercise of their search powers or to fail to comply with a relevant direction.

Section 13 — the right to privacy

Section 13(6) of the Charter provides that everyone has the right not to have his or her privacy unlawfully or arbitrarily interfered with.

In considering whether the new search powers breach section 13(6), the first question is whether the amendments empower the police to interfere with a person’s privacy. If so, then the second question is whether that interference is ‘unlawful’ or ‘arbitrary’.

The concept of ‘privacy’ defies precise definition but at its most basic, is concerned with notions of personal autonomy and dignity. It has been said that the right to privacy contains several spheres, including ‘spatial, personal and informational’ spheres, and that it includes the right of the individual to determine for himself or herself when, how and to what extent he or she will release personal information about himself or herself (R v. Dymen [1988] 55 DLR (4th) 503 at 520; R v. Duarte [1990] 65 DLR (4th) 240 at 252).

It is clear that, in general terms, a search of a person is an intrusion on a person’s privacy. However, it is also clear from the case law in other jurisdictions that intrusions on privacy must pass a threshold of seriousness before the privacy right can be said to be engaged. Trivial intrusions will not amount to an interference with privacy for the purposes of section 13(a). It is possible that the power to conduct an initial search of a person solely by use of an electronic metal detection device under new schedule 1, clause 3 does not amount to a sufficiently serious intrusion to engage the section 13(a) right. In R (Gillan & Anor) v. Commissioner of Police of the Metropolis & Anor [2006] 2 AC 307, the House of Lords went further and held that a power to conduct pat down searches and to search bags within designated areas did not engage the right in article 8 of the European Convention on Human Rights to respect for ‘private life’. Bearing in mind the different language of the European Convention (‘private life’ rather than ‘privacy’) and the special context in which
the Gillian case arose (it concerned a counter-terrorism measure) the safer conclusion, in my view, is that the power in schedule 1, clauses 4 and 5 to conduct pat down searches and to search outer clothing and belongings does amount to an interference with the right to privacy in terms of section 13(a) of the charter. This is consistent with the weight of authority from other jurisdictions. Given that conclusion, it is unnecessary to decide whether an electronic metal detection device search, without more, engages the section 13(a) right.

Undoubtedly, the power to conduct ‘strip searches’ (schedule 1, clause 7) and the power to search vehicles (new section 10H) amount to interferences with the right to privacy.

The key question, therefore, is whether the interferences with privacy authorised under any of these provisions can be said to be ‘unlawful’ or ‘arbitrary’ for the purposes of section 13(a). A ‘lawful’ interference is one that is authorised by a positive law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it (Sunday Times v United Kingdom (1979) 2 EHRR 245). The bill provides detailed guidance as to the circumstances in which the new search powers will be exercised and the manner of their exercise so there is no question of the resulting interferences with privacy being ‘unlawful’ in this sense.

The meaning of “arbitrary” has been touched on above. The prohibition on ‘arbitrariness’ has been said to require that a lawful interference must be reasonable or proportionate in all the circumstances, and has also been said to incorporate elements of appropriateness, injustice and lack of predictability. I give separate consideration below to two situations contemplated by the new search powers. First, I consider the powers that are being given to police to search persons and vehicles in public places within the designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon. Secondly, I consider separately the power that is being given to police to ‘strip search’ individuals. This power only arises if a police officer has formed a reasonable suspicion that the person is carrying a weapon.

The power to search without suspicion within the designated areas

I accept that the power given to police officers by clause 12 of the bill to search persons and vehicles in designated areas even though the police officer has not formed a suspicion on reasonable grounds that the person or vehicle is carrying a weapon is an unusual one that warrants careful scrutiny in order to determine its level of consistency with charter values. There are two significant reasons to proceed with introducing random stop and search powers in designated areas, as provided for in the bill. Firstly, the detection of and prevention of weapons-related offending poses significant challenges for Victoria Police and the new search powers will provide a valuable tool for them in trying to meet those challenges. Secondly, the legislation has been carefully tailored to ensure that it provides significant safeguards whilst providing the police with an effective tool to meet those challenges.

The bill provides for police with a tool to assist them in meeting the challenges faced by patterns of offending in particular areas by enabling them to target particular geographical hotspots through the designation process. The bill also enables the police to target particular events (such as New Year’s Eve and the evening of the AFL final) which attract particularly large crowds onto the streets and therefore pose special policing challenges.

Having regard to the unusual and intrusive nature of the new search powers, the legislation has been carefully tailored to limit the reach and impact of the power to search without suspicion and to protect against inappropriate use. For example, the legislation includes the following features:

- Designations can only be made in the limited circumstances set out in new sections 10D(1) and E(1) as already outlined. Those circumstances link the grounds for making a designation to the patterns of weapons-related offending just discussed and to a likelihood of weapons-related violence occurring;

- The designations must be geographically limited to an area that is no larger than is reasonably necessary to effectively respond to the particular threat (new sections 10D(2) and 10E(3));

- Each designation only operates for a limited time. In addition to the maximum durations of 12 hours, the period of operation of a designation must be for no longer than is reasonably necessary to enable the police to respond effectively to the particular threat (new sections 10D(3) and 10D(4));

- In the case of planned designations, notice of the designation must be given to the public through the Government Gazette and through daily newspapers (new section 10D(4) and (5)). This will enable at least some members of the public to moderate their expectations and to avoid travelling through the designated areas if they are sufficiently concerned about the impact on them of the search power;

- In accordance with schedule 1, any search of a person under section 10G must be conducted, commencing with the least intrusive form of search available, that is, a search by the use of a metal detection device and only proceeding to a pat down search and search of outer clothing if, as a result of the initial search, the member considers that the person may be concealing a weapon;

New section 10I provides written and oral notice requirements that apply once any person or vehicle is detained for the purposes of a search. They ensure that the person is informed of the reason for and authority for the search and, if they wish to know it, the identity of the police officer.

The government intends to proceed with this legislation notwithstanding the conclusion that it is incompatible with section 13(a) of the charter. There is considerable concern in the community about the pattern of weapons-related offending with which this legislation is concerned. I am unwilling to reduce further the operational scope of the legislative response to that threat. In particular, the government is very concerned that the carriage and use of weapons by people in public places should be prevented, or at the very least, deterred.

As I am entitled to do, I make this statement indicating that the legislation is partially incompatible with the charter to the extent that it provides powers for police to randomly search persons and vehicles in public places within the designated areas, even if the police have not formed a reasonable
SUMMARY OFFENCES AND CONTROL OF WEAPONS ACTS AMENDMENT BILL

Thursday, 12 November 2009

ASSEMBLY

4023

The power to strip search

I have given separate consideration to whether the more serious interference with privacy arising from the provisions in the bill that empower the police to 'strip search' individuals is arbitrary in terms of section 13(6). The bill provides for this power to be exercised in one of two circumstances. First, as amended, section 10 of the Control of Weapons Act 1990, read together with new schedule 1, makes clear that the section 10 power to search on reasonable suspicion may, in certain circumstances, include the power to strip search. That power is not limited to designated areas. Secondly, section 10G, read together with schedule 1, makes clear that the power to search in designated areas can also, in certain circumstances, include a power to strip search.

A strip search is one of the most serious forms of invasion of privacy and I accept that such a power requires a correspondingly high level of justification. I am satisfied that high level of justification is present in both the above circumstances because the power is contingent on two preconditions. First, it is only available if a police officer, having conducted a less intrusive search, has formed a suspicion on reasonable grounds that the person has a weapon concealed on his or her person (section 10 and schedule 1, clause 7). I am satisfied that the standard of reasonable suspicion is sufficient. That is because of the serious and immediate public safety concerns that arise where the suspicion is that the person is carrying a weapon in a public place.

Secondly, a number of provisions in the bill ensure that a strip search can only be conducted if less intrusive measures will be insufficient to meet the exigencies of the situation. For example, new section 10G(3) provides that a police officer must conduct the least intrusive search that is practicable in the circumstances, and schedule 1, clause 7 provides that a police officer can only conduct a strip search if it is necessary for the purposes of the search and if the seriousness and urgency of the circumstances require it.

I am satisfied that a strip search conducted on the grounds of reasonable suspicion and in accordance with the necessity principle just articulated would not be arbitrary per se. However, the experience in other jurisdictions indicates that such a search might nevertheless be rendered arbitrary if it were not conducted in a manner that maximised, as far as possible, the dignity of the individual. The bill contains a general stipulation that the search must be conducted in a manner that preserves the dignity and self-respect of the person being searched (schedule 1, clause 9(5)). Additionally, the bill contains substantially more specific protections designed to maximise individual dignity:

Police must conduct the least invasive kind of search that is reasonably necessary and the search must not involve the removal of more clothes than is reasonably necessary (schedule 1, clause 9(4) and (14)). It is likely that in some cases, the 'strip search' may entail an intrusion as minimal as the person being asked to lift their shirt to reveal a concealed object;

Before the search begins, the police officer must inform the individual of his or her identity and of the reason for

and authority for the search (schedule 1, clause 8(1)). He or she must inform the person whether the person will need to remove clothing during the search and, if so, why; and must also ask the person to cooperate (schedule 1, clause 9(2) and (3)).

Police must conduct the strip search as expeditiously as possible and must use as little force as possible (schedule 1, clause 9(7) and (8)).

The search must be conducted in a private area and in a way that provides reasonable privacy for the person being searched (schedule 1, clause 9(6)). It must be conducted by someone of the same sex as the person being searched. It must not be conducted in the presence or view of a person of the opposite sex, nor in the presence or view of any person whose presence is not necessary for the purposes of safety (schedule 1, clause 9(9)-(11)). It must involve no more visual inspection than is reasonably necessary (schedule 1, clause 9(15)). It is anticipated that the police will conduct the strip searches in mobile police vehicles which will be kept nearby for that purpose.

Searches of the genital area or breasts must not be conducted unless the police officer suspects on reasonable grounds that it is necessary to do so, and searches of body cavities are absolutely prohibited (schedule 1, clause 9(12) and (13)).

Special protections apply to persons with impaired intellectual functioning (schedule 1, clause 12). The situation of children is discussed separately below.

In the light of all of these factors, I conclude that the power provided for in the bill to strip search individuals where there is a reasonable suspicion that they are concealing a weapon does not amount to an arbitrary interference on a person's privacy in terms of section 13(6) of the charter.

Section 21 — liberty and security

Section 21(1) of the charter provides that every person has the right to liberty and security, and section 21(2) provides that a person must not be subjected to arbitrary arrest or detention.

Clause 9 of the bill inserts into section 10 a power for a member of the police to detain a person for so long as is reasonably necessary to conduct a search under that section (new section 10G(6)). Additionally, the power to search within designated areas in new section 10G includes the power to detain a person for so long as is reasonably necessary to conduct a search under that section.

Case law from other jurisdictions diverges markedly as to when a 'detention' occurs in fact. Until the Victorian courts develop an approach to this question, the safe assumption is that whenever the police make clear to an individual, either vocally or through their actions, that the individual is not free to go, the person is detained.

I have concluded above that the search powers contained in section 10 (as amended) and new section 10G do not amount to arbitrary interferences with liberty. For those powers to be effective, police must be able to place whatever restraints on the liberty of individuals are necessary in order to ensure that they receive cooperation for the duration of the search. That is probably, in any event, implicit in the grant of a power to search a person. The new powers to detain in sections 10(6)
and 10G(4) are strictly limited to what is reasonably necessary to conduct the search. In my view, therefore, those sections are not incompatible with the section 21(2) right not to be subjected to arbitrary detention.

New section 10I contains notice requirements that ensure that any person who is detained is informed of the reason for the search in compliance with section 21(4) of the charter — the right of persons who are detained to be informed of the reason for the detention.

Section 20 — property rights

Section 20 provides that a person must not be deprived of his or her property other than in accordance with law.

The bill allows for seizure of a person’s property where the police reasonably suspect that the person is carrying a weapon in a public place. There are two provisions in the legislation to guard against any permanent interference with property where no offence has been committed.

First, new section 10J stipulates that, if a member of the police seize an item and then determines after examination that it is not a weapon, the member must return the item to the person from whom it was seized. Secondly, the existing forfeiture regime in section 9 will apply. It ensures that where a weapon has been seized in relation to an offence under the act, it must be returned to the person if proceedings for that offence are not commenced within three months or if a decision is made not to bring proceedings. I would expect that the words ‘in relation to an offence’ will be interpreted liberally to ensure that any person who has an item seized under sections 10G or 10H will be entitled to reclaim that item if no proceedings are commenced against them.

In my view, there is no inconsistency with section 20 of the charter.

Section 17(2) — children’s rights

I have already determined that sections 10G and 10H of the Control of Weapons Act 1990 are incompatible with the charter in relation to section 13(3). Similarly, I have determined that they are incompatible with section 17(2).

However, the government believes this legislation is important for preventative and deterrent reasons, including the protection of children.

Section 25(1) — the presumption of innocence

Section 25(1) of the charter provides that any person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. This means that it is the responsibility of the prosecution to prove every element of the offence to the standard of beyond reasonable doubt.

The bill contains four offence provisions which allow a defendant to escape liability if he or she has a ‘reasonable excuse’. Specifically, a person commits an offence if, ‘without reasonable excuse’, he or she:

- contraves a direction given by a police officer to move on from an area under new section 6 of the Summary Offences Act 1966 (clause 3);
- fails or refuses to comply with a request to disclose his or her identity under new section 10K of the Control of Weapons Act 1990 (clause 12);
- in response to such a request to disclose his or her identity, gives a name that is false in a material particular or is an address other than the person’s full and correct address;
- obstructs or hinders the police in the exercise of their search and seizure powers under section 10 and new sections 10G, 10I and 10J of the Control of Weapons Act 1990 or fails to comply with a direction given by a member of the police to accompany the member to a place for the purposes of a strip search under schedule 1 (new section 10L, inserted by clause 12).

Pursuant to section 130 of the Magistrates’ Court Act 1989, the effect of these provisions is to require the accused to present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish a lawful excuse. If the defendant discharges this ‘evidential burden’, the onus reverts to the prosecution to prove absence of lawful excuse beyond reasonable doubt. It is questionable for that reason whether provisions of this kind amount even to a prima facie breach of the presumption of innocence. In any event, any limitation on the right is reasonable and demonstrably justified.

In each case, the lawful excuse will be a matter that is peculiarly within the knowledge of the defendant. The evidential burden removes the need for the prosecution to conduct the impossible exercise of eliminating a potentially infinite number of possible excuses by requiring the defendant to put in issue the precise excuse that he or she wishes to rely on. All the defendant must do is to provide sufficient evidence to cloak the excuse with an air of reality (for example, by taking the stand and giving his or her side of the story), but the burden remains with the Crown to disprove its existence to the ordinary criminal standard.

Conclusion

I consider that the majority of the bill is compatible with the charter because, to the extent that some provisions may limit human rights, those limitations are reasonable and demonstrably justified in a free and democratic society.

However, I consider that the bill is incompatible with the charter to the extent it limits rights under sections 13(a) and 17(2) in providing powers for police to randomly search persons (including children) and vehicles in public places within designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon. The government intends to proceed with the legislation in its current form as there is considerable concern in the community about the pattern of weapons-related offending with which this legislation is concerned.

Bob Cameron, MP
Minister for Police and Emergency Services

Second reading

Mr CAMERON (Minister for Police and Emergency Services) — I move:

That this bill be now read a second time.
As part of its commitment to tackling the growing incidence of drunkenness, disorderly behaviour and violence involving the carrying and use of weapons in the Victorian community, the government is introducing the Summary Offences and Control of Weapons Acts Amendment Bill 2009. The bill will amend the Summary Offences Act 1966 and the Control of Weapons Act 1990 to give police stronger powers to combat violence and antisocial behaviour.

This bill was foreshadowed by the Premier on 9 August 2009, when he announced that the government will fund 120 additional full-time police officers on the street to help make the Victorian public safer. The Premier announced the government would introduce the following new police powers:

- tougher random search powers for weapons in designated areas;
- a power for police to direct people to move on from a certain area where there is a fear there will be a breach of the peace;
- a new offence of disorderly conduct, and
- for the new offence of disorderly conduct, and for existing offences of drunk and disorderly and drunk, there will be on the spot penalties with a fine of $234.

**Drunk and drunk and disorderly offences enforceable by infringement notice**

The bill amends the section 13 offence in the Summary Offences Act 1966 of drunk in a public place to carry a maximum penalty of 4 penalty units, which is enforceable by means of an infringement notice with a penalty of two penalty units.

For the section 14 offence of drunk and disorderly, the bill specifies a maximum penalty of five penalty units, with an infringement amount of 2 penalty units.

The amendments form part of a specific package of reforms aimed at addressing the problems of violence, the carrying and use of weapons and public disorder, at least some of which is alcohol related. There are strong and justifiable public interest grounds for enabling drunk and drunk and disorderly offences to be enforceable by means of infringement notices. The new infringement penalties should act as a deterrent, punish the offender and be a suitable justice system denunciation of public drunkenness behaviour.

I am advised that the chief commissioner will issue instructions that will apply to operational members in the use of the power to issue infringement notices. This will be especially important as the power will apply to circumstances where notices may be given to drunken or drunken and disorderly persons who have not been arrested and detained as well as to persons who are detained. The chief commissioner’s instructions will direct that members should only issue infringements for these offences to drunken persons who have been detained in police custody or who have been escorted home by police.

The legislation will not preclude infringement notices being given on multiple separate occasions to the one person, should they continue to reoffend. Police will establish guidelines to assist operational members in determining when it is appropriate to issue court proceedings, instead of an infringement notice.

**Detention power for offence of drunk and disorderly**

Section 13 of the Summary Offences Act 1966 explicitly enables Victoria Police to arrest a person found drunk in a public place and to lodge the person in safe custody. An explicit power to detain is not currently included in section 14 for the offence of drunk and disorderly. A percentage of the annual attendances for arrest/drink (drunk in a public place) are cases where drunkenness is accompanied by disorderly behaviour. However, at present, to secure the safe custody of an intoxicated person, even where their behaviour may also be disorderly, police will generally arrest and detain the person under the section 13 drunk in a public place offence. The bill therefore inserts into section 14 the same arrest and detention power that is used in section 13.

**A new offence of disorderly conduct**

The bill inserts a new offence of disorderly conduct into the Summary Offences Act 1966. The new section 17A offence of disorderly conduct provides that any person who behaves in a disorderly manner in a public place is guilty of an offence. The maximum financial penalty for this offence is 5 penalty units, with an infringement penalty of 2 penalty units. The penalty is consistent with the proposed amended penalty for the offence of drunk and disorderly. The existing definition of ‘public place’ under the act applies to this offence.

**Move-on powers**

The government has made a commitment to give police the power to direct people to move on from a certain area where there is a fear there will be a breach of the peace. The introduction of this new power will bring Victoria into line with every other jurisdiction in
Australia. All jurisdictions have given their police forces the power to issue enforceable directions to individuals and groups, in public places, to move away or disperse from an area.

A move-on power is a pre-emptive tool designed to diffuse a situation and to ensure the peaceful enjoyment of public spaces by the citizenry. Police, in all states and territories, have long endeavoured to maintain public order through informal and enforceable requests to persons in public places to refrain from engaging in certain activities or to move away from an area. Having regard to the increase in disorder and related behaviours in public places in Victoria, especially in the CBD and entertainment areas, it is now appropriate to give Victoria Police enhanced powers to ensure that members of the public can peacefully enjoy these spaces.

The bill inserts a ‘move-on’ power into the Summary Offences Act 1966. This gives police the power to direct a person, or a group of persons, in a public place to leave the public place, or a part of the public place (as ‘public place’ is already defined in the act), for a period of up to 24 hours if the officer suspects on reasonable grounds that:

the person, or the group of persons, is breaching the peace or is likely to breach the peace; or

the person is endangering or is likely to endanger the safety of any other person; or

the person’s behaviour is likely to cause injury to a person or damage property or is, otherwise, a risk to public safety.

The bill makes it an offence to contravene a direction without reasonable excuse, which carries a maximum penalty of 5 penalty units with an infringement penalty of 2 penalty units.

The bill contains exclusions so that the move-on power may not be exercised where a person, whether or not in the company of other people, is:

picketing a place of employment, or

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.

Enhanced police powers to search for weapons

The government is committed to reduction and deterrence of violence involving the carrying and use of weapons in the community. Therefore, the government is of the view that it is appropriate to provide Victoria Police with additional powers to search for weapons when it is believed that violence or disorder involving prohibited weapons, controlled weapons or dangerous articles has taken place, or will take place, in an area. These new powers will enable Victoria Police to act to address the risk that violence or disorder involving weapons will occur or recur.

The bill establishes two grounds for conducting searches for weapons in a public place without warrant. Firstly, there will remain the existing power under section 10 of the Control of Weapons Act to search a person in a public place, without warrant, on a reasonable suspicion that the person is carrying a weapon. Secondly, the bill creates a new power under new section 10G to search any person, without warrant, in a designated area.

The bill provides that police will only be able to exercise the new power to search any person without warrant in public places which are in an area specifically designated for the purposes of this search power under the Control of Weapons Act 1990. ‘Public place’ will be defined in the same way that it is already defined in the Summary Offences Act 1966.

It is proposed that an area may be designated in either of two ways. Firstly, a planned designation may be made with public notice. The chief commissioner must designate an area and publish a notice, including a map and a description of the designated area, in a newspaper generally circulating in the state of Victoria, and if the area is in rural Victoria and the area has a daily newspaper generally circulating within it, in that daily newspaper. A notice to the same effect must also be published in the Government Gazette. In both cases, the publication must occur no less than seven days prior to the designation taking effect.

Secondly, there may an unplanned urgent designation of an area that will not require publication in a newspaper and may take effect immediately.

The power to designate an area (planned or unplanned) may be exercised by a member of the police force at the level of inspector or higher. A planned designation will take effect from the date and time stipulated in the publication and will remain in force for no longer than 12 hours. The duration of an unplanned designation will
be no longer than 12 hours from the time that the inspector (or higher) makes the designation.

To make a planned designation of an area, the inspector (or higher) must believe that violence or disorder involving prohibited weapons, controlled weapons or dangerous articles has taken place in the area and there is a risk that such violence or disorder may recur.

To make an unplanned designation of an area, the inspector (or higher) must believe that it is likely that violence or disorder involving prohibited weapons, controlled weapons or dangerous articles will take place in the area. The police member must also believe that it is necessary to designate the area for the purposes of police exercising search powers to prevent or deter the occurrence of such violence or disorder.

Where an area has been the subject of a planned designation, no further planned designation of that area may take effect until after the expiry of 10 days after the previous planned designation has ceased to be in force.

In the case of an unplanned designation of an area, it is likely that the urgency of the designation will arise from information/intelligence obtained by police of the possibility of some incident at a particular place. This will enable police to act quickly to establish an unplanned designation of an area. It will not be practicable in such circumstances for police to provide clear identification of the area as being designated for the benefit of members of the public. The clear identification of an area’s designation would also risk the potential for persons who might be illegally carrying weapons to avoid the ‘designated area’ and thereby avoid the search process.

Information, including a notice, will be provided to all persons who police search in a designated area. The information provided will include details of the designated area, the time over which the designation applies, together with an explanation of the powers.

The bill contains detailed provisions regarding the manner in which searches for weapons by police are to be undertaken.

I appreciate that there will be a range of views about human rights when a random search takes place. In particular, there are likely to be a range of views regarding the ability of police to conduct random searches of adults and children for weapons using the new powers. I have considered the human rights engaged by the bill in detail in my statement of compatibility and reiterate that the government is extremely concerned that the carriage and use of weapons, particularly by children, should be deterred and prevented to the greatest extent possible. Therefore, although the bill is partially incompatible with the charter, the government is of the view that it is necessary and appropriate to provide police with these powers to address the community’s concerns regarding weapons-related offending.

I commend the bill to the house.

Debate adjourned on motion of Mr TILLY (Benambra).

Debate adjourned until Thursday, 26 November.

SERIOUS SEX OFFENDERS (DETENTION AND SUPERVISION) BILL

Statement of compatibility

Mr CAMERON (Minister for Corrections) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the Charter of Human rights and Responsibilities, I make this statement of compatibility with respect to the Serious Sex Offenders (Detention and Supervision) Bill 2009 (the bill).

In my opinion, the bill as introduced to the Legislative Assembly is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Overview of bill and charter of compatibility

Purpose of the bill

The main purpose of the bill is to enhance community safety by requiring offenders who have served custodial sentences for serious sex offences and who pose an unacceptable risk of harm to the community to be subject to either a supervision or detention order. The secondary purpose of the bill is also to facilitate the treatment and rehabilitation of such offenders so as to reduce their risk of harm to the community.

Legislative context

This bill will repeal the current Serious Sex Offenders Monitoring Act 2005 and replace the scheme which operated under that act with a new detention and supervision scheme. This new scheme will create two types of orders to better protect the community and to tailor the level of protection to the level of risk presented by the offender.

Key features of the bill

The bill establishes a two-tier scheme, with one tier for the post-sentence detention of high-risk sex offenders and a second tier providing supervision for high risk offenders who can safely be supervised in the community. A court will be able to impose on an eligible offender in respect of whom an application has been made.
Summary Offences and Control of Weapons Acts Amendment Bill 2009

Introduced 10 November 2009
Second Reading Speech 12 November 2009
House Legislative Assembly
Member introducing Bill Hon. Peter Batchelor MLA for Hon. Rob. Cameron MLA
Portfolio responsibility Minister for Police and Emergency Services

Purpose

The Bill amends the –

- **Summary Offences Act 1996** to confer on police a new power to direct people to move on from an area if they are, or are likely to become, involved in a breach of the peace or threat to public safety.

  The Bill also creates a new offence of disorderly conduct, empowers the police to arrest and lodge in safe custody a person who is found drunk and disorderly in a public place, and expands the list of offences for which infringement notices can be issued.

- **Control of Weapons Act 1990** to clarify and strengthen the existing power to search a person for weapons on reasonable suspicion that the person is carrying a weapon in a public place. It also provides the police with a new power to search persons for weapons in public places within temporarily designated areas. This new power is not premised on the police first forming a reasonable suspicion that the person to be searched is carrying a weapon. The bill regulates in detail the way in which the new search powers are to be exercised (and includes special protections as to the circumstances in which, and manner in which, strip searches can be conducted).

Submissions

The Committee has received written submissions from the following organisations and persons –

- Victorian Equal Opportunity and Human Rights Commission
- Centre for the Human Rights of Imprisoned People
- Human Rights Law Resource Centre
- Law Institute Victoria
- Victorian Aboriginal Legal Service Co-operative Limited
- Youth Affairs Council of Victoria Inc.
- African Think Tank Inc.
- Centre for Multicultural Youth
- Council to Homeless Persons
- Indigenous Social Justice Association
- Maribyrnong City Council, Youth Services and Social Support
- Melbourne Copwatch
- Moreland Community Legal Centre Inc.
- Nicholas Chenu
- Northern Bundji Bundji Project
- Peninsula Community Legal Centre Inc.
- Ross Rees Pty Ltd.
- Royal Children’s Hospital Melbourne, Centre for Adolescent Health
- Ruth Liston, Lecturer, School of Social and Political Sciences, Univ. of Melbourne
- Simply Skateboarding
Summary of major points made by submissions

Whilst is not possible to fully detail the content of these submissions the Committee notes that the major contentions / points made by the submissions are that:

- The Bill is inconsistent with fundamental human rights set out in the Charter and this is acknowledged in the Statement of Compatibility itself and the government will proceed with the proposed legislation nevertheless.

- The decision to enact laws incompatible with the Charter permitting the operation of provisions acknowledged to enable unreasonable breaches of human rights is a serious matter and should be approached with caution and planning if it is not to undermine the Charter.

- There has been no public consultation with the community during the development of the proposed legislation permitting very broad powers. A process of consultation should explain to the community the necessity for these laws and enable meaningful participation by groups most effected by the proposed laws.

- Police will have extensive search powers in designated areas even where they have formed no reasonable belief or suspicion that a person may be carrying a weapon. In the absence of a reasonable suspicion/ belief requirement the proposed laws are in breach of the Charter.

- The police search powers include search of children of any age which is inconsistent with the rights of children.

- Move on powers may be applied in a discriminatory way and may be particularly discriminatory in their impact on indigenous Australians, the young, the homeless, persons with a mental impairment and other vulnerable groups.

- The move on power should not be based on anticipated future conduct and therefore the test of ‘is likely to’ should be deleted.

- The inclusion of ‘breach of the peace’ as a relevant test in the move on power is unwarranted and should be deleted.

- The move on power should only apply in areas where they are associated with particular licensed premises.

- The proposed law impinge on the right to protest and therefore engage the right to freedom of expression and freedom of association also protected under the Charter.

- The Statement of Compatibility lacks the necessary detail to adequately explain the rationale for the provisions of the proposed legislation.

- A minimum age permitting the search of children should be prescribed.

- Strip search of children below 18 years of age should not be permitted.

- Limiting the type of location that may be designated to alleviate unintended impact on the homeless or other vulnerable groups.
• Requiring orders to be in writing and be subject to review.

• Recording the data of the use of the directions powers to include sufficient material to enable effective analysis.

• If the proposed laws are enacted there should be appropriate reporting and monitoring on the laws operation and impact as well as set periodic reviews.

• There should be parliamentary and judicial oversight of the designation or particular geographical areas in which searches of individuals can occur.

• The designation of areas power should be narrowed in circumstances attracting the order, size or include areas only where there are associated licensed premises.

• Search powers in a designated area show not apply to circumstances of lawful protest / demonstrations.

Content

Summary Offences Act 1966

Move on powers

The Bill inserts a new section 6 regarding move on powers.

Note: Move on powers currently exist in every other State and Territory in Australia, in England and a number of other international jurisdictions.

The new power will give police the power to give a direction to a person or persons, to leave a public place or a part of a public place (that is, give a direction to move on) if the police member suspects on reasonable grounds that the person or persons is or are breaching or is or are likely to breach the peace; or the person or persons is or are endangering, or is or are 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, damage to property or is a risk to public safety.

A direction given to a person or persons may be given orally by the police member and may direct the person or persons not to return to, or not to be in, the public place, or to the part of the public place as the case may be, for a specified period. The provisions will exclude certain activities from being subject to the operation of the power. These are where a person, whether not the person is in company of other persons is —

• picketing a place of employment; or

• demonstrating or protesting about a particular issue; or

• apparently intending to publicise their view about a particular issue through speech, the use of a banner or placard or other means. [3]

The Committee notes that this power may be used where no actual incident or event has happened but is likely to happen. The move on power will be able to be used on suspicion based on reasonable grounds.

The Committee further notes the inclusion of the term 'breach of the peace' as also attracting the move on power.

The Committee notes that a number of submissions raised concerns that such a power was vague and may lead to arbitrary decisions.

The Committee observes that the power cannot be invoked to limit protest or picketing

The Committee draws attention to the provision.
Persons found drunk – section 13

The Bill increases the penalty for the offence of being drunk in a public place to a maximum penalty of 4 penalty units (currently 1 penalty unit) and makes the offence an infringement offence provided in clauses 7 and 8. [4]

Persons found drunk and disorderly – section 14

The Bill amends the offence of persons found drunk and disorderly in a public place to enable police to arrest persons who are drunk and disorderly in a public place and to place them into safe custody in the same manner as police are currently able to arrest people and place them in safe custody in relation to the offence of drunk in a public place and increases the penalty from 1 to 5 penalty units and makes the offence an infringement offence provided in clauses 7 and 8. [5]

The Committee notes the existing offence in section 13 allows for a person found drunk to be arrested and lodged in safe custody.

New offence – Disorderly conduct – new section 17A

The Bill establishes a new offence for any person to behave in a disorderly manner in a public place with a penalty of 5 penalty units applying. The new offence will be an infringement offence (clauses 7 and 8). [6]

The Committee notes the new offence involves the broader question of determining the meaning and extent of ‘disorderly’ as regards behaviour or conduct. This may be regarded as a very broad and vague power requiring subjective assessments by police as to the proper characterisation of the behaviour as being ‘disorderly’. The Committee also notes the uncertain interpretation in current jurisprudence on the meaning of ‘disorderly’.

The Committee notes the new section may raise issues concerning freedom of expression and peaceful assembly and notes the discussion on these matters in the Statement.

The Committee further raises this new offence in its Charter report below.

The Committee draws attention to the provision.

Control of Weapons Act 1990

Search without warrant

The Bill substitutes a new section 10 to allow a police member to search a person for weapons where the member has a reasonable grounds for suspecting that the person is carrying or has in his or her possession in a public place a prohibited weapon, a controlled weapon or a dangerous article. The substituted section does not require the person to produce the weapon or article and refers to the Schedule 1 search regime.

The search must be conducted in the least invasive way that is practicable in the circumstances and a person who is being searched under this provision may be detained by a police member only for as long as is reasonably necessary to conduct the search. [9]

Rights or freedoms – Search without warrant where officer has a ‘reasonable suspicion’
The Committee notes the use of the lower threshold test of 'reasonable suspicion' rather than the test of 'reasonable belief'. The test is the same as the current section 10.

The Committee has previously commented on the lower threshold test for the granting of search warrants and has accepted previously the proposition that a lower threshold may be justified in regulatory schemes involving public safety or health.

In respect to this Bill the Committee notes the lower threshold test applies to a search without warrant.

Subject to the Committee's comments in the Charter Report the Committee notes that whilst the search does not involve any judicial oversight (warrant) it appears to be reasonably circumscribed by the provision itself (new section 10) and by the Schedule (Conduct of Searches).

The Committee draws attention to the provision.

**Designated areas and stop and search of persons and vehicles**

The Bill inserts new sections 10C to 10L into the Act in relation to new forms of weapons stop and search powers that may be exercised in public places within designated areas.

A designated area is an area in respect of which there is in effect a declaration that has been made under new sections 10D or 10E respectively, planned designated areas and unplanned designated areas.

Planned areas (10D) concern those locations that have had a history of weapons related violence or disorder over the last 12 months or was associated with a particular event or celebration on previous occasions and violence is likely to recur. Unplanned designated areas (10E) deal with the scenario where the police receive intelligence that a weapons related incident has or is likely to occur.

New section 10F provides that the level of police member who may be delegated the power to make a declaration of a planned or an unplanned designation must not be of a rank lower than that of inspector. Declarations may not be for periods of greater than 12 hours and the area must not be larger than is reasonably necessary to respond effectively to the threat.

**Power to search persons in designated area**

New section 10G sets out the powers that may be exercised by police when a planned or an unplanned designation of an area is in force. A member of police may, without warrant, stop and search a person, and may search anything in that person's possession or under their control, for weapons provided that the person (or thing) is in a public place within the designated area. A police member must conduct the least invasive search that is practicable in the circumstances (refer to Schedule 1) and any detaining of a person for the purposes of a search under section 10G must be for a period that is no longer than is reasonably necessary to conduct the search.

The Committee notes that the Statement of Compatibility provides that this clause is incompatible with the Charter. The power to randomly search a person or vehicle in a public place within a designated area is not premised on the basis of a reasonable belief or suspicion. The power to search includes the power to undertake a strip search where the police member considers there is a reasonable suspicion the person may be concealing a weapon.

In respect to the search powers the Statement of Compatibility specifically acknowledges that they are incompatible with the rights to privacy under Charter 13(a) and the rights of children under Charter 17(2). The Statement further provides that the provisions are nevertheless justified and the Government considers the legislation is
'Important for preventative and deterrent reasons, including the protection of children'.

The Committee notes the serious implications of the Ministers candid declaration of incompatibility and draws particular attention to these provisions.

The Committee further reports on these provisions in the Charter report below.

New section 10H will empower a police member to, without a warrant, stop and search a vehicle and anything that is in or that is on the vehicle, provided that the vehicle is in a public place that is within a designated area and there is a person in or on the vehicle at that time.

New section 10I contains provisions regarding the information that must be given by police to persons who are detained and searched under these new search provisions.

New section 10J provides an express power for police to seize and detain any item that is found during a search under the new powers set out in new sections 10G and 10H.

New section 10K provides police with the power to obtain a disclosure of the identity of any person who is to be subject to a strip search under the provisions of Schedule 1 to the Act.

New section 10L establishes a further new offence for a person to, without reasonable excuse, obstruct or hinder a police member in the exercise of search powers. [12]

Conduct of searches – Schedule 1

The Bill inserts new Schedule 1 regarding the manner in which searches of persons and things are to be conducted under substituted section 10 and new section 10G. [13]

Clause 3 enables a police member to carry out an initial electronic device search of a person or thing.

Clause 4 allows for a further search of things to be conducted once there has been an initial electronic device search, and the police member considers that a person may be concealing a weapon. This form of search may include—

- a request that the person produce and empty any bag, basket or receptacle of its contents or that the person turn out their pockets;
- a search by the member of any bag, basket or receptacle or a search through and the moving of the contents of any bag, basket or receptacle;
- a pat down of the area of the person's pockets; or
- a search though and the moving of the contents of the person's pockets after the pockets have been turned out or have been patted down.

Clause 5 of Schedule 1 allows for a further outer search of a person following an initial electronic device search and the police member considers that the person may be concealing a weapon. This form of search may include—

- the police member running their hands over the person's outer clothing;
- the removal, upon the request of the police member, of the person's overcoat, coat or jacket and any gloves, shoes or hat after which the member may use an electronic metal detection device, may run his or her hands over the person's outer clothing and may search the items of clothing that have been removed by the person, including by the use of an electronic metal detection device.
Clause 6 sets out a number of things that a police member must comply with, as far as is reasonably practicable, in conducting an outer search of a person. These matters include—

- informing the person whether they will be required to remove outer clothing and, if so, why this is necessary;
- that the police member must ask for the cooperation of the person;
- the search must be conducted in a manner that affords the person reasonable privacy and it must be conducted as quickly as is reasonably practicable;
- the search must be of the least invasive kind reasonably necessary in the circumstances;
- where a search involves the police member running their hands over the person's outer clothing, it must be conducted by a police member of the same sex as the person being searched, if that is reasonably practicable.

Clause 7 of Schedule 1 enables a police member to conduct a strip search of a person provided that a search has already been conducted under clause 4 or 5 of the Schedule and the member reasonably suspects that the person is concealing a weapon. The member must also believe on reasonable grounds that a strip search is necessary due to the seriousness and urgency of the circumstances. A person may be directed to accompany the member to a police vehicle or other private place in which the search is to be conducted.

Clause 8 requires a police member who intends to conduct a strip search of a person to comply with certain requirements regarding the information that must be given to that person.

Clause 9 sets out specific rules that apply when a police member conducts a strip search of a person.

Clause 10 empowers police to search the clothing that has been removed by a person during their strip search.

Clause 11 of Schedule 1 makes particular provision for rules that are to apply to any search of a child, other than an initial search involving the use of an electronic metal detection device or an examination of things under clause 4 of Schedule 1.

A search of a child must be conducted in the presence of a parent or guardian of the child being searched or, if that is not acceptable to the child, in the presence of an independent person who is capable of representing the interests of the child and who, as far as practicable in the circumstances, is acceptable to the child. However, if a parent or guardian is not then present and the seriousness and urgency of the circumstances require the search to be conducted without delay, then the search must be conducted in the presence of an independent person who is capable of representing the interests of the child and who, as far as practicable in the circumstances, is acceptable to the child.

Clause 12 makes particular provision for rules that are to apply to any search of a person with impaired intellectual functioning, other than an initial search or a search under clause 5 of Schedule 1 that is limited to a search involving the use of an electronic metal detection device or an examination of things under clause 4 of Schedule 1.

A search of a person with impaired intellectual functioning must be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the person, in the presence of an independent person who is capable of representing the interests of the person and who, as far as practicable in the circumstances, is acceptable to the person.

Under subclause (4), however, if a parent or guardian is not then present and the seriousness and urgency of the circumstances require the search to be conducted without delay, then the search must be conducted in the presence of an independent person who is
capable of representing the interests of the person and who, as far as practicable in the circumstances, is acceptable to the person.

Charter report

Freedom of movement – Move-on powers – Whether ‘under law’ – Whether least restrictive alternative reasonably available

**Summary:** The Committee is concerned that clause 3’s terms do not place clear and accessible boundaries on the police’s move-on power and observes that some move-on powers in other Australian jurisdictions include narrower or clearer constraints.

The Committee notes that clause 3, inserting a new section 6 into the Summary Offences Act 1966, empowers police to direct people in public places ‘to leave the public place, or part of the public place’ and to not return for a specified period. Clause 3 limits the Charter’s right to freedom of movement.

The Statement of Compatibility remarks:

The ‘move-on’ power provides police with a pre-emptive tool to diffuse dangerous situations and to ensure the peaceful enjoyment of public spaces by the citizenry. In this way, there is a clear and rational connection between the limitation on the right to freedom of movement and the purpose of the provision....

Clause 3 is carefully tailored. The ‘move on’ power is only triggered if there is a reasonable suspicion of a breach of the peace, threat to safety, or threat to injury or damage (or a likelihood of one of these things occurring) and is in effect for a limited period of time. Additionally, subclause (5) specifies that the power does not apply in relation to a person who is 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. This means that activities with a high expressive content will generally be exempted from interference. In light of these limits to its operation, clause 3 restricts the right to freedom of movement no more than reasonably necessary to achieve the legislative purpose.

*Whilst the Committee agrees that the purposes of diffusing dangerous situations and ensuring peaceful enjoyment of public spaces may justify limiting the Charter’s right to freedom of movement,* and observes that such powers exist in every other Australian jurisdiction, it is concerned that clause 3’s terms do not place clear and accessible boundaries on the police’s move-on power. In particular:

- The power is triggered by a reasonable suspicion of ‘likely’ outcomes
- One of those outcomes – breach of the peace – is a technical and evolving common law concept that is unlikely to be well understood by lay people
- No criteria are provided for the police’s exercise of their discretion as to either the giving or the content of the direction

While the European Court of Human Rights has held that a police power to enter a home to prevent a breach of the peace is a ‘lawful’ interference in rights in the context of a domestic dispute, the Committee is concerned that the much wider context in which move-on powers may be exercised, and its combination with a criminal penalty for disobeying a

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41 Temoannui v Ford [2009] ACTSC 69, [29]
42 See also Federation of Community Legal Centres submission, p. 4; Youth Affairs Council of Victoria Inc submission, p. 3.
43 See also Human Rights Law Resources Centre submission, Annexure p. 1; Federation of Community Legal Centres submission, p. 3.
44 McLeod v UK (1998) ECHR 92, [45].
direction, means that the terms of clause 3 may be insufficient to satisfy the Charter’s requirement that any limitation on rights be made ‘under law’.45

The ACT Supreme Court has held that, for move-on powers to comply with that jurisdiction’s Human Rights Act 2004, ‘the extent to which persons are to be restricted from exercising their statutory right to freedom of movement and association must be the minimum necessary to achieve that objective’.46 Whilst clause 3 is more protective than earlier forms of move-on powers that still apply in some Australian jurisdictions,47 the Committee is concerned that more modern powers in other Australian jurisdictions are subject to various narrower constraints on the exercise of those powers, including:

- Requiring a reasonable belief, rather than a reasonable suspicion48
- Restricting the power to when a person is likely to engage in ‘violent conduct’49
- Requiring that the person be ‘obstructing’, ‘harassing’ or ‘intimidating’ people, or acting in a way that would cause fear to people of reasonable firmness, (instead of the ‘breach of the peace’ language)50
- Limiting the direction to one that is for the purpose of reducing those outcomes51
- Limiting the direction to one that is reasonable in the circumstances52
- Requiring the police officer to ‘take into account the likely effect of the order on the person, including but not limited to the effect on the person’s access to the places where he or she usually resides, shops and works, and to transport, health, education or other essential services’53
- Exempting the subject of the direction from compliance if he or she stopped the relevant conduct after the direction was given54
- Limiting the period of time that a person can be told not to return to six55 hours, rather than 24 hours.

The Committee refers to Parliament for its consideration the question of whether or not clause 3 is a reasonable limit on the Charter’s right to freedom of movement according to the test in Charter s. 7(2)56 and, in particular, whether or not clause 3 sets out clear and accessible rules governing the interference with the right; and there are

45 Charter s. 7(2) provides that: ‘A human right may be subject under law only to such reasonable limits as can be demonstrably justified...’
46 Temoaannui v Ford [2009] ACTSC 69, [29].
47 Summary Offences Act 1953 (SA), s. 18; Summary Offences Act 1979 (NT), s. 47A, both targeted at ‘loitering’ and providing for imprisonment for non-compliance with directions.
48 Crime Prevention Powers Act 1998 (ACT), s. 4(1); Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 197(1); Police Offences Act 1935 (Tas), s. 15B(1).
49 Crime Prevention Powers Act 1998 (ACT), s. 4(1). The Dictionary defines ‘violent conduct’ to mean violence or intimidation to a person or damage to property.
50 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 197(1)(a)-(c)
51 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 197(2)
52 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 197(2)
53 Criminal Investigations Act 2006 (WA), s. 27(3)
54 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 199(2); Criminal Investigations Act 2006 (WA), s. 27(7).
56 Charter s. 7(2) provides that: ‘A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including... any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.’
any less restrictive alternatives reasonably available to achieve the purpose of clause 3.

Deprivation of liberty except on grounds, and in accordance with procedures, established by law – Drunk and disorderly persons may be lodged in safe custody – Arrest for disorderly conduct

Summary: The Committee is concerned that clause 5(1) does not include any express constraints on the duration of the power to detain a drunk and disorderly person and that clause 6’s language may be too malleable to protect the Charter’s right not to be deprived of liberty ‘except on grounds… established by law’.

The Committee notes that clause 5(1), amending existing s. 14 of the Summary Offences Act 1966, provides that a person who is ‘found drunk and disorderly in a public place’ may be ‘arrested by a member of the police force and lodged in safe custody’.

The Statement of Compatibility remarks:

In practical terms, this amendment does not empower the police to do anything that they cannot already do. This is because any person who has contravened section 14 will also have contravened section 13 (and therefore already be eligible to be arrested and lodged in safe custody for that offence)… Nevertheless, as the amendment to section 14 provides the police with an additional power, I consider the charter issues raised by the provision briefly below…

In my view, the power to arrest a person who is found drunk and disorderly in a public place and lodge them in safe custody is not arbitrary. It is for the legitimate purpose of protecting the safety of both the person themselves and others in the community by placing them in a safe environment until they have sobered up. Implicitly, it must be exercised for this purpose, and the person must not be detained for longer than is reasonably necessary for those purposes. The Victoria Police manual also contains detailed guidance for police about protecting the safety and welfare of persons who are drunk while in custody.

While the Committee agrees the clause 5(1) merely reiterates an existing power and that protecting the safety of drunk persons is a legitimate purpose, it is nevertheless concerned that the power in question may engage the Charter’s right against deprivation of liberty ‘except… in accordance with procedures, established by law’. In contrast with both the regular arrest power in Victoria and with provisions on dealing with public drunkenness in other Australian jurisdictions, clause 5(1) does not include any express constraints on the duration of the power to detain a drunk and disorderly person. The European Court of Human Rights has held that neither implied limitations nor administrative guidelines suffice to satisfy the ‘established by law’ requirement in relation to powers to detain drunk and disorderly people.

The Committee also notes that clause 6, inserting a new section 17A into the Summary Offences Act 1966, creates an offence of ‘behaving in a disorderly manner in a public place’. Although the offence is punishable only by a fine and may be dealt with as an infringement offence, it is nevertheless possible that people found committing the offence may be

57 Charter s. 21(3)
58 Section 45R(3) of the Crimes Act 1958 provides that arrestees ‘shall be held in the custody of the person apprehending him only so long as any reason referred to in the said paragraph for his apprehension continues’.
59 Intoxicated People (Care and Protection) Act 1994 (ACT), s. 4(3); Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 207(2)(f); Police Offences Act 1935 (Tas), s. 4A(6).
60 Hafsteinsdóttir v Iceland [2004] ECHR 251, [54]-[56].
arrested, e.g. to 'prevent the continuation or repetition of the offence', thus engaging the Charter's right to liberty.61

The Statement of Compatibility does not address the right to liberty, but does remark on clause 6's compatibility with the right to freedom of expression as follows:

...[T]he language in which the offence of behaving in a 'disorderly manner' is malleable, allowing for it to be interpreted and applied narrowly so as to ensure consistency with a human rights framework. So, for example, the New Zealand Supreme Court recently considered the meaning of the equivalent New Zealand offence... Each member of the court formulated, in slightly different language, a test that he or she considered sufficient to protect the right... It is to be expected that the Victorian police and, if necessary, the judiciary will likewise interpret and apply the new offence in a manner that is consistent with section 15(3) of the Charter...

The Committee is concerned that, unless and until the meaning of 'behaves in a disorderly manner' is subject to an authoritative court ruling, this terminology may be too malleable to protect the Charter's right not to be deprived of liberty 'except on grounds... established by law'.62

The Committee refers to Parliament for its consideration the questions of whether or not:

1. clause 5(1), by providing that persons found drunk and disorderly in a public place may be 'lodged in safe custody' but not stating any limits on the duration of such detention, limits the Charter's right against deprivations of liberty 'except... in accordance with procedures, established by law'?

2. clause 6, by empowering the potential arrest of anyone who 'behaves in a disorderly manner in a public place', uses language that is too malleable to protect the Charter's right against deprivations of liberty 'except on grounds... established by law'?

Movement – Privacy – Unwarranted weapon searches – Whether reasonable limit

Summary: The Committee considers that the compatibility of clause 12 with human rights depends on whether or not: the threat of violence or disorder with weapons is sufficient to justify the potential stopping and searching of anyone who is in an area where such violence is likely to occur; it is necessary, in order to prevent such violence or disorder from occurring, to suspend the usual requirement that a police officer suspect on reasonable grounds that a person to be searched is carrying a weapon; and that the designation and search powers and those who exercise them are subject to sufficient legal and practical constraints to prevent unjustified rights limitations, including unlawful discrimination.

The Committee notes that clause 12, inserting new sections 10D and 10E into the Control of Weapons Act 1990, provide for the designation of areas:

- where there is a likelihood that previous violence or disorder involving the use of weapons (either in that area or at previous occasions of an event to be held in that area) will recur; or
- where it is likely that violence or disorder involving weapons will occur and designation is necessary to prevent or deter it

New sections 10G and 10H empower the police in such areas to, without a warrant:

61 Charter s. 21.
62 Charter s. 21(3). See also Human Rights Law Resources Centre submission, Annexure p. 2.
Scrutiny of Acts and Regulations Committee

- search a person for weapons.
- search an occupied vehicle for weapons
- detain a person or vehicle for so long as is reasonably necessary to conduct such a search

Clause 12 engages the Charter’s rights to freedom of movement and against arbitrary interferences in privacy.63

The House of Lords has held that similar provisions in the Terrorism Act 2000 (UK) are compatible with the rights to liberty and privacy in Europe’s human rights convention.64 Clause 12 is broader than those provisions in that it:

- applies to all violence or disorder involving weapons, rather than to terrorism
- authorises strip searches in some circumstances
- extends to risks related to ‘events’ (potentially including political protests)65
- does not require Ministerial confirmation of a designation of an area66

However, it also is more protective of human rights than the UK provisions in that:

- it is limited to ‘necessary’ (rather than efficacious) designations for 12 hours (rather than 28 days)
- is enforced by an offence carrying a fine (rather than imprisonment) and
- except when violence is likely to occur in a particular time period, requires public advertising of the designation and bars a repeat designation within 10 days of a previous one.

The Committee considers that the compatibility of clause 12 with human rights depends on whether or not:

- the threat of violence or disorder with weapons is sufficient to justify the potential stopping and searching of anyone who is in an area where the Commissioner believes that such violence is likely to occur; and
- it is necessary, in order to prevent such violence or disorder from occurring, to suspend the usual requirement that a police officer suspect on reasonable grounds that the person to be searched is carrying a weapon
- the designation and search powers and those who exercise them are subject to sufficient legal and practical constraints to prevent unjustified rights limitations, including unlawful discrimination67

63 Charter s. 12 provides that ‘Every person lawfully within Victoria has the right to move freely within Victoria’. Charter s. 13(a) provides that ‘A person has the right not to have his or her privacy unlawfully or arbitrarily interfered with’.
64 R (Gillian) v Commissioner of Police of the Metropolis [2006] UKHL 12. The matter is now before the European Court of Human Rights.
65 See also Human Rights Law Resources Centre submission, Annexure p. 3.
66 Cf Terrorism Act 2000 (UK), s. 46(4)
67 See R (Gillian) v Commissioner of Police of the Metropolis [2006] UKHL 12, [57], where Lord Hope stated: “It should be noted, of course, that the best safeguard against the abuse of the power in practice is likely to be found in the training, supervision and discipline of the constables who are to be entrusted with its exercise. Public confidence in the police, and good relations with those who belong to the ethnic minorities are of the highest importance when extraordinary powers of the kind that are under scrutiny in this case are being exercised. The law will provide remedies if the power to stop and search is improperly exercised. But these are remedies of last resort. Prevention of any abuse of the power in the first place, and a tighter control over its use from the top, must be the first priority.”
The Committee refers these questions to Parliament for its consideration.

Statement of partial incompatibility – Unwarranted weapon searches – Operation of the Charter

**Summary:** In the Minister’s opinion, new sections 10G and 10H are an arbitrary interference with Victorians’ privacy, do not provide Victorian children with such protection as is in their best interests and are not reasonable limits on these rights. While the Parliament undoubtedly has the power to enact the bill, the Committee has a number of concerns about the operation of the Charter in relation to new sections 10G and 10H. It will write to the Minister seeking further information.

The Statement of Compatibility remarks:

As I am entitled to do, I make this statement indicating that the legislation is partially incompatible with the charter to the extent that it provides powers for police to randomly search persons and vehicles in public places within the designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon.

I have already determined that sections 10G and 10H of the Control of Weapons Act 1990 are incompatible with the charter in relation the section 13(a). Similarly, I have determined that they are incompatible with section 17(2).

The Committee observes that these remarks mean that, in the Minister’s opinion:

- new sections 10G and 10H arbitrarily interfere with Victorians’ privacy; and
- new sections 10G and 10H do not provide Victorian children with such protection as are in their best interests and are needed by them by reason of being children, and
- new sections 10G and 10H are not reasonable limitations that are demonstrably justified in a free and democratic society.

While the Parliament undoubtedly has the power to enact the bill, the Committee has a number of concerns about the operation of the Charter in relation to new sections 10G and 10H:

First, the statement of compatibility does not identify in what way new sections 10G and 10H fail to protect children in their best interests or in what respect they are unreasonable limits on either the right to privacy or the rights of children. The Committee observes that the Charter requires an identification of the ‘nature and extent’ of any incompatibility. As the

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68 Charter s. 13(a) provides that: ‘A person has the right not to have his or her privacy unlawfully or arbitrarily interfered with’.

69 Charter s. 17(2) provides that: ‘Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child’.

70 Charter s. 7(2) provides that: ‘A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.’ The classic test for whether or not a law satisfies this test was stated by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, 109-110, which provides that a law will fail the test if either: (1) its objective is not sufficiently important to warrant overriding human rights; or (2) it is not rationally connected to that objective; or (3) it does not impair rights as little as possible to achieve that objective; or (4) its effects are disproportionate to that objective.

71 Charter s. 26(3)(b) provides that: ‘A statement of compatibility must state - if, in the member’s opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.’
Scrubty of Acts and Regulations Committee

Victorian Equal Opportunity and Human Rights Commission has remarked in a submission to the Committee:  

'This requirement is not only intended to require full disclosure regarding incompatibility per se, but is also vital to assessing any explanations provided by the Government. It is only where the community appreciates the full scope and magnitude of a particular infringement on rights that it can form an informed opinion on whether rational is provided is or is not satisfactory.'

The Committee considers that such an explanation is also vital to the assessment of the bill by members of Parliament.

Second, the bill does not contain an override declaration in respect of new sections 10G and 10H. The Victorian Equal Opportunity and Human Rights Commission has remarked in its submission to the Committee:

'Enacting an override in the circumstances surrounding this Bill would have set a low threshold for such declarations in the future, which would be highly unsatisfactory.'

However, the Committee observes that the satisfaction of the threshold for an override declaration cannot be assessed in the absence of a statement from the Minister as to whether or not exceptional circumstances exist that might justify it. The inclusion of an override declaration would have the advantages of requiring the Minister to make such a statement and ensuring that Parliament revisits the enactment of new sections 10G and 10H within five years.

Third, if the bill is incompatible with human rights, then police exercising powers under new sections 10G and 10H may not be required to act compatibly with those rights or to give proper consideration to those rights. Also, because other clauses introduced by clauses 12 and 13 have a common purpose with new sections 10G and 10H, police exercising those powers (including the powers to designate areas under new sections 10D and 10E) may also not be bound by the Charter's obligations.

The Committee will write to the Minister expressing its concern about the statement of compatibility's compliance with Charter s. 28(3)(b)'s requirement that a statement identify the 'nature and extent' of any incompatibility with human rights; and seeking further information as to the operation of the Charter's provisions on override declarations (Charter s. 31) and obligations of public authorities (Charter s. 38(2)) in relation to clauses 12 and 13. Pending the Minister's response, the Committee calls attention to new sections 10G and 10H.

The Committee makes no further comment.

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72 Victorian Equal Opportunity and Human Rights Commission submission, pp. 1-2. See also Human Rights Law Resources Centre submission, p. 1; Homeless Persons' Legal Clinic submission, p. 5.

73 Charter s. 31(1) provides that: 'Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.' Charter s. 31(3) provides that: 'A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.' Charter s. 31(7) provides that: 'A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.'

74 Charter s. 38(2) provides that the obligation of public authorities in Charter s. 38(1) 'does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision'. The sub-section provides the following example: 'Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.'
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PARLIAMENT OF VICTORIA

Introduced in the Assembly

Summary Offences and Sentencing Amendment Bill 2013

A Bill for an Act to amend the Summary Offences Act 1966 and the Sentencing Act 1991 and for other purposes.

The Parliament of Victoria enacts:

PART I—PRELIMINARY

1 Purposes

The main purposes of this Act are—

(a) to amend the Summary Offences Act 1966 in relation to directions to move on and to provide for the making of exclusion orders from public places; and

(b) to amend the Sentencing Act 1991 to provide for the making of alcohol exclusion orders in relation to offenders who commit certain violent assaults.
Part 1—Preliminary

2 Commencement

(1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.

(2) If a provision of this Act does not come into operation before 1 September 2014, it comes into operation on that day.
PART 2—AMENDMENTS TO THE SUMMARY OFFENCES
ACT 1966

3 Direction to move on

(1) In section 6(1)(c) of the Summary Offences Act 1966, for "safety." substitute "safety; or".

(2) After section 6(1)(c) of the Summary Offences Act 1966 insert—

"(d) the person has or persons have committed, within the last 12 hours, an offence in the public place, or

(e) the conduct of the person or persons is causing a reasonable apprehension of violence in another person; or

(f) the person is or persons are causing, or likely to cause, an undue obstruction to another person or persons or traffic; or

(g) the person is or persons are present for the purpose of unlawfully procuring or supplying, or intending to unlawfully procure or supply, a drug of dependence within the meaning of section 4 of the Drugs, Poisons and Controlled Substances Act 1981; or

(h) the person is or persons are impeding or attempting to impede another person from lawfully entering or leaving premises or part of premises.

(3) After section 6(1) of the Summary Offences Act 1966 insert—

"(1A) For the purpose of subsection (1)(f), in considering whether an obstruction is undue, a member of the police force, or a protective services officer on duty at a designated place, must have regard to—
Part 2—Amendments to the Summary Offences Act 1966

(a) the duration of the obstruction; and

(b) the conduct that is causing the obstruction."

(4) In section 6(2) of the Summary Offences Act 1966, after "orally" insert "and may apply to an individual person or a group of persons".

(5) In section 6(5) of the Summary Offences Act 1966, for "This section does" substitute "Subject to subsection (6), subsections (1)(a) and (f) do".

(6) After section 6(5) of the Summary Offences Act 1966 insert—

"(6) Subsection (5) does not prevent a member of the police force or a protective services officer giving a direction under subsection (1)(b), (c), (d), (e), (g) or (h)."

4 New sections 6A and 6B inserted

After section 6 of the Summary Offences Act 1966 insert—

"6A Arrest of person found in contravention of direction to move on

(1) Without limiting section 458 of the Crimes Act 1958, a member of the police force, or a protective services officer on duty at a designated place, may arrest a person without warrant if the member or officer reasonably believes that the person is committing or has committed an offence against section 6(4).

(2) If a protective services officer arrests a person under subsection (1), the officer must hand the person into the custody of a member of the police force as soon as practicable after the person is arrested."
(3) A member of the police force who arrests a person under subsection (1), or into whose custody a person is handed under subsection (2), must not detain the person in custody unless the member reasonably believes that the detention is necessary—

(a) to ensure the attendance of the arrested person before a court of competent jurisdiction; or

(b) to preserve public order; or

(c) to prevent the continuation or repetition of the offence; or

(d) for the safety or welfare of members of the public or of the arrested person.

(4) If it appears to a member of the police force that it is no longer necessary to detain a person who has been arrested under this section for a reason set out in subsection (3), the member must release that person from custody without bail or cause the person to be so released, whether or not a summons to answer to a charge has been issued against the person or a notice to appear has been served on the person in relation to the offence alleged.

6B Requirement to give name and address

(1) A member of the police force who intends to give a person a direction to move on may request the person to state the person's name and address.

(2) A member of the police force who makes a request under subsection (1) must inform the person of the member's intention to give the person a direction to move on.
Part 2—Amendments to the Summary Offences Act 1966

(3) A person must not, in response to a request made by a member of the police force in accordance with this section—

(a) refuse or fail to comply with the request without a reasonable excuse for not doing so; or

(b) state a name or address that is false in a material particular.

Penalty: 5 penalty units.

(4) A person who is requested to state his or her name or address may request the member who made the request to state, orally or in writing, the member’s name, rank and place of duty.

(5) A member of the police force must not, in response to a request under subsection (4)—

(a) refuse or fail to comply with the request, including refusing or failing to answer the request in writing if specifically requested to do so; or

(b) state a name or rank that is false in a material particular; or

(c) state as his or her place of duty an address other than the name of the police station which is the member’s ordinary place of duty.

Penalty: 5 penalty units.

(6) If a person states a name or address in response to a request made under subsection (1) and the member who made the request suspects on reasonable grounds that the stated name or address may be false, the member may request the person to produce evidence of the correctness of the name or address.
(7) A person must comply with a request under subsection (6), unless he or she has a reasonable excuse for not doing so.

Penalty: 5 penalty units.

(8) It is not an offence for a person to fail to comply with a request made under subsection (1) or (6) if the member who made the request did not inform the person, at the time the request was made, that it is an offence to fail to comply with the request.

5 New Division 1B of Part I inserted

In Part I of the Summary Offences Act 1966, after Division 1A insert—

"Division 1B—Exclusion orders

6C Definitions

In this Division—

Court means the Magistrates' Court;

direction to move on means a direction given under section 6;

exclusion order means an order made under section 6D.

6D Application for exclusion order

(1) A member of the police force may apply for an exclusion order.

(2) An application made under this section must—

(a) be in writing; and

(b) identify the person in respect of whom the exclusion order is sought; and
(c) contain a description of the public place, or part of the public place, in respect of which the exclusion order is sought; and

(d) state the grounds on which the exclusion order is sought; and

(e) be accompanied by at least one affidavit that verifies the facts on which the application is based.

(3) An application made under this section must be served on the respondent as soon as is practicable after the application is filed with the Court.

6E Determination of application

(1) On an application under section 6D, the Court may make an exclusion order in respect of a person if the Court is satisfied on the balance of probabilities that in respect of the same public place, or part of the public place—

(a) the person has been given a direction to move on—

(i) 3 or more times within a period of 6 months; or

(ii) 5 or more times within a period of 12 months; and

(b) an exclusion order has not previously been made in respect of the person in relation to the conduct that formed the basis of the directions to move on referred to in paragraph (a); and
(c) an exclusion order may be a reasonable means of preventing the person from engaging in further conduct in the public place, or part of the public place, that could form the basis for another direction to move on.

(2) In determining whether an exclusion order may be reasonable under subsection (1)(c), the Court may take into account the following—

(a) the nature and gravity of the person’s conduct that formed the basis for any of the previous directions to move on;

(b) whether the person has previously been the subject of an exclusion order under this Division;

(c) the likely impact of the exclusion order on—

(i) the person; and

(ii) any other person affected by the conduct that formed the basis of any of the previous directions to move on; and

(iii) public safety and order;

(d) any other matter that the Court considers relevant.

(3) An exclusion order must state—

(a) the name of the person to whom the order applies; and

(b) the ground on which the order has been made; and

(c) a description of the public place, or part of the public place, which the person must not enter; and
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Part 2—Amendments to the Summary Offences Act 1966

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(d) when the exclusion order takes effect in accordance with section 6F; and

(e) a period not exceeding 12 months during which the person must not enter the public place or part of the public place; and

(f) the conditions, if any, imposed under subsection (5).

(4) Subject to subsection (5), an exclusion order prohibits a person from entering or remaining in a public place, or part of a public place, at all times during the period of the order.

(5) An exclusion order may allow the person to enter a public place, or part of a public place, for a specified purpose during the period of the order if—

(a) the Court considers that there is a good reason why the person should be allowed to enter the place; and

(b) the Court considers that it is appropriate in all the circumstances.

6F When exclusion order takes effect

An exclusion order takes effect—

(a) if the person to whom the order applies is present at court when the order is made—from the time at which the order is made; or

(b) if the person to whom the order applies is not present at court when the order is made—7 days after the day on which a copy of the order is served on the person.
6G Offence to contravene exclusion order

(1) A person in respect of whom an exclusion order is in effect must not engage in conduct in contravention of the order knowing that the order is in effect, or being reckless as to whether the order is in effect.

Penalty: 2 years imprisonment.

(2) It is not a contravention of subsection (1) if the conduct contravening the order was caused by circumstances beyond the control of the accused and the accused had taken reasonable precautions to avoid committing an offence against subsection (1).

(3) In proceedings for an offence against subsection (1), proof of the person the subject of the exclusion order being present in court when the order is made, or proof of service of the exclusion order on the person is admissible in evidence for the purpose of establishing that the person knows that an exclusion order is in effect and, in the absence of evidence to the contrary, is proof of that fact.

6H Variation of exclusion order

(1) Any of the following may apply to the Court for variation of an exclusion order—

(a) the applicant for the exclusion order;
(b) the person to whom the order applies.

(2) On application under subsection (1), the Court may vary an exclusion order if the Court—
(a) is satisfied that new facts or circumstances have arisen since the making or last variation of the order that make it appropriate for the order to be varied; and

(b) considers that it is appropriate to do so.

(3) In determining whether it is appropriate to vary an exclusion order under subsection (2)(b), the Court may consider the likely impact of the exclusion order as proposed to be varied on—

(a) the person to whom the order applies; and

(b) any other person affected by the conduct that resulted in the directions to move on that formed the basis of the exclusion order; and

(c) public safety and order—

and any other matter that the Court considers relevant.

(4) The Court must specify the time and date at which an exclusion order as varied takes effect.

61 Revocation of exclusion order

(1) Any of the following may apply to the Court for revocation of an exclusion order—

(a) the applicant for the exclusion order;

(b) the person to whom the order applies.

(2) On application under subsection (1), the Court may revoke an exclusion order if the Court is satisfied that—
(a) new facts or circumstances have arisen since the making or last variation of the order; and

(b) the exclusion order is no longer a reasonable means of preventing the person to whom the order applies from engaging in conduct in the public place, or part of the public place, that could form the basis for a direction to move on.

(3) In determining whether an exclusion order is no longer reasonable under subsection (2)(b), the Court may take into account—

(a) the nature and gravity of the conduct that resulted in the directions to move on that formed the basis of the exclusion order; and

(b) whether the person to whom the exclusion order applies has previously been the subject of an exclusion order under this Division; and

(c) the likely impact of the revocation of the exclusion order on—

(i) the person to whom the exclusion order applies; and

(ii) any other person affected by the conduct that resulted in the directions to move on that formed the basis of the exclusion order; and

(iii) public safety and order; and

(d) any other matter that the Court considers relevant.
6J Chief Commissioner to report on exclusion orders

The Chief Commissioner of Police must provide to the Minister for inclusion in the annual report of operations under Part 7 of the Financial Management Act 1994 a report containing—

(a) the number of applications made for exclusion orders during that financial year; and

(b) the number of applications for exclusion orders that were withdrawn during that year; and

(c) the number of applications for exclusion orders that were dismissed during that year; and

(d) the number of exclusion orders made during that year; and

(e) the number of persons charged with an offence against section 6G during that year; and

(f) the number of persons found guilty of an offence against section 6G in that year; and

(g) the number of contraventions of an exclusion order that were recorded by members of the police force during that year in respect of which no charge-sheet was filed."
6 Transitional provision

After section 62(8) of the Summary Offences Act 1966 insert—

"(9) This Act, as amended by section 5 of the Summary Offences and Sentencing Amendment Act 2014, applies in respect of a direction given under section 6 on or after the commencement of that Act."
PART 3—AMENDMENTS TO THE SENTENCING ACT 1991

7 New Division 4 of Part 4 inserted

In Part 4 of the Sentencing Act 1991, after Division 3 insert—

"Division 4—Alcohol exclusion orders

89DC Definitions

In this Division—

alcohol exclusion order means an order under section 89DE;

bar area means an area within a licensed premises that is set aside for the service of liquor for consumption on those premises;

intoxicated, in relation to a person, means the person’s speech, balance, co-ordination or behaviour is noticeably affected as a result of the consumption of liquor;

licensed premises has the same meaning as in the Liquor Control Reform Act 1998;

liquor has the same meaning as in the Liquor Control Reform Act 1998;

major event has the same meaning as in the Liquor Control Reform Act 1998;

offender means a person referred to in section 89DE(1);

relevant offence means any of the following offences—

(a) murder;
(b) manslaughter;
(c) an offence against any of the following provisions of the Crimes Act 1958—

(i) section 15A(1) (Causing serious injury intentionally in circumstances of gross violence);

(ii) section 15B(1) (Causing serious injury recklessly in circumstances of gross violence);

(iii) section 16 (Causing serious injury intentionally);

(iv) section 17 (Causing serious injury recklessly);

(v) section 18 (Causing injury intentionally or recklessly);

(vi) section 19(1) (Offence to administer certain substances);

(vii) section 20 (Threats to kill);

(viii) section 22 (Conduct endangering life);

(ix) section 23 (Conduct endangering persons);

(x) section 24 (Negligently causing serious injury);

(xi) section 29(1) (Using firearm to resist arrest etc.);

(xii) section 30 (Threatening injury to prevent arrest);

(xiii) section 31(1) (Assaults);
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(xiv) section 31A(1) (Use of firearms in the commission of offences);

(xv) section 38(1) (Rape);

(xvi) section 38A(1) (Compelling sexual penetration);

(xvii) section 39(1) (Indecent assault);

(xviii) section 40(1) (Assault with intent to rape);

(xix) section 45(1) (Sexual penetration of a child under age of 16);

(xx) section 47(1) (Indecent act with child under age of 16);

(xxii) section 48(1) (Sexual penetration of 16 or 17 year old child);

(xxii) section 49(1) (Indecent act with 16 or 17 year old child);

(xxiii) section 53(1) (Administration of drugs etc. with intention to perform act of sexual penetration);

(xxiv) section 53(2) (Administration of drugs etc. with intention to perform indecent act);

(xxv) section 57(1) (Procuring sexual penetration by threats);

(xxvi) section 57(2) (Procuring sexual penetration by fraud);
(xxvii) section 58(1) (Procuring child to take part in an act of sexual penetration);

(xxviii) section 58(2) (Procuring person to take part in an act of sexual penetration of a child);

(xxix) section 58(3) (Procuring person who is 16 or 17 and under their care to take part in an act of sexual penetration);

.xxx) section 60A(1) (Sexual offence while armed with an offensive weapon);

.xxxi) section 63A (Kidnapping);

.xxxii) section 68(1) (Production of child pornography);

.xxxiii) section 70AC (Sexual performance involving a minor).

89DD Alcohol exclusion order

(1) If a person has been charged with a relevant offence, the Director of Public Prosecutions or a member of the police force may make an application for an alcohol exclusion order.

(2) An application for an alcohol exclusion order under this section must be filed and served on the accused who is the subject of the application—

(a) in the case of a proceeding listed for a summary hearing in the Magistrates' Court, before the first mention hearing, or later with the leave of the court; or
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(b) in the case of a committal proceeding, before the committal mention hearing, or later with the leave of the court; or

(c) in any other case, before the first directions hearing, or later with the leave of the court.

(3) An application for an alcohol exclusion order may be withdrawn by the Director of Public Prosecutions or a member of the police force at any time before it is determined.

(4) A court may also make an alcohol exclusion order in respect of an offender on the court's own motion if it is satisfied that the circumstances set out in section 89DE(1) apply to the offender.

89DE When an alcohol exclusion order must be made

(1) A court must make an alcohol exclusion order in respect of an offender if—

(a) the court records a conviction against the offender for a relevant offence; and

(b) the court is satisfied on the balance of probabilities that—

(i) at the time of the relevant offence the offender was intoxicated; and

(ii) the offender's intoxication significantly contributed to the commission of the relevant offence; and

(c) the offender is not, or has not been, the subject of a previous alcohol exclusion order in relation to the circumstances that gave rise to the relevant offence.
(2) The court is not required to call further evidence for the purposes of satisfying itself of the matters set out in subsection (1)(b).

(3) The duration of an alcohol exclusion order is 2 years.

(4) Subject to subsection (5), an alcohol exclusion order prohibits an offender from—

(a) entering or remaining in any licensed premises characterised as a nightclub, bar, restaurant, cafe, reception centre or function centre; and

(b) entering or remaining in the location of any major event; and

(c) entering or remaining in a bar area of any licensed premises to which paragraph (a) or (b) does not apply; and

(d) consuming or attempting to consume any liquor in any licensed premises to which paragraph (a) or (b) does not apply.

(5) An alcohol exclusion order may be subject to exemptions that allow a person to enter or remain in a specified place for a specified purpose during the period of the order if—

(a) the Court considers that there is a good reason why the person should be allowed to enter or remain in the place; and

(b) the Court considers that it is appropriate in all the circumstances.
(6) An alcohol exclusion order takes effect—

(a) if the offender is not serving a custodial sentence for another offence and the order has not been made in combination with a custodial sentence, at the time the order is made; or

(b) if the offender is serving a custodial sentence for another offence at the time the order is made or the order has been made in combination with a custodial sentence, on the offender’s release from prison.

(7) An alcohol exclusion order must state—

(a) the name of the offender; and

(b) the grounds on which the order is made; and

(c) the conduct that is prohibited by the order; and

(d) any exemptions imposed under subsection (5), and

(e) when the order takes effect in accordance with subsection (6); and

(f) the duration of the order.

(8) If a court makes an alcohol exclusion order in respect of a person, it must not, for the duration of the order, in respect of that person—

(a) make an exclusion order under Part 8A of the Liquor Control Reform Act 1998 (except an order under section 148I(2)(a) of that Act); or

(b) attach an alcohol exclusion condition as a condition of a community corrections order.
89DF Offences for contravening alcohol exclusion order

(1) A person in respect of whom an alcohol exclusion order is in effect must not, in contravention of the order, enter, remain or attempt to enter or remain in any place that the person knows or is reckless as to whether the place is—

(a) a licensed premises characterised as a nightclub, bar, restaurant, cafe, reception centre or function centre; or

(b) the location of a major event; or

(c) a bar area of any licensed premises to which paragraph (a) or (b) does not apply—

knowing that the order is in effect, or being reckless as to whether the order is in effect.

Penalty: Level 7 imprisonment.

(2) A person in respect of whom an alcohol exclusion order is in effect must not, in contravention of the order, consume or attempt to consume liquor in any place that the person knows or is reckless as to whether the place is a licensed premises, knowing that the order is in effect, or being reckless as to whether the order is in effect.

Penalty: Level 7 imprisonment.

(3) It is not a contravention of subsection (1) if the conduct contravening the order was caused by circumstances beyond the control of the accused and the accused had taken reasonable precautions to avoid committing an offence against subsection (1).
(4) In proceedings for an offence against subsection (1) or (2), proof of the person the subject of the alcohol exclusion order being present in court when the order is made, or proof of service of the alcohol exclusion order on the person is admissible in evidence for the purpose of establishing that the person knows that an alcohol exclusion order is in effect and, in the absence of evidence to the contrary, is proof of that fact.

89DG Variation of alcohol exclusion order

(1) Any of the following may apply for variation of an alcohol exclusion order—

(a) the person to whom the order applies;

(b) a member of the police force.

(2) An application under subsection (1) must be made to the same court that made the alcohol exclusion order.

(3) On an application under subsection (1), the court may vary an alcohol exclusion order, if the court—

(a) is satisfied that new facts or circumstances have arisen since the making or last variation of the order that make it appropriate for the order to be varied; and

(b) is satisfied that there is a good reason why the person to whom the order applies should, or should not, be allowed to enter specified licensed premises; and

(c) considers that it is appropriate in all the circumstances to do so.
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(4) If the court varies an exclusion order under this section, it may only make any of the following variations—

(a) imposing a new exemption on an alcohol exclusion order;

(b) varying or removing an existing exemption on an alcohol exclusion order.

(5) The court must specify the date on which the alcohol exclusion order as varied takes effect.

89DH Chief Commissioner to report on alcohol exclusion orders

(1) The Chief Commissioner of Police must provide to the Minister for inclusion in the annual report of operations under Part 7 of the Financial Management Act 1994 a report containing—

(a) the number of applications made for alcohol exclusion orders during that financial year; and

(b) the number of applications for alcohol exclusion orders that were withdrawn during that year; and

(c) the number of applications for alcohol exclusion orders that were dismissed during that year; and

(d) the number of alcohol exclusion orders made during that year; and
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(e) the number of persons charged with an
offence against section 89DF(1) or (2)
during that year; and

(f) the number of charges for an offence
under section 89DF(1) or (2) that
resulted in a finding of guilt in that
year; and

(g) the number of contraventions of an
alcohol exclusion order that were
recorded by members of the police
force during that year in respect of
which no charge sheet was filed; and

(h) a comparison with the immediately
preceding 3 financial years of the
information required under this
subsection.

(2) As soon as is practicable after the end of
each financial year, the Director of Public
Prosecutions must provide the Chief
Commissioner of Police with the following
information for the purposes of preparing a
report under this section—

(a) the number of applications made by the
Director of Public Prosecutions for
alcohol exclusion orders during that
financial year; and

(b) the number of applications for alcohol
exclusion orders that were withdrawn
during that year; and

(c) the number of applications for alcohol
exclusion orders that were dismissed
during that year.".
8 New section 151 inserted

After section 150 of the Sentencing Act 1991 insert—

"151 Transitional provision—Summary Offences and Sentencing Amendment Act 2013

(1) This Act, as amended by Part 3 of the Summary Offences and Sentencing Amendment Act 2013, applies in respect of a relevant offence committed after the commencement date.

(2) For the purposes of subsection (1), if an offence is alleged to have been committed between 2 dates, one before and one after the commencement date, the offence is alleged to have been committed before that commencement.

(3) In this section, commencement date means the date on which all of the provisions of Part 3 of the Summary Offences and Sentencing Amendment Act 2013 have come into operation."
PART 4—REPEAL OF AMENDING ACT

9 Repeal of amending Act

This Act is repealed on the first anniversary of the day after the day on which all of its provisions have come into operation.

Note

The repeal of this amending Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the Interpretation of Legislation Act 1984).
I commend the bill to the house.

Debate adjourned on motion of Ms HUTCHINS (Kellor).

Debate adjourned until Thursday, 26 December.

SUMMARY OFFENCES AND SENTENCING AMENDMENT BILL 2013

Statement of compatibility

Mr CLARK (Attorney-General) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act 2006:

In accordance with section 28 of the Charter of Human Rights and Responsibilities Act 2006, (the ‘charter act’), I make this statement of compatibility with respect to the Summary Offences and Sentencing Amendment Bill 2013.

In my opinion, the Summary Offences and Sentencing Amendment Bill 2013, as introduced to the Legislative Assembly, is compatible with human rights as set out in the charter act. I base my opinion on the reasons outlined in this statement.

Overview of bill

The bill amends the Summary Offences Act 1966 by expanding the grounds on which police members and protective services officers (PSOs) may direct a person to move on from a public place, and enabling police members to apply to the Magistrates Court for an exclusion order where they have repeatedly been directed to move on from a public place. The bill also amends the Sentencing Act 1991 by creating a new alcohol exclusion order that prohibits a person who has been convicted of a relevant offence, in circumstances where the person’s intoxication was a significant contributing factor, from entering or consuming liquor in specified licensed premises in Victoria.

Human rights issues

Changes to move-on powers and the related exclusion orders

The bill expands the grounds on which the move-on powers under section 6 of the Summary Offences Act may be used. A person who is directed to move on from a public place by police members or PSOs must leave that public place and is prohibited from returning to it for up to 24 hours. The related exclusion orders also prohibit a person from entering a particular public place but for up to 12 months.

The amendments impose a limitation on an individual’s right to move freely within Victoria as set out in section 12 of the charter act and may, in certain circumstances, limit the rights to freedom of expression (section 15), and peaceful assembly and freedom of association (section 16). However, for the reasons that follow these limitations are consistent with explicit or implicit internal limits on the rights or are reasonable and justified under section 7(2) of the charter act.

All of these charter act rights can be subject to restrictions, including to protect public order, public safety and the rights and freedoms of others. Section 15 contains an explicit internal limitation to this effect (section 15(3)), but the other sections may be implicitly limited in the same way (in accordance with the reasoning in Magare v. Delaney (2013) VSC 407). In the International Covenant on Civil and Political Rights, from which each of these charter act rights is derived, there are express internal limitations for each of the rights in relation to measures that are necessary to protect public order, public health or morals, or the rights and freedoms of others (see 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). Although these internal limitations do not appear in the relevant charter act rights, the internal limitations in the international covenant illustrate morals that may be considered to justify limitations on these rights in accordance with section 7(2). 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.

The bill includes a range of safeguards that minimise effects on the relevant charter act rights and ensure any limitation is reasonable. A police member or PSO may tailor a move-on direction as required. For example, a direction can be given in respect of an entire public place, or just part of that place. The duration of the direction cannot exceed 24 hours and need not be for the full 24 hours.

The making of an exclusion order by a court is discretionary and the court must be satisfied that an order would be a reasonable means of preventing that person from continuing to behave in a manner that would be the basis for another move-on direction. The court can tailor the scope of the order. For example, it may determine the nature and extent of the public place that the order applies to, and the duration of the order. Similarly, new section 6(5) of the Summary Offences Act enables the court to allow a person to enter a place to which the exclusion order applies for specified purposes where it is appropriate. Exclusion orders may also be varied upon application where the court is satisfied it is appropriate.

There are also specific safeguards around the enforcement of move-on directions and the related exclusion orders. For example, a person does not commit the offence of contravening a move-on direction where he or she has a reasonable excuse for doing so. A similar exclusion applies to the offence of contravening an exclusion order.

Section 6(5) of the Summary Offences Act excludes the use of move-on powers based on the grounds set out in section 6(1)(a) and new section 6(1)(5) in relation to a person who is picketing a place of employment, demonstrating, protesting or publicising his or her view about a particular issue. That exception will no longer apply to the grounds in sections 6(1)(b) and (c) to the remaining four new grounds. Those grounds are more closely related to unlawful conduct and a move-on power on those grounds should not be excluded simply because a person is engaged in picketing, protesting or publicising a view. The application of these...
grounds in such circumstances will assist police in protecting the rights of others and maintaining public safety and order.

**Power to require name and address**

The bill creates a new power enabling police members and PSOs to require a person being directed to move on to provide their name and address. The right to privacy set out in section 13 of the Charter Act is relevant to this power. However, in my view this provision is compatible with the right to privacy as it is lawful and not arbitrary. Police will only be able to utilise this power where they intend to direct a person to move on. This new power will enable police to keep track of when a person has been repeatedly moved on for the purposes of applying for a related exclusion order. It will also assist police in determining whether a person contravenes a move-on direction. The use and disclosure of that information would be subject to the usual protections under the Information Privacy Act 2000.

**Arrest power**

The bill inserts a new power into the Summary Offences Act, which provides that a police member or a PSO may, without warrant, arrest a person if the officer suspects on reasonable grounds that the person is or has committed an offence against section 6(4) of the Summary Offences Act (contravention of a move-on direction). In my view these provisions are compatible with the right to liberty as the grounds for arrest are clear and appropriate, and cannot be regarded as arbitrary. Section 6(4) also provides safeguards that minimise interference with liberty by expressly limiting the reasons for which a person may be detained in custody.

**Alcohol exclusion orders**

Alcohol exclusion orders prohibit a person from entering into a range of licensed premises including nightclubs, bars, restaurants, reception centres and major events. These orders limit the right to freedom of movement and are relevant to the right to peaceful assembly and freedom of association.

Alcohol exclusion orders are aimed at protecting public order and the rights and freedoms of others, including the right to life and the right to liberty and security of a person. The orders may only be made after a person has been convicted by a court of a relevant offence and the court is satisfied that the offender’s intoxication significantly contributed to the commission of the offence.

There is a clear and rational connection between the limitation on the right to freedom of movement and the purpose of the order. Before making an order, a court must be satisfied that the person was intoxicated at the time of the offending. Further, that intoxication must have significantly contributed to the offending. Thus, any person subject to an order has demonstrated through their offending that they are a risk to public safety when intoxicated. The alcohol exclusion order will reduce that risk by ensuring the person cannot enter or consume liquor in many places where they could otherwise become intoxicated in public.

The effect of an alcohol exclusion order reflects the significant contribution of alcohol to that offending. Applying the order to a narrower range of licensed venues could channel those subject to the order towards those licensed venues not covered by the order and thus place the public at those venues at risk. The strong, mandatory scheme provided for in this Bill is also intended to provide a clear and powerful deterrent against others committing relevant offences. The deterrence of a discretionary scheme would be undermined by cases where an order is not made.

As with the move-on-related exclusion orders, there are safeguards to ensure alcohol exclusion orders do not inappropriately limit other rights. Courts may create conditions where appropriate allowing a person to enter licensed premises for specified purposes. Such purposes might include employment, reaching accommodation, or attending particular events where appropriate. Section 89DQ allows a person subject to the order to apply for its variation throughout the duration of the order. Given this capacity to adjust alcohol exclusion orders appropriately if justified by a person’s individual circumstances, I do not consider that they create an unreasonable limitation on the right to freedom of movement when balanced with the important objectives of the orders, including public safety and protecting the rights of others.

**Offences for contravening exclusion orders**

New sections 6G of the Summary Offences Act and 89DF(1) and (2) of the Sentencing Act make it an offence to contravene a move-on-related exclusion order or an alcohol exclusion order. Sections 6G(3) and 89DF(4) have the effect of placing an evidential onus on the accused where the prosecution adduces proof that the accused was present in court when the order was made, or proof of service of the order on the person. The right to be presumed innocent until proved guilty according to law is relevant to these provisions. However, the right is not limited. Where the accused points to evidence that puts knowledge of the order at issue, the prosecution will still have a legal onus to prove beyond reasonable doubt that the accused knew or was reckless as to whether the order was in place.

Robert Clark, MP
Attorney-General

**Second reading**

Mr CLARK (Attorney-General) — I move:

That this bill be now read a second time.

This bill makes important changes to the law to better protect the community from lawless behaviour on our streets and to deter and prevent alcohol fuelled violence.

First, the bill amends the Summary Offences Act to give police clearer and more effective move-on powers and to create longer lasting exclusion orders.

Secondly, the bill delivers the government’s election commitment to ban those convicted of alcohol fuelled violence from licensed premises for two years.

**Clearer and more effective move-on powers**

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. Police and PSOs are currently
able to direct people to move on from public places for a range of reasons. These include where they reasonably suspect that a person is breaching or is likely to breach the peace, or is endangering or is likely to endanger the safety of another.

The bill provides further grounds on which these powers may be used. Police and PSOs will be able to direct a person to move on from a public place if they suspect on reasonable grounds that a person:

- has committed an offence in the place;
- is causing a reasonable apprehension of violence to another person;
- is causing, or is likely to cause, an unreasonable obstruction to others;
- is present for the purpose of procuring or supplying drugs; or
- is impeding, or attempting to impede, another person from lawfully entering or leaving premises or part of premises.

These new grounds will provide greater certainty for police members and PSOs as to when they may exercise move-on powers, and expand the range of circumstances in which such directions may be given.

Move-on powers may be applied in relation to one person or many. The bill clarifies that police and PSOs may give one direction to an entire group rather than having individually to direct each person in the group to move on.

The bill continues to protect legitimate rights to lawful protest or demonstration, but it makes clear that if 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, police will have the power to order those protesters to move on.

To this end, the bill provides that move-on powers may be used in respect of people engaged in picket lines, protests and other demonstrations. However, the existing ground relating to breach of peace and the new unreasonable obstruction ground will not apply in those situations. These grounds are excluded because of the scope for dispute about their application in the context of demonstrations. Police will instead be able to rely on the impeding access ground and other grounds to deal with protesters who blockade or otherwise impede access to or from premises or who resort to threats of violence or to illegal conduct.

The bill will also improve the enforcement of move-on directions. For example, the bill expressly provides that police and PSOs may arrest a person who contravenes a move-on direction. The bill also assists the detection of such contraventions by providing that police may require a person being directed to move on to provide their name and address. Currently, police are unable to do this in many cases, making it difficult to detect contraventions of the move-on directions where the person returns a few hours later. This change will also enable police to keep a record of people who are repeatedly moved on.

**Move-on-related exclusion orders**

Move-on powers can keep a person away from a public place for up to 24 hours, but no more. Consequently, a person may return to the place and engage in the same conduct the very next day. This can be a particular issue where police know that people are returning to a certain area repeatedly, such as for the purpose of buying or selling drugs.

The bill addresses these situations by enabling police to apply to the Magistrates Court for an exclusion order against an individual.

The making of an exclusion order will be discretionary, and the court may only make an order if it is satisfied that:

- a person has been repeatedly directed to move on from the same public place or part of a public place; and

an exclusion order would be a reasonable means of preventing that person from continuing to behave in a manner that would be the basis for another move-on direction.

If a court decides to make an exclusion order, it can specify a duration of up to 12 months. During that time a person will be prohibited from entering the public place specified in the order. However, the bill does allow the court to create exemptions allowing a person to enter the place if there is a good reason for doing so and the court considers it appropriate in all the circumstances.

Once an exclusion order is in place, it will be an offence to contravene that order. The offence will carry a maximum penalty of two years imprisonment.

These exclusion orders will give police a new tool for addressing low-level street drug dealing and for breaking up gangs that gather in public places to threaten people or engage in criminal behaviour.
Alcohol exclusion orders

The government made an election commitment to ban those found guilty of committing a violent offence while under the influence of alcohol from licensed premises for two years. This bill makes amendments to the Sentencing Act 1991 to give effect to that commitment.

A high proportion of violent behaviour is caused by people who have had too much to drink. These measures will better protect the public from the recurrence of such behaviour and create a strong deterrent to the offender and to others.

Under the requirements, a court must make an alcohol exclusion order where it is satisfied that:

- a person has been convicted of a relevant offence;
- the person was intoxicated at the time of the assault; and
- the person’s intoxication significantly contributed to the commission of the offence.

These orders will apply to most indictable offences against the person, ranging from homicides to intentionally causing injury, as well as sexual assaults such as rape or indecent assault, and to offences such as threats to kill and assaulting police.

Alcohol exclusion orders will prohibit the offender from entering specified licensed premises or consuming liquor in any licensed premises anywhere in Victoria for a period of two years. Where an offender goes to jail for their offence, the exclusion will apply from the time they are released from jail. Where an offender is sentenced to a community correction order of longer than two years, the court will be able to impose alcohol treatment conditions that will continue to operate after the expiry of the alcohol exclusion order.

The licensed premises from which persons are excluded are the same as those covered by alcohol exclusion conditions made under a community correction order pursuant to section 48J of the Sentencing Act 1991. These include nightclubs and bars — including pubs — as well as licensed restaurants and cafes. Bar areas of other licensed premises will also be covered, including hotel bars and bars at sporting grounds and clubs. A person is also prohibited from entering major events covered by a relevant liquor license, such as the formula one grand prix.

Provision is made for the court on application to vary the exclusion conditions in circumstances where that is justified, such as where a person lives above licensed premises or works at licensed premises. A court may also allow a person to enter licensed premises for a specified purpose if there is a good reason and the court considers it appropriate. However, the courts cannot allow a person to drink on those premises.

Contravention of an alcohol exclusion order will be an offence, carrying a maximum penalty of two years imprisonment.

Alcohol exclusion orders will send a clear message that drunken, violent behaviour will not be tolerated in Victoria and that those who engage in it will face significant consequences for their personal and social life, in addition to whatever other sentence they receive.

I commend the bill to the house.

Debate adjourned on motion of Ms GREEN (Yan Yean).

Debate adjourned until Thursday, 26 December.

FENCES AMENDMENT BILL 2013

Statement of compatibility

Mr CLARK (Attorney-General) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act 2006:

In accordance with section 28 of the Charter of Human Rights and Responsibilities Act 2006 (the ‘charter act’), I make this statement of compatibility with respect to the Fences Amendment Bill 2013.

In my opinion, the Fences Amendment Bill 2013, as introduced to the Legislative Assembly, is compatible with human rights as set out in the charter act. I base my opinion on the reasons outlined in this statement.

Human rights issues

Human rights protected by the charter act that are relevant to the bill

Privacy (section 13)

Section 13(a) of the charter act provides that a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with.

If an owner does not know the whereabouts of an adjoining owner for the purposes of giving a fencing notice under the bill, they must make reasonable inquiries to locate the adjoining owner, including asking the municipal council about the whereabouts of the adjoining owner. Section 9(1)(b) of the existing Fences Act contemplates that a person wishing to construct a fence will obtain the adjoining occupier’s address details from council records in order to serve a fencing notice but does not expressly confer a power on councils to disclose such information. The amendments
PROPOSED CHANGES TO THE LAW IMPACTING CLIENTS OF COMMUNITY SECTOR ORGANISATIONS

Expanded powers to move people on in public spaces, and to effect arrest where there is a failure to comply, are proposed under the new Summary Offences and Sentencing Amendment Bill 2013 (Vic).

There has been public outcry in relation to the targeted removal of rights to engage in public assembly and political demonstration through the proposed laws. Copies of these submissions may be found on the Scrutiny of Acts and Regulations Committee website.

This briefing paper addresses the impacts of the proposed amendments on use of public spaces by persons who are not engaged in political demonstration.

Move on powers under existing laws

What is a move on direction? Many workers in the community sector will be familiar with the terminology of ‘move on’ directions.

Police directions to members of the public may often be informal. Police rely on implied authority in a wide variety of circumstances to gain cooperation from members of the public.

Under current law, a formal move on direction can be issued on limited grounds where the police member issuing the direction reasonably suspects:

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

A move on direction lasts a maximum of 24 hours, and failure to comply may result in a penalty infringement (fine) being issued of approximately $600 (5 penalty units).

Other laws governing use of public space & competing rights

Move on directions are not the only laws that govern use of public space. Victoria has a wide range of laws that may be applied prohibiting property damage, obstructions of roads/footpaths causing danger, the use of obscene/threatening/indecent language, disorderly conduct, assault, begging or gathering alms, loitering with intent, being drunk in a public place, drunk and disorderly. Police also have powers to search persons suspected of carrying drugs or weapons, or present in designated areas, in order to establish whether those persons are engaged in criminal conduct.
EXPANSION OF THE MOVE ON POWER AS A FRAMEWORK OF CRIMINALISATION, DISCRIMINATION & SOCIAL EXCLUSION

It is currently proposed to extend the power to issue move on directions in a number of key ways that will affect vulnerable members of the community who rely on public spaces.

It is necessary to understand some nuances of the way these laws will operate in order to comprehend their impact, and importantly, the way in which they alter the manner in which police powers and criminal law have traditionally been controlled by law to protect fundamental freedoms.

**New grounds for exclusion** - under the new laws, a move on direction may be issued in circumstances that include:

- where a police member reasonably suspects person(s) are present for the purpose of buying or selling drugs.
- where the conduct of person(s) is causing a reasonable apprehension of violence in another person.

**Arrest powers** - Under the new laws arrest powers are extended to cover a failure to comply with a move on direction.

**Long term exclusion from an area** - Where three move on directions are issued within six months, or five within twelve months, police may lodge a Court application to exclude a person from a public space for a period of up to one year.

**Imprisonment for failure to comply** - Where a person engages in conduct in contravention of an exclusion order knowing or being reckless as to whether the order is in effect, a maximum penalty of two years imprisonment may apply.

**Protected rights – right to liberty and security of person**

'Suspicion' – 1. The action of suspecting; the feeling or state of mind of one who suspects; imagination or conjecture of the existence of something evil or wrong without proof; apprehension of guilt or fault on slight grounds etc...

A reasonable suspicion is a very low threshold that would not in the ordinary course justify arrest or criminal charges. Through these laws a reasonable suspicion may ultimately result in incarceration.

**Reasonable suspicion that person(s) are present for the purpose of buying or selling drugs**

A reasonable suspicion by a police member that a person is in possession of drugs for any reason provides grounds to carry out a search of the person to locate evidence. Police may seize property such as mobile phones as evidence, and may depose to any other observations supporting a charge. They may
arrest and interview a suspect. Where charges are laid, police bail conditions may exclude a person from a particular location. Where charges are found proven, sentencing orders may also exclude a person from a particular location.

The remaining circumstances captured by move on directions involve those cases where there is no evidence to support the view a person has engaged in criminal conduct (in the form of buying and selling drugs), only an unsubstantiated suspicion based on a range of indicators or impressions that could not be deemed to constitute evidence.

Reasonable suspicion conduct of person(s) is causing a reasonable apprehension of violence in another person

There are currently a broad range of offences that capture the circumstances where a member of the public has a reasonable apprehension of violence – summary and indictable assault, threat to inflict injury, threatening/obscene/indecency language in a public place, disorderly conduct, sexual assault, and indecent exposure. Civil remedies in the form of personal safety intervention orders may also be sought on application by police or members of the public.

Again it is difficult to conceive of circumstances relevant to the power to issue a move on direction other than those where there is no evidence to suggest criminal offending has taken place. It is worth noting in this context that move on directions may be issued to a group as opposed to an individual. It may be that the presence of a group of persons is suspected to generate reasonable apprehension of violence in another despite the absence of conduct that might warrant a charge. The capacity of such broad discretions to disproportionately impact persons by reference to indicators such as race, poverty, and homelessness are it would seem self-evident.

That a person may be –

- excluded from use of public space and access to local services/supports,
- potentially arrested if non-compliant with a ‘lawful’ police direction though no properly constituted allegation of criminal offending has been laid, and
- potentially incarcerated for intentional or reckless failure to comply with an exclusion order

undermines the rule of law and principles of justice in the most fundamental way.

In many central areas of Melbourne community agencies have been located in ‘hot spots’ to enhance access to treatment and harm reduction. Councils have also been engaged in work to address amenity concerns and to balance the rights of users of public space.

It is our strong view:

1. These laws will lead to increased criminalisation and incarceration of drug users in contrary to the central directives of the National Drug Strategy.
2. These laws will disproportionately affect marginalised young people, people experiencing homelessness, poverty, and mental health issues who occupy public spaces, both as a result of social choice and necessity.

3. These laws erode fundamental premises of common law that protect the individual from arbitrary and unfettered exercises of power, and further, these laws purposively facilitate criminalisation of non-offenders/ by-pass the presumption of innocence to the point of incarceration.

4. These laws fail to support the police force of Victoria in maintaining internal accountability and external credibility in the exercise of power against individuals.

5. These laws will directly inhibit the work of community sector in supporting long term health, inclusion, social integration, and recovery objectives. In particular they will undermine harm reduction and community integration objectives of government funded health and community services.

What can you do?

We would encourage individuals and organisations to raise any concerns with each of the following members of Parliament, and to request a stay of the Bill to allow opportunity for proper consultation and consideration of community health based concerns.

Minister for Health - Hon. David Davis, MLC
Email david.davis@parliament.vic.gov.au

Attorney-General for the State of Victoria - Hon. Robert Clark, MP
Email robert.clark@parliament.vic.gov.au

Minister for Mental Health, Community Services - Hon Mary Wooldridge MP
Email mary.wooldridge@parliament.vic.gov.au

Shadow Minister for Health - Mr Gavin Jennings, MLC
Email gavin.jennings@parliament.vic.gov.au

Shadow Attorney General - Hon, Martin Pakula, MP
Email martin.pakula@parliament.vic.gov.au

Sue Pennicuik MLC Greens Member (Justice Portfolio)
Email sue.pennicuik@parliament.vic.gov.au

Colleen Hartland MLC Greens Member (Health Portfolio)
Email colleen.hartland@parliament.vic.gov.au

For comment/ contact details of spokespersons please contact Meghan Fitzgerald of Fitzroy Legal Service on 9419 3744.
Summary Offences and Sentencing Amendment Bill 2013

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Introduced: 11 December 2013
House: Legislative Assembly
2nd Reading: 12 December 2013
Commencement: The earlier date of the day of Proclamation or 1 September 2014.

Links to key documents including the Bill, Explanatory Memorandum, Statement of Compatibility and Second Reading Speech can be found in the Library's New Bills -- Information Links page at:

For further information on the progress of this Bill please visit the Victorian Legislation and Parliamentary Documents website @ http://www.legislation.vic.gov.au.
Introduction

The Summary Offences and Sentencing Amendment Bill 2013 ('the Bill') was introduced by the Attorney-General, the Hon. Robert Clark, on 11 December 2013, and second read on 12 December 2013. The Bill amends the Summary Offences Act 1966 in relation to 'move-on' powers and exclusion orders from public places. It also amends the Sentencing Act 1991 to create alcohol exclusion orders in relation to people who commit certain violent assaults under the influence of alcohol.

This Research Brief provides background on the existing arrangements, and presents feedback from key stakeholders on the proposed amendments. Move-on powers in other jurisdictions are also considered, particularly those in Queensland, New South Wales and the United Kingdom.

I. Background

The Bill introduces two new exclusion order schemes: move-on exclusion orders and alcohol exclusion orders. It also extends the circumstances where people can be directed to move on, and applies some of these circumstances to previously excluded persons (such as protesters and picketing employees). This section presents the current move-on arrangements in comparison to the proposed changes, as well as media coverage of the Bill and submissions to the Scrutiny of Acts and Regulations Committee (SARC).

Current Arrangements

The power to direct people to move on was inserted by the Summary Offences and Control of Weapons Amendment Act 2009, which commenced on 16 December 2009. This Act was introduced with the purpose of 'tackling the growing incidence of drunkenness, disorderly behaviour and violence involving the carrying and use of weapons in the Victorian community' and also created broader random search powers, the offence of disorderly conduct, and on-the-spot penalties for drunk and disorderly and drunk offences.

Now, a member of the police force or protective services officer (PSO) can direct persons to move on under section 6 of the Summary Offences Act if:

(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.

However, certain types of behaviour are excluded from move-on orders under section 6(5), including persons:

(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.

According to the latest Crime Statistics (2012-13), the infringement order scheme has been utilised in the following way since its inception:

Table 1: Infringement notices issued since their introduction on 16 Dec 2009

<table>
<thead>
<tr>
<th>Infringement notice</th>
<th>2009-10</th>
<th>2010-11</th>
<th>2011-12</th>
<th>2012-13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contravene Police Direction to Move On</td>
<td>249</td>
<td>361</td>
<td>329</td>
<td>312</td>
</tr>
<tr>
<td>Drunk in Public Place</td>
<td>8,031</td>
<td>13,371</td>
<td>11,070</td>
<td>11,414</td>
</tr>
<tr>
<td>Drunk and Disorderly in Public Place</td>
<td>517</td>
<td>619</td>
<td>1,187</td>
<td>1,504</td>
</tr>
<tr>
<td>Behave in Disorderly Manner in a Public Place</td>
<td>178</td>
<td>198</td>
<td>265</td>
<td>230</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>8,975</td>
<td>14,459</td>
<td>12,851</td>
<td>13,460</td>
</tr>
</tbody>
</table>


This table shows that the new offences of behaving in a disorderly manner in a public place and contravening a direction to move on inserted by the 2009 Act have not been used as frequently as the infringements for drunk, and drunk and disorderly, offences.

**Proposed Changes**

This Bill adds five new paragraphs to section 6 detailing other situations where a member of the public can be directed to move on, including:

(d) the person has or persons have committed, within the last 12 hours, an offence in the public place; or
(e) the conduct of the person or persons is causing a reasonable apprehension of violence in another person; or
(f) the person is or persons are causing, or likely to cause, an undue obstruction to another person or persons or traffic; or
(g) the person is or persons are present for the purpose of unlawfully procuring or supplying, or intending to unlawfully procure or supply, a drug of dependence within the meaning of section 4 of the Drugs, Poisons and Controlled Substances Act 1981; or
(h) the person is or persons are impeding or attempting to impede another person from lawfully entering or leaving premises or part of premises.
The Bill also extends the circumstances where a person can be moved on to people picketing a place of employment, or demonstrating or protesting about a particular issue, except for breaching the peace and unduly obstructing persons or traffic. Thus, protesters can now be moved on if their behaviour is likely to injure a person, damage property, or is preventing the lawful entering or leaving of premises.

The Bill allows for new powers to arrest people who do not comply with a direction to move on. If a police member is intending to give a move-on direction, a person must provide an accurate name and address (penalty: 5 penalty units). In return, a police member or PSO must give their name, rank and place of duty upon request. These mirror current arrest and name provisions under the Crimes Act 1958 (section 458).

A new Division is inserted into the Summary Offences Act to create a move on exclusion order scheme. Exclusion orders can be made by a Magistrates’ Court for a period of up to 12 months to exclude a person from a particular public place, if a person has been repeatedly directed to move on from the same place. The conditions in the order, and need for the order, are at the Courts’ discretion.

In line with an election commitment prior to the 2010 election, the Bill also makes amendments to the Sentencing Act to create an alcohol exclusion order scheme.4 This gives the Director of Public Prosecutions or a member of the police force the power to apply for an alcohol exclusion order against a person who has committed an offence while intoxicated where that intoxication significantly contributed to the commission of that offence. Alcohol exclusion orders prohibit the person from entering or remaining in a licensed premise that is a nightclub, bar, restaurant, café, reception, function centre, or a location of a major event, and last for two years. An excluded person may enter other types of licensed premises on the condition that they do not enter the bar area or consume alcohol on the premises. Breaking an alcohol exclusion order is punishable by level 7 imprisonment (2 years).

Media Coverage

The changes proposed by the Bill have received significant media attention, particularly in relation to how they may affect current protests, such as those at East West Link construction sites. Some articles have suggested the Bill ‘would drastically increase police powers and severely curtail our basic human rights’ and express concerns over broader potential impacts on vulnerable people, such as the homeless.5 Conversely, other stories have supported the changes as the fines make ‘project pests financially

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responsible for their actions and deter protesters from risking their safety, as well as those of police and construction workers. Union officials have been reported as saying the changes are unnecessary as employers are able to apply to the Federal Court to stop unlawful picketing and sue for any harm to their businesses. The Herald Sun stated that the laws are 'aimed at clamping down on violent protests, like those that dogged the Grocon Emporium site' and that peaceful protests would be unaffected.

Attorney-General Robert Clark issued a media release, reiterating that:

Every Victorian has the right to protest and express their views. However, when individuals resort to unlawful tactics that threaten the livelihood of law-abiding businesses, employees and their families, they must be held to account.

Police should be able to focus on protecting the community, not having to deal repeatedly with the same individuals at the same unlawful blockades. Exclusion orders will empower the courts to make longer lasting orders to tackle serial law-breakers intent on causing trouble for hard working Victorians and their businesses.

Submissions to SARC

The Scrutiny of Acts and Regulations Committee (SARC), which examines all Bills and regulations introduced in Parliament, assessed the Bill and its compatibility with Victoria’s Charter of Human Rights and Responsibilities Act 2006 (the Charter). SARC concluded that while it had concerns when move-on provisions were introduced in 2009, the preservation of some exemptions for people picketing or protesting and the similarity of the remaining provisions with those that exist in New South Wales ensure the Bill’s compatibility with the Charter.

SARC received ten submissions in relation to the Bill. Common issues raised by the submissions included the Bill’s compatibility with human rights, the role of discretion by police officers, the potential for inappropriate or discriminatory use of move-on powers, the potential impact on vulnerable groups in society (i.e. homeless, young or

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Indigenous people, or people with mental health or drug/alcohol issues), and the need for community consultation. The submissions of four key stakeholders are outlined below.

**Victorian Trades Hall Council**
The Victorian Trades Hall Council (VTHC) describes its major role as 'the coordination of union activities and campaigns'. It further describes itself as being the state organisation for communication of trade union issues to the public, and is involved in lobbying State Parliament on social and industrial matters.

In its submission to SARC, the VTHC expressed its concerns with the Bill, stating that the amendments to the move-on powers and exclusion order ‘have the effect of placing limitations on Victorians’ rights to freedom of expression, peaceful assembly and movement’ and are not compatible with human rights contained in the Charter. The VTHC noted that although the Charter does allow for ‘reasonable limits as can be demonstrably justified in a free and democratic society’ (section 7(2)), the VTHC does not believe that the amendments are justified under this section. The VTHC stated that ‘such changes are not only incompatible but against the intent and spirit of the Charter which was to protect and promote human rights’.

In opposing the amendments, the VTHC stated that there is a lack of evidence to show that the Government has investigated other measures to address the issue of ‘lawless behaviour in our streets’ without impairing on the rights contained in the Charter.

The VTHC stated that ‘the expanded move on powers in conjunction with the exclusion order scheme criminalise actions which are currently lawful and protected by the Charter’.

The VTHC expressed concern regarding the introduction of the changes, stating that the Government was acting with haste and had failed to consult the community. The VTHC emphasised the importance of consulting relevant stakeholders by stating that the Government did not have a mandate to introduce changes to move-on powers which limit human rights as set out in the Charter. The VTHC stated that ‘The Government’s failure to consult widely with the community about such an important issue belies the real intent of the Bill which can only be to silence dissent in an election year’.

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12 Ibid.
15 Ibid.
16 Ibid., p. 1.
17 Ibid.
In their submission, the VTHC put forward two actions for SARC to undertake. These actions were that SARC should recommend the Bill not be passed in its current form and should recommend further consultation with the community.18

**Law Institute of Victoria**

The Law Institute of Victoria (LIV) describes itself as a ‘leader, contributor and lobbyist on issues of law reform, access to justice and the rule of law’.19 In the LIV submission to SARC, Katie Miller, President Elect of the Law Institute of Victoria, wrote of the LIV’s disappointment at the Government’s lack of consultation on this Bill, which limits exceptions to move-on powers in relation to picketing, protesting and demonstrations.20

The LIV stated that ‘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’ and would ‘increase criminalisation of direct protest action in Victoria’.21 The LIV emphasised the role of direct protest action as an opportunity for people to express their views, create a sense of solidarity and often attract media attention.22 It is the LIV’s view that laws which restrict freedom of movement, peaceful assembly, association or expression undermine ‘fundamental democratic values’ and the ‘most basic rights of people and groups in our community’.23

The LIV stated that the Bill makes restrictions on human rights as expressed internationally24 and in the Victorian Charter, and that under section 7(2) of the Charter, such restrictions must be demonstrated by the Government to be reasonable limits which are justified in a ‘free and democratic society based on human dignity, equality and freedom’.25 The LIV pointed out that the Charter gives direction to Parliament to consider ‘any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’.26 The LIV stated that:

> 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.27

The LIV submission includes a list of specific concerns regarding the Bill, including that:

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18 ibid., p. 2.
21 ibid.
22 ibid.
23 ibid.
24 See International Covenant on Civil and Political Rights (ICCPR) art 12(3), art 21 and art 22, ibid., p. 5.
25 ibid., p. 2.
26 ibid.
27 ibid.
the 'lawless behaviour' occurring in the streets from which the community need
protection, as referred to in the Statement of Compatibility, is not adequately
identified or explained in the Second Reading Speech, and therefore justification for
increased move-on powers has not been established;
• less restrictive means to address 'lawless behaviour' have not been considered;
• the discretionary powers for police officers in issuing move-on directions are
broadly expressed in the Bill and have the potential to be applied in a subjective or
discriminatory way;
• groups who often engage in protests and other activism such as unions and
environmental activists could be targeted unfairly by the proposed new move-on
powers under clause 3(2)(h) of the Bill;
• under clause 3(2)(d), a person who has 'committed within the last 12 hours, an
offence in the public place' may be given a move-on direction, yet it is unlikely that
the charge for the offence committed within 12 hours previously will have been
heard by a court at the time when a police officer is issuing a move-on direction.
The police officer would be acting on allegations of an offence having been
committed, raising questions about the subjective nature of the move-on powers
and the lack of 'a clear evidentiary basis';
• in determining an application for an exclusion order, clause 6E requires the Court
to consider whether an exclusion order would be a reasonable means for
preventing further conduct in a public place which could lead to a further move-on
direction for that person. The LIV is concerned that this determination of
exclusion orders is based on a subjective assessment of future conduct;
• issuing a move-on direction to a 'group of persons' under clause 6(2) may be
problematic, as not every individual within the group may hear the direction and
police officers may have difficulty identifying individuals in a group to whom they
have already given a move-on direction. There is the risk that this could lead to
wrongful arrest. The term 'group' is also ill-defined in the Bill;
• the term 'public place' may allow for a wide interpretation in exclusion orders
which could lead to a person being severely limited in their freedom of movement;
• the Bill does not give the Court alternative penalties other than 2 years
imprisonment for contravention of an exclusion order; and
• the Bill creates more uncertainty around what behaviour would lead to a move-on
direction rather than less uncertainty.28

The LIV recommended the Bill should not be passed in its current form, stating that
further consultation is necessary.29

**Victorian Council of Social Services**
The Victorian Council of Social Services (VCOSS) describes itself as 'the peak body of
the social and community services sector in Victoria', pursuing 'just and fair social
outcomes through policy development and public and private advocacy'.30 In the
VCOSS submission to SARC, the Chief Executive Officer of VCOSS, Emma King

28 Ibid., pp. 3-4.
29 Ibid., p. 4.
30 Victorian Council of Social Services (2014) 'Vision and Mission', VCOSS website, viewed 13 February

VCROSS pointed to the discretionary powers given to police officers in the Bill with regard to move-on directions, expressing concern that this may lead to discrimination against vulnerable groups 'who are more highly visible in public spaces or who may exhibit challenging behaviours due to mental health or substance abuse issues'.\footnote{Ibid., p. 2.}

VCROSS stated that such behaviour should not be criminalised but referred by police and PSOs to appropriate support services.\footnote{Ibid.}

VCROSS was concerned that there were no adequate safeguards to prevent inappropriate use of move-on powers. Its submission highlighted an example of homeless people seeking relief from the heat in shopping centres, only to be asked to leave by the owners of the premises. VCROSS raised the question of whether move-on powers would be issued in this situation if owners complained to police.\footnote{Ibid., p. 2.}

The proposed exclusion orders of up to 12 months are also a concern, according to VCROSS, as they may restrict people's access to their home or support services when applied to homeless people and those with drug/alcohol issues.\footnote{Ibid., p. 3.}

VCROSS stated that there is a lack of evidence from the Government as to why existing legislation is inadequate to address threats to public order. VCROSS also expressed concern that the proposed amendments to move-on powers are not compatible with Victoria's Charter, as it limits a person’s right to freedom of movement, expression, association and assembly. VCROSS submitted to SARC that the Bill should be delayed to allow for further consultation.\footnote{Victorian Equal Opportunity & Human Rights Commission (2013) 'About the Commission', VEOHRC website, viewed on 13 February 2014, <http://www.humanrightscommission.vic.gov.au/index.php/about-us>.

\textit{Victorian Equal Opportunity & Human Rights Commission}  
Charter, particularly the rights to freedom of assembly, movement, expression, protest and privacy.\textsuperscript{38}

The Commission raised concerns about the Government's lack of adequate justification for the expanded move-on powers and exclusion orders.\textsuperscript{39} The Commission emphasised the role of the Charter as a statutory framework for scrutinising the effect of proposed legislation on human rights, stating that the Charter requires any infringement of human rights to be justified and based on clear evidence.\textsuperscript{40} Pointing to section 7(2)(e) of the Charter, the Commission stated that the Charter directs the Government to employ the least restrictive means reasonably available to achieve the purpose that the limitation of human rights seeks to achieve.\textsuperscript{41} The Commission stated 'there should be a strong focus on the limitation on rights being the least rights restrictive option available to meet the public policy aim'.\textsuperscript{42}

The Commission highlighted issues with the practical application of the Bill's amendments. For example, the Commission stated the alcohol exclusion order may be problematic, as a person can be banned from all licensed premises, which could have a disproportionate impact on a person's personal freedoms and family life. As the consequences of contravening an alcohol exclusion order may be imprisonment, the Commission recommended safeguards such as adequate guidance to people who are subject to exclusion orders so that such orders may be understandable.\textsuperscript{43}

The potential for a disproportionate impact of move-on powers and exclusion orders on vulnerable groups was also highlighted by the Commission, citing research in other jurisdictions as evidence that homeless people, Indigenous Australians, people with mental health issues and young people are disproportionately affected by move-on powers.\textsuperscript{44}

The Commission pointed out that a 'public place' may also fall under legislation regarding areas of cultural heritage significance for Aboriginal people in Victoria, where native title rights protect significant lands and waters and include rights to enter and access such places.\textsuperscript{45}

As Victoria Police is a public authority under the Charter and police members are obliged to act compatibly with the Charter, the Commission stated that Victoria

\textsuperscript{39} ibid., p. 2.
\textsuperscript{40} ibid.
\textsuperscript{41} ibid.
\textsuperscript{42} ibid.
\textsuperscript{43} ibid., p. 3.
\textsuperscript{44} ibid.
\textsuperscript{45} ibid.
Police’s obligations under the Charter could form a safeguard for the proposed new move-on powers if the Bill was passed.\textsuperscript{46}

The Commission expressed concern that there was no community consultation on the development of this Bill. Should the Bill be passed, the Commission would seek a commitment from the Government to monitor and report on the operation and effects of the new legislation, with a review of the new law after two years. The Commission stated that this may assist in ensuring transparency and accountability in the use of move-on directions and exclusion orders, and would provide opportunity for reflection on whether such directions and orders achieved their aim of protecting public order and whether the limitations on human rights imposed were reasonable and justified within a democratic society.\textsuperscript{47}

\textsuperscript{46} ibid., p. 4.

\textsuperscript{47} ibid.
2. Second Reading Speech

The Attorney-General, the Hon. Robert Clark, delivered the second reading speech and statement of compatibility to the Bill on 12 December 2013.\(^48\) He noted that the Bill 'continues to protect legitimate rights to lawful protest or demonstration' while also 'safeguarding the peaceful enjoyment of public spaces by all, as well as defusing situations that threaten public order and safety'.\(^49\)

When referring to the extension of grounds warranting a move-on order to protesters and picketing employees, Mr Clark stated:

> Those grounds are more closely related to unlawful conduct and a move-on power on those grounds should not be excluded simply because a person is engaged in picketing, protest or publicising a view. The application of these grounds in such circumstances will assist police in protecting the rights of others and maintaining public safety and order.\(^50\)

He noted that protesters and picketing employees will be exempt from the grounds relating to breaching the peace and unreasonable obstruction 'because of the scope for dispute about their application in the context of demonstrations'.\(^51\)

In relation to the new arrest powers, Mr Clark stated that this will 'improve the enforcement of move-on directions' and 'enable police to keep a record of people who are repeatedly being moved on'.\(^52\)

The new exclusion orders in relation to contravention of move-on directions are primarily aimed at 'addressing low-level street drug dealing and for breaking up gangs that gather in public places to threaten people or engage in criminal behaviour'.\(^53\) Such orders will be discretionary and 'allow the court to create exemptions allowing a person to enter the place if there is a good reason for doing so'.\(^54\)

Alcohol exclusion orders may only be made 'after a person has been convicted by a court of a relevant offence and the court is satisfied that the offender's intoxication significantly contributed to the commission of the offence' and 'will better protect the public from the recurrence of such behaviour and create a strong deterrent to the offender and to others'.\(^55\) In particular,

> Alcohol exclusion orders will send a clear message that drunken, violent behaviour will not be tolerated in Victoria and that those who engage in it will face significant

\(^{48}\) Victoria, Legislative Assembly (2013) op. cit., pp. 4680–4683.
\(^{49}\) Ibid., pp. 4681–4682.
\(^{50}\) Ibid., pp. 4680–1.
\(^{51}\) Ibid., p. 4682.
\(^{52}\) Ibid.
\(^{53}\) Ibid.
\(^{54}\) Ibid.
\(^{55}\) Ibid., pp. 4681, 4683.
consequences for their personal and social life, in addition to whatever other sentence they receive.\textsuperscript{56}

In his statement of compatibility tabled in accordance with the Victorian Human Rights Charter, Mr Clark noted that the Bill imposes limitations on a number of rights including:

an individual's right to move freely within Victoria as set out in section 12 of the Charter Act and may, in certain circumstances, limit the rights to freedom of expression (section 15), and peaceful assembly and freedom of association (section 16).\textsuperscript{57}

However, he also stated that the Bill is aimed at 'protecting public safety and order and the rights and freedoms of others' and ensures a balance between the above rights and 'the protection of the rights of others, including the rights of others to freedom of movement, privacy, property rights and security'.\textsuperscript{58}

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. The Bill includes a range of safeguards that minimise effects on the relevant Charter Act rights and ensure any limitation is reasonable.\textsuperscript{59}

Such safeguards include that police may use their discretion when directing a person to move on, and similarly that the Court may 'tailor the scope' of an exclusion order once it is satisfied 'that an order would be a reasonable means of preventing that person from continuing to behave in a manner that would be the basis for another move-on direction'.\textsuperscript{60} While alcohol exclusion orders are less discretionary, they are still subject to conditions and variations able to be imposed by the Court which act as 'safeguards to ensure alcohol exclusion orders do not inappropriately limit other rights'.\textsuperscript{61}

\textsuperscript{56} ibid., p. 4683.
\textsuperscript{57} ibid., p. 4680.
\textsuperscript{58} ibid.
\textsuperscript{59} ibid.
\textsuperscript{60} ibid.
\textsuperscript{61} ibid., p. 4681.
3. The Bill

This section of the Research Brief summarises the key provisions of the Bill. For an overview of the Bill in its entirety, readers are directed to the Explanatory Memorandum.

The Bill has four Parts. Part 1 sets out the purpose of the Bill and that it commences on the day of Proclamation or 1 September 2014, whichever is earlier. Part 2 expands the circumstances in which move-on orders can be issued and inserts a new Division into the Summary Offences Act to provide for exclusion orders in relation to failure to comply with directions to move on. Part 3 inserts a new Division into the Sentencing Act to provide for new alcohol exclusion orders. Part 4 repeals the amending Act as of the first anniversary of all the provisions coming into operation. The key provisions of Parts 2 and 3 of the Bill are discussed below.

Part 1—Amendments to the Summary Offences Act

Clause 3 of the Bill amends section 6 of the Summary Offences Act to insert five new circumstances in which a person or group of people can be directed to move on by a member of the police force or PSO, including:

(d) the person has or persons have committed, within the last 12 hours, an offence in the public place; or

(e) the conduct of the person or persons is causing a reasonable apprehension of violence in another person; or

(f) the person is or persons are causing, or likely to cause, an undue obstruction to another person or persons or traffic; or

(g) the person is or persons are present for the purpose of unlawfully procuring or supplying, or intending to unlawfully procure or supply, a drug of dependence within the meaning of section 4 of the Drugs, Poisons and Controlled Substances Act 1981; or

(h) the person is or persons are impeding or attempting to impede another person from lawfully entering or leaving premises or part of premises.

Further, clause 3 inserts new subsection (1A) so that when considering whether to direct a person to move on due to 'undue obstruction', the police force member or PSO must take into account the duration of the obstruction and the conduct that is causing the obstruction.

Clause 3(4) clarifies that move-on directions can be given orally to both individuals or a group of people.

Section 6(5) of the Act is amended so that the current exemption from move-on directions being given to people picketing a place of employment, demonstrating about a particular issue, or behaving in a way intended to publicise a view about a particular issue is removed, except in circumstances covered by sections 6(1)(a) and (f) —
breaching or likely to breach the peace, and causing or likely to cause an undue obstruction to another person, persons or traffic. Clause 3(6) allows such people to be directed to move on under the other circumstances listed in section 6 including the new inserted paragraphs (except for paragraph (f)), and if 'the person or persons are endangering, or likely to endanger, the safety of any another person' (section 6(1)(b)) or 'the behaviour of the person or persons is likely to cause injury to a person or damage property or is otherwise a risk to public safety' (section 6(1)(c)).

Clause 4 inserts new section 6A into the Act, which provides for the arrest of a person contravening a direction to move on. Under this new section, on duty members of the police force of PSOs may arrest a person without a warrant if they reasonably believe that the person is contravening a direction to move on without a reasonable excuse (proposed section 6A(1)). A PSO must hand the arrested person into the custody of a member of the police force as soon as practicable (proposed section 6A(2)). A member of the police force must not detain a person under this section unless it is necessary to ensure the attendance of the arrested person before a court, to preserve public order, prevent the continuation or repetition of the offence, or for the safety or welfare of members of the public or the arrested person (proposed section 6A(3)).

Clause 4 also inserts new section 6B, which states that if a member of the police force intends to give a person a direction to move on, they may request a person's name and address once they have informed that person of their intention to issue a direction to move on. A penalty of five penalty units is introduced for any person who refuses or fails to comply with a request to give their name and address, or supplies a false name or address (proposed section 6A(3)). If the member of the police force suspects that the name or address supplied is false, they may request evidence of the name or address, and that person must comply or attract a penalty of five penalty units (proposed sections 6A(6) and (7)). In response, a person may request the police force member to state their name, rank and place of duty (proposed section 6A(4)) and the member of the police force must supply that information or attract a penalty of five penalty units (proposed section 6A(5)). Penalties for refusing to comply with a request to give an accurate name and address, and failing to supply evidence of name and address when asked, are only applicable if the police force member has informed the person that it is an offence not to comply with the request when making the request (proposed section 6A(8)).

Clause 5 of the Bill inserts new Division 1B of Part 1 into the Act, which provides for exclusion orders associated with directions to move on. Under this Division, a member of the police force can apply in writing to the Magistrates' Court for an exclusion order to restrict a person from entering a public place, or part of the public place, for a period of up to 12 months. When making a determination in regard to the application, the Magistrates' Court must be satisfied on the balance of probabilities that the person has been directed to move on at least three times within a six month period or at least five times within a 12 month period, and not previously received an exclusion order in relation to those directions to move on. In particular, the Court must be satisfied that:
an exclusion order may be a reasonable means of preventing the person from engaging in further conduct in the public place, or part of the public place, that could form the basis for another direction to move on (proposed section 6E(1)(c)).

The Court may take into account the nature and gravity of the person’s conduct, their history of exclusion orders, and the impact of the order on the person and public safety and order when determining whether an exclusion order is reasonable (proposed section 6E(2)).

Intentional or reckless contravention of an exclusion order attracts a penalty of two years imprisonment (proposed section 6G). Exclusion orders may be varied if there are new facts or circumstances, or if the Court considers it appropriate to do so (proposed section 6H). Orders may also be revoked in the instance of new facts or circumstances, or if the Court considers ‘the exclusion order is no longer a reasonable means of preventing the person to whom the order applies from engaging in conduct in the public place’ (proposed section 6I). The Chief Commissioner of Police must report the number of applications for exclusion orders made, withdrawn and dismissed as well as the number of orders made to the Minister. Further, the Chief Commissioner must report the number of persons charged with contravening an exclusion order and those found guilty of an offence, as well the number of contraventions of an exclusion order that were recorded but not charged (proposed section 6J).

**Part 3—Amendments to the Sentencing Act**

Part 3 is made up of two clauses: clause 7 inserts new Division 4 of Part 4 into the Sentencing Act, and clause 8 inserts transitional provisions. The new Division consists of six sections (89DC to 89DH) providing for new alcohol exclusion orders.

Under the new Division, the Director of Public Prosecutions or a member of the police force may make an application to the Magistrates’ Court for an exclusion order in regard to a person that has committed a relevant offence, which the Court can issue if at the time of that offence the offender was intoxicated, and the intoxication significantly contributed to the commission of the offence. Relevant offences for this Division include murder, manslaughter, offences against the person (including injury offences and statutory assault) and sexual offences (including rape and indecent assault).

Alcohol exclusion orders must be issued for two years and prohibit a person from:

(a) entering or remaining in any licensed premises characterised as a nightclub, bar, restaurant, café, reception centre or function centre; and

(b) entering or remaining in the location of any major event; and

(c) entering or remaining in a bar area of any licensed premises not covered by paragraphs (a) and (b); and
(d) consuming or attempting to consume any liquor in any licensed premises not covered by paragraphs (a) and (b).\textsuperscript{52}

Exemptions may be granted if the Court considers it appropriate to allow a person to enter or remain in a specified place for a specified purpose (proposed section 89DE(5)). Upon application by the person to whom the order applies or a member of the police force, exclusion orders may be varied if the Court considers it appropriate to do so, but such variations may only vary, remove or insert new exemptions to an order (i.e., they cannot cancel or reduce the length of the exclusion order) (proposed section 89DG).

Knowingly or recklessly contravening an alcohol exclusion order attracts a penalty of Level 7 imprisonment (two years) (proposed section 89DF). The Chief Commissioner must report on alcohol exclusion orders in a similar manner as that proposed for move on exclusion orders (proposed section 89DH).

\textsuperscript{52} Proposed section 89DE(4).
4. Other Jurisdictions

All Australian states and territories have legislation giving move-on powers to police in some form. In the Australian Capital Territory, move-on powers are included in the Crime Prevention Powers Act 1998. New South Wales has the Law Enforcement (Powers and Responsibilities) Act 2002 and the Northern Territory has the Summary Offences Act 1923. Move-on powers are covered under the Police Powers and Responsibilities Act 2000 in Queensland, while South Australia has the Summary Offences Act 1953. Tasmania’s Police Offences Act 1935 includes powers to disperse people, and move-on powers form part of the Criminal Investigations Act 2006 in Western Australia.

The function of the move-on powers is the same across the jurisdictions - giving police the power to direct people to move away from a specific public area, in the interests of crime prevention and the protection of public safety. The differences between jurisdictions can be seen in the conditions and circumstances required before a move-on direction can be issued, the level of discretion for police officers, the types of directions and the penalties for contravening a direction. See Appendix A for a comparative table of move-on legislation across Australian states and territories.

Characteristics of Move-On Directions

**Circumstances That Can Trigger a Move-On Direction**

Most move-on powers are based on a person’s ‘behaviour’, though legislation in Queensland and New South Wales also includes a person’s ‘presence’ as potential grounds for a move-on direction. A person does not necessarily have to have already committed an offence to be issued a move-on direction. Rather, a police officer can issue a move-on direction if they reasonably believe a person ‘has or is likely to’ commit an offence. The discretionary powers of police officers in issuing move-on directions is reflected through phrases such as where a police officer has ‘reasonable grounds… to believe’ (ACT), ‘believes on reasonable grounds’ (NSW, NT, Tas), ‘believes or apprehends on reasonable grounds’ (SA) or ‘reasonably suspects’ (Qld, WA).

Legislation in the Australian Capital Territory provides the shortest list of circumstances which may trigger a move-on direction. Section 4 of the Crime Prevention Powers Act focuses solely on ‘violent conduct’ as potential grounds for a move-on direction. ‘Violent conduct’ is defined as violence to, or intimidation of, a person, or damage to property. South Australia (section 18) and Northern Territory (sections 47A and 47B) use the term ‘loitering’, though the characteristics described are similar.

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64 Police Powers and Responsibilities Act 2000 (QLD), Part 5; Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 197-201; Crime Prevention Powers Act 1998 (ACT), s 4; Summary Offences Act 1923 (NT), s 47A; Police Offences Act 1935 (Tas), s 15B; Summary Offences Act 1953 (SA), s 18; Criminal Investigation Act 2006 (WA), s 27.

to the other jurisdictions. Across most jurisdictions, common conditions which may lead to a move-on direction include when a person has or is likely to commit an offence, obstruct the movement of pedestrians or traffic, or endanger the safety of others. Breaching the peace or interfering with the peaceful enjoyment of other people using public spaces is a triggering condition in Queensland (Part 5), Northern Territory (section 47A), South Australia (section 18), Tasmania (section 15B) and Western Australia (section 27).

Queensland legislation for move-on powers also focuses on 'trade or business', where obstructing a person from entering or leaving a place could lead to a move-on direction if the occupier of the premises has complained about the behaviour or presence (sections 46(3) and 47(3)). Western Australia also includes obstructing a person from going about 'lawful activity' as a condition which may result in a move-on direction being issued (section 27(b)(d)). Causing fear or anxiety to another person in a public place may also lead to a move-on direction under legislation in Queensland (sections 46(1)(a) and 47(1)(a)), New South Wales (section 197(1)(c)) and Western Australia (sections 27(1)(a)(ii) and 27(1)(b)(iii)).

New South Wales legislation makes specific reference to drugs, stating that a police officer may give a move-on direction to a person whom they believe is in a public place for the purpose of buying or selling prohibited drugs (section 197(1)(d)(e)).

In Western Australia, a police officer is required to give consideration to the likely effect of a move-on order on the person, including such factors as the person’s access to places where he or she lives, shops and works, and to transport, health, education or other services (section 27(3)). Another safeguard in Western Australian legislation is that the move-on direction must be given in writing on a prescribed form (section 27(6)).

Exemptions From Move-On Powers
Queensland, New South Wales and the Australian Capital Territory do allow for exemptions, whereby move-on powers do not apply to persons or gatherings in particular circumstances. Move-on powers do not apply to authorised public assemblies in Queensland under the Peaceful Assembly Act 1992, as long as public safety, public order and the rights and freedoms of others is not adversely affected (sections 45 and 48(2)). In New South Wales, police officers are not authorised to issue move-on directions to industrial disputes, genuine demonstrations or protests, procession or organised assemblies (section 200). Legislation in the Australian Capital Territory states that move-on powers do not apply to a person picketing a place of employment, demonstrating or protesting, or speaking or carrying or identifying with a banner, placard or sign or behaving in such a way as to publicise their views on a particular issue (section 4(5)).

Time Periods for Move-On Directions
The length of time for which police can direct a person to not return to a particular public space varies between jurisdictions. The time period for move-on directions in

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66 See also Walsh & Taylor (2007) op. cit., p. 151.
Queensland and Western Australia is the same as in Victoria, a maximum of 24 hours.\(^{67}\) In the Australian Capital Territory, the time period is much shorter – a person can only be directed to stay away from a particular public place for a maximum of six hours (section 4(3)(b)). In New South Wales, the time period for general move-on directions is not stated, though there is a time period for move-on directions to intoxicated persons in public places – they may be ordered not to return to a public place for a period not exceeding six hours (section 198). At the other end of the spectrum, police in the Northern Territory can give a written notice to a person requiring them to stay away from a public place for up to 72 hours (section 47B(1)(a)). In Tasmania, move-on directions have a minimum of four hours but no specified maximum time period (section 15B(1)), while time limits are not specified for move-on directions in South Australia (section 18).

**Penalties**

Substantial penalties can apply if a person does not comply with a move-on direction. Under legislation in Western Australia, a person who does not comply with a police order such as a move-on direction without a reasonable excuse could face a $12,000 fine and 12 months’ imprisonment (section 153). In Queensland, contravention of a move-on direction carries a maximum penalty of 40 penalty units ($4,400) (section 791(2)). In the Northern Territory, failing to comply with a direction to cease loitering may result in a penalty of up to $2000 or six months’ imprisonment, or both (section 47A(1)). If a person contravenes a written notice to cease loitering issued by police in the Northern Territory, they may face a maximum penalty of 100 penalty units ($14,400) or six months’ imprisonment (section 47A(2)). Failure to comply with a move-on direction in South Australia could result in a maximum penalty of $1250 or three months’ imprisonment (section 18(2)). Maximum penalties are lower in Australian Capital Territory, Tasmania and New South Wales. In the Australian Capital Territory, contravention of a direction without a reasonable excuse carries a maximum penalty of 2 penalty units ($280) (section 4(4)). The penalty for failing to comply with a direction in Tasmania is a maximum of 2 penalty units ($260) (section 15B(2)), and 2 penalty units in New South Wales ($220) (section 199(1)). See Table 1 for maximum penalties for contravention of move-on directions across Australian jurisdictions.

The following section focuses on the jurisdictions of Queensland, New South Wales and the United Kingdom, where move-on powers have been a particularly contentious issue and the subject of several reviews.

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\(^{67}\) Police Powers and Responsibilities Act 2000 (QLD) Pars 5, s 48(3) and Criminal Investigation Act 2006 (WA), s 27(2)(b).
Table 1: Penalties for Contravention of a Move-On Direction, by Jurisdiction

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Penalty units (as of February 2013)</th>
<th>Maximum penalty units</th>
<th>Maximum term of imprisonment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>$144.36</td>
<td>5</td>
<td>$721.80</td>
</tr>
<tr>
<td>NSW</td>
<td>$110</td>
<td>2</td>
<td>$220</td>
</tr>
<tr>
<td>Queensland</td>
<td>$110</td>
<td>40</td>
<td>$4,400</td>
</tr>
<tr>
<td>ACT</td>
<td>$140</td>
<td>2</td>
<td>$280</td>
</tr>
<tr>
<td>Tasmania</td>
<td>$130</td>
<td>2</td>
<td>$260</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>$144</td>
<td>100</td>
<td>$2,000</td>
</tr>
<tr>
<td>- written notice</td>
<td></td>
<td></td>
<td>6 months</td>
</tr>
<tr>
<td>South Australia</td>
<td>$1,250</td>
<td></td>
<td>3 months</td>
</tr>
<tr>
<td>Western Australia</td>
<td>$12,000</td>
<td></td>
<td>12 months</td>
</tr>
</tbody>
</table>

Queensland

Development of Move-On Powers in Queensland

Current move-on powers were established in Queensland after a period of review of police powers. In 1989, the Commission of Inquiry pursuant to Orders in Council (the ‘Fitzgerald Inquiry’) undertook a significant review of police powers. Mr Fitzgerald QC referred the issues to the Criminal Justice Commission (CJC). The subsequent CJC Report on a Review of Police Powers in Queensland in 1993 highlighted a need to consolidate all police powers into a single Act.68 Following this report, the Police Powers and Responsibilities Act 1997 was established.

The CJC review stated that ‘police should not be given a general move-on power’69 as move-on powers already existed in other legislation.70 Those in favour of move-on powers argued for broader powers to deal with anti-social behaviour.71 Following the CJC review, the Parliamentary Criminal Justice Committee (PCJC) attempted to strike a balance by rejecting general move-on powers while allowing police to exercise move-one powers ‘in defined’ circumstances, to direct a person to either desist their actions

that are potentially or actually improper, dangerous or unnecessarily affect the rights of others, or to require those persons to move-on. 72

The PCJC also recommended that:

- police officers should record any move-on directions given, including details of event and demographic information;
- police officers should issue a citation to any individual who is subject to a move-on direction;
- police stations should keep monthly records of move-on directions, which can be forwarded to the Commissioner’s office for collation; and
- legislation should include restrictions on the use of move-on powers with regard to peaceful and authorised public assemblies. 73

The Police Powers and Responsibilities Act took on board the PCJC’s recommendations, though amendments were made soon afterwards to broaden the powers with regard to the types of places where move-on directions could be given. The Police Powers and Responsibilities Act 1997 was repealed and replaced by the Police Powers and Responsibilities Act 2000. This Act fulfilled the reform process by consolidating police powers into one Act, while also expanding the venues covered by move-on powers to include all shopping centres, racing venues and war memorials in Queensland.74

In 2006, move-on powers were expanded to all public spaces in Queensland. Premier Hon. Peter Beattie MP argued for state-wide move-on powers to be given to police, stating that it may assist in preventing ‘Cronulla Beach-style riots’ which had recently taken place in New South Wales.75 The Premier also argued that allowing move-on powers in all public places would eliminate the lengthy processes which local councils faced when attempting to have areas designated as ‘notified areas’. 76 These legislative changes in 2006 prompted some commentators to point out that ‘The current ambit of move-on powers comes extremely close to the ‘general move-on power’ that the PCJC recommended against’.77

Current Move-On Powers in Queensland

Under the Police Powers and Responsibilities Act 2000, a police officer may direct a person in a public place to move on from that place if the police officer reasonably suspects that a person’s behaviour or presence is, or has been, causing anxiety to a person entering or leaving the place, interfering with trade or business at the place by

73 ibid., p. 387-8.
74 ibid.
75 ibid., p. 388.
76 In 2005, after several violent incidents in Brisbane’s CBD, Brisbane City Council sought to have certain ‘hot spots’ declared as notified areas where police could exercise move-on powers. See ibid.
obstructing people entering or leaving (where the occupier of the premises has complained about a person's behaviour or presence), behaving in a disorderly, indecent, offensive or threatening manner towards someone entering or leaving a place, or disturbing the peaceable conduct of any event, entertainment or gathering at the place (sections 46 and 47). A person may also be moved on if a police officer suspects the person is soliciting for prostitution (section 46(5)). A police officer must give the person or group of people the reasons for giving the move-on direction (section 48(4)).

A police officer can order a person to leave a public place and not return for a reasonable time of up to 24 hours (section 48(3)). Contravening a direction carries a maximum penalty of 40 penalty units ($4,400).  

Peaceful assemblies under the Peaceful Assembly Act are exempt from move-on directions, unless it is reasonably necessary in the interests of public safety, public order or the protection or rights and freedoms of other persons (sections 45 and 48(2)). The rights and freedoms include the right and freedom of people to enjoy public places and to conduct lawful business in the place (section 48(2)).

**Review of Move-On Powers in Queensland**

The Police Powers and Responsibilities Act 2000 required that the Queensland Crime and Misconduct Commission (CMC) review the use of these move-on powers as soon as practicable after 31 December 2007 (section 49). In December 2010, the CMC produced a report into whether move-on powers were being used ‘properly, fairly and effectively’ in Queensland.

The CMC report found that juveniles (10-16 years) and Indigenous people were overrepresented in the move-on data gathered from Queensland Police Service. The CMC stated that ‘Indigenous people were significantly more likely to receive a move-on direction than were non-Indigenous people’. Examining data from 12 months before and 12 months after the statewide move-on powers were introduced (1 June 2005 to 31 May 2007), the CMC report found that of the move-on directions where it had been recorded whether the person was Indigenous or not (n = 6092), 42.6 per cent (n= 2594) were issued to Indigenous people. When taking into account the proportion of Indigenous people in Queensland, the CMC report found that 'Indigenous people were 20.0 times more likely to be given a recorded move-on direction than were non-Indigenous people'.

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78 Police Powers and Responsibilities Act 2000 (QLD) section 791.
While the behaviour triggering a move-on direction may not necessarily be an offence, disobeying a direction may result in an offence being committed. The CMC report found that more people were charged only with disobeying a move-on direction (i.e. they were not also charged with additional offences) after the state-wide expansion of move-on powers. Significantly, Indigenous people were more likely to be charged only with disobeying a move-on direction than non-Indigenous people. This absence of other charges suggests that Indigenous people may be unnecessarily brought into the criminal justice system and that move-on directions are not functioning as an effective diversionary mechanism.83

The CMC report made 11 recommendations, including repealing section 47 of the Police Powers and Responsibilities Act to restrict the use of move-on powers to 'behaviour' rather than 'presence' in a public space.83 This would mean police could no longer give a move-on direction to a person for being present in a public space. However, this recommendation was not supported by the Queensland Government and section 47 has not been repealed.84 The CMC report also recommended more training and guidance be provided to police in using discretion when faced with public order situations.85

**Rowe v Kemper**

A notable case involving move-on powers in Queensland is *Rowe v Kemper* (2009).86 Bruce Kemper, a 65-year-old homeless man, was arrested and charged with failing to comply with a move-on direction and obstructing a police officer. Rowe had been changing his clothes in a public toilet at Brisbane's Queen Street Mall on 8 July 2006 when a cleaner asked him to leave. He did not comply, an argument followed and the cleaner contacted police. Police officers issued Rowe with a move-on direction to leave the Mall for eight hours. When Rowe did not leave, he was arrested for failing to comply with a move-on direction. A struggle with police saw Rowe also charged with obstructing a police officer.

Though initially found guilty of both charges, Rowe was successful in having his convictions overturned in the Queensland Court of Appeal. The lawful basis of the move-on direction was supported, but the Court of Appeal found that the nature of the move-on direction and the manner in which it was given were not in accordance with the law. The Court deemed the nature of the direction, requiring Rowe to stay away from the Mall for eight hours, was too broad in scope and not a reasonable length of time given the circumstances. Regarding the manner of the direction, the

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court found police officers had not given Rowe further reasonable opportunity to comply with the direction and had not given adequate warning prior to arrest.87

As the CMC report states, this case highlighted some important principles relating to the exercising of move-on powers by police:

- that the police officer’s suspicion must be objectively reasonable and held by the police officer
- the need for a strong connection between the scope and duration of the move-on direction and the conduct giving rise to it
- the importance of police officers following the safeguards associated with the powers.88

New South Wales

Under the Law Enforcement (Powers and Responsibilities) Act 2002, a police officer can direct a person to move on from a public place if the police officer has reasonable grounds to believe that the person’s behaviour or presence is obstructing another person or traffic, harassing or intimidating another person(s), causing fear to another person, or procuring or supplying prohibited drugs (section 197(1)). A police officer can give a move on direction to a group of people without having to repeat the direction for each individual (section 198A). Refusal or failure to comply with a move on direction may result in a maximum penalty of two penalty units ($220) (section 199(1)). There is no time period stated under the general move-on directions (section 197), but there is a time period for move-on directions to intoxicated persons in a public place - they may be directed not to return to a public place for a period which may not exceed 6 hours (section 198(3)). A police officer must provide reasons for the move-on direction, as well as evidence to prove they are a police officer (if they are not in uniform), their name and place of duty (section 201). However, police officers are not authorised under this part to give move on directions to industrial disputes, genuine demonstrations or protests, procession or organised assemblies (section 200).

In 1999, the NSW Ombudsman produced the report Policing Public Safety which found that more move-on directions were issued to Indigenous and young people than other members of the public.89 The report stated that ‘A high proportion of those given directions are from Indigenous backgrounds – 3,194 (22%) of the 14,455 people given directions between 1 July 1998 and 30 June 1999 were Aborigines or Torres Strait Islanders, whereas Aborigines and Torres Strait Islanders constitute less than 2% of the total population of NSW’.90 The report also found that comparatively high numbers of young people (14 to 19 years) were issued with move-on directions. Nearly half of the

88 ibid.
90 ibid., p. 36.
people issued with directions were aged 17 years or younger. In seeking reasons for why so many young people are affected by the Police and Public Safety powers, the report stated that one factor to consider is the tendency for young people to socialise in public places in groups. However, the Ombudsman also recommended that 'In light of the comparatively high numbers of young people and Aboriginal people affected by these powers, the [New South Wales Police] Service must seek to address concerns expressed by those particular groups, as well as any other group likely to be targeted'.

In 2011, the Law Enforcement (Powers and Responsibilities) Act was amended to give police greater powers to move on intoxicated and disorderly people from public places. This amendment was aimed at preventing alcohol related violence. The police officer may move a person on if they reasonably believe the person is likely to cause injury to others, damage property or poses a risk to public safety. The NSW Ombudsman has been reviewing the operation of these new move-on powers for drunk and disorderly persons in public spaces and is currently completing a report of the findings to the Attorney General and Minister for Police.

United Kingdom

Dispersal Powers
The Anti-Social Behaviour Act 2003 includes police powers to disperse groups of people if a police officer has reasonable grounds for believing that the presence or behaviour of a particular group in a specific public space has resulted, or is likely to result, in another person being intimidated, harassed, alarmed or distressed. These dispersal powers cover specific public areas where a Police Superintendent or above has reasonable grounds to believe that anti-social behaviour is a significant and persistent problem and has made a written authority with the consent of the local authority allowing police officers to disperse groups of two or more in that public area. A direction may be given orally to an individual or group. A police officer may direct a group to disperse or leave the public space and not to return for a period not exceeding 24 hours. A person who ‘knowingly contravenes’ a direction under section 30(4) commits an offence and may be issued a fine of up to level 4 on the standard scale (£2,500) or imprisonment for up to 3 months, or both.

91 ibid., p. 37.
92 ibid., p. 229.
93 ibid., p. 239.
98 Anti-Social Behaviour Act 2003 (UK), Part 4, section 32 (1)
99 Anti-Social Behaviour Act 2003 (UK), Part 4, section 30 (4).
100 Anti-Social Behaviour Act 2003 (UK), Part 4, section 32 (2)
The Act also enables a police officer to remove a person under 16 years of age to the person's residence, if they are found in a dispersal zone between the hours of 9pm and 6am and they are not under the effective control of a parent or responsible adult.\footnote{101}

However, section 5 states that a police officer may not give a direction to disperse to a group of people who are engaged in peaceful picketing under section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992 or pre-arranged public procession under section 11 of the Public Order Act 1986.

Concerns had been raised about whether public demonstrations would be affected by the Anti-social Behaviour, Crime and Policing Bill 2013-14, which is currently before the British Parliament.\footnote{102} The Bill would introduce new injunctions to prevent 'nuisance and annoyance' and give local authorities the power to make a 'public spaces protection order' to prohibit certain behaviour in public places.\footnote{103} Campaigners argued that the Bill was too broad and could lead to restrictions on the activities of certain groups such as protesters in public spaces.\footnote{104}

**Anti-Social Behaviour Orders**

In the UK, Anti-Social Behaviour Orders (ASBOs) can ban a person from a particular public area for a period of time. Introduced under the Crime and Disorder Act 1998, ASBOs were aimed at deterring anti-social behaviour and preventing more serious crimes from occurring.\footnote{105} An ASBO may be given by a civil court to any person over the age of 10 years if they have engaged in anti-social behaviour, including drunken or threatening behaviour, graffiti or vandalism, or playing loud music at night.\footnote{106} An ASBO prevents a person from certain activities, such as going to specific geographic locations, associating with people identified as 'trouble-makers' and consuming alcohol in the street.\footnote{107} An ASBO can last for a minimum of two years. Breaching an ASBO is a criminal offence, carrying a fine of up to £5,000 or 5 years' imprisonment.\footnote{108}

The use of ASBOs has been a highly contentious issue and the subject of many studies.\footnote{109} It is beyond the scope of this Research Brief to examine ASBOs in detail. In

\footnote{101} Anti-Social Behaviour Act 2003 (UK) Part 4, section 30(6).
\footnote{104} Travis (2014) op. cit.
\footnote{105} Walsh & Taylor (2007) op. cit., p. 156.
\footnote{107} ibid.
\footnote{108} ibid.
general terms, some common findings of studies include that ASBOs are more likely to
be given to disadvantaged people, such as young or homeless people, and are
ultimately likely to eventuate in charges being laid.\textsuperscript{110} There is also debate surrounding
the definition of what constitutes anti-social behaviour.\textsuperscript{111}

The Anti-social Behaviour, Crime and Policing Bill 2013-14, currently before the British
Parliament, has stimulated debate on possible amendments to, or replacement of,
ASBOs and other mechanisms for dealing with anti-social behaviour. The UK Bill aims
to ‘streamline’ the current legislative tools which deal with anti-social behaviour.\textsuperscript{112}

\textsuperscript{110} Walsh & Taylor (2007) op. cit., p. 156.
\textsuperscript{112} Ares et al. (2013) op. cit.
### Appendix A: Move-On Powers Legislation across Australian States and Territories

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>VIC*</th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Triggering conditions</strong></td>
<td>If the police force reasonably suspects that the person is breaching, or likely to breach, the peace; or - is engaging in activities that are likely to endanger the safety of another person; or - is behaving in a way which is likely to cause injury to a person or damage to property or is otherwise a risk to public safety; or - has committed, within the last 12 hours, an offence in the public place; or - is causing, or likely to cause, an undue obstruction to another person or persons or traffic; or - is present for the purpose of procuring or供应, or intending to procure or supply prohibited drugs; or - is impeding or attempting to impede another person from</td>
<td>If there are reasonable grounds for a police officer to believe that a person in a public place has engaged, or is likely to engage, in violent conduct in that place. (Violent conduct means violence to, or intimidation of, a person; or damage to property; (section 4(1))</td>
<td>If the police officer believes on reasonable grounds that a person’s behaviour or presence in a place - is obstructing another person or persons or traffic, or - constitutes harassment or intimidation of another person(s), or - is causing or likely to cause fear to a person(s) of reasonable firmness, or - is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or - is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess. (section 197(1))</td>
<td>Where a person is loitering in a public place and a member of the Police Force believes, on reasonable grounds that - an offence has been committed or likely to be committed, or - the movement of pedestrian or vehicular traffic is obstructed or is about to be obstructed, by that person or by any other person in the vicinity of that person, or - the safety of the person or any person in his vicinity is in danger; or - the person is interfering with the reasonable enjoyment of other persons using the public place for the purpose of which it was intended. (section 47A(1))</td>
<td>If a police officer reasonably suspects the person's behaviour or presence is or has been - causing anxiety to a person entering, at or leaving the place, reasonably arising in all the circumstances; or - interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place; or - disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place. If a police officer reasonably suspects a person's behaviour is or has been disorderly, indecent, offensive, or threatening to someone entering, at or leaving the place. (sections 46(1) and 47(1))</td>
<td>Where a police officer believes or apprehends on reasonable grounds that an offence has been, or is about to be, committed by that person or by one or more of the persons in the group or by another in the vicinity; or - that a breach of the peace has occurred, is occurring, or is about to occur, in the vicinity of that person or group; or - that the movement of pedestrians or vehicular traffic is obstructed, or is about to be obstructed, by the presence of that person or group or of others in the vicinity; or - that the safety of a person in the vicinity is in danger. (section 18(1))</td>
<td>If the police officer reasonably suspects that the person is doing an act, or is about to do an act that is likely to, - involve the use of violence against a person; or cause a person to use violence against another person or cause a person to flee violence will be used by a person against another person; or - is committing any other breach of the peace; or - is hindering, obstructing or preventing any lawful act by that is being, or is about to be, carried out by another person; or - intends to commit an offence; or - has just committed or is committing an offence. (section 27(1))</td>
<td></td>
</tr>
</tbody>
</table>
### Exemptions

| Subsections 6(1)(a) (breaching the peace) and (f) obstructing people or traffic do not apply to a person:  
- picketing a place of employment; or  
- demonstrating or procession 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.  
(Proposed Section 6(3)) |
| This section does not apply in relation to a person who, whether in the company of other people or not, is—(a) picketing a place of employment; or  
(b) demonstrating or procession 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.  
(Section 4(5)) |
| This part does not authorise a police officer to give directions in relation to:  
- an industrial dispute, or  
- an apparently genuine demonstration or protest, or  
- a procession, or  
- an organised assembly.  
(Section 200) |
| This part does not apply to an authorised public assembly under the Peaceful Assembly Act 1992.  
(Section 45) |

### Time limits and directions

<table>
<thead>
<tr>
<th>Max. 24 hours</th>
<th>Max. 6 hours</th>
<th>Not stated (§ 198) - Move on directions to intoxicated persons in a public place - Max. 6 hours</th>
<th>Max. 72 hours</th>
<th>Max. 24 hours</th>
<th>Not stated</th>
<th>Min 4 hours (No maximum)</th>
<th>Max. 24 hours</th>
</tr>
</thead>
</table>

### Max. penalty

| 5 Penalty units ($721.80)  
(Section 6(4)) |
| 2 Penalty units ($280)  
(Section 4(4)) |
| 2 Penalty units ($220)  
(Section 199(1)) |
| $2,000 and/or 6 months' imprisonment  
(Section 47A(2))  
Contraction of a written notice 100 penalty units ($14,400) or 6 months' imprisonment.  
(Section 47B(4)) |
| 40 Penalty units ($4,400)  
(Section 79(2)) |
| $1,250 or 3 months' imprisonment  
(Section 18(2)) |
| 2 Penalty units ($260)  
(Section 15B(2)) |
| $12,000 and 12 months' imprisonment  
(Section 153) |
References

Relevant Legislation

Charter of Human Rights and Responsibilities Act 2010 (Vic)
Crime and Disorder Act 1998 (UK)
Criminal Investigation Act 2006 (WA)
Equal Opportunity Act 2010 (Vic)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Peaceful Assembly Act 1992 (Qld)
Police Offences Act 1935 (Tas)
Police Powers and Responsibilities Act 1997 (Qld)
Police Powers and Responsibilities Act 2000 (Qld)
Public Order Act 1986 (UK)
Racial and Religious Tolerance Act 2001 (Vic)
Sentencing Act 1991 (Vic)
Summary Offences Act 1923 (NT)
Summary Offences Act 1953 (SA)
Summary Offences Act 1966 (Vic)
Summary Offences and Control of Weapons Amendment Act 2009 (Vic)
Trade Union and Labour Relations (Consolidation) Act 1992 (UK)

Works Cited


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Summary Offences and Sentencing Amendment Bill 2013

Introduced  11 December 2013
Second Reading Speech  12 December 2013
House  Legislative Assembly
Member introducing Bill  Hon Robert Clark MLA
Portfolio responsibility  Attorney-General

Purpose

The Bill amends the Summary Offences Act 1966 (the Act') to provide for additional circumstances in which police members and protective services officers ('PSO’s') may direct a person to move on from a public place and clarifies the operation of those powers.

The new grounds in section 6(1)\textsuperscript{18} of the Act are where police members or PSO’s suspect on reasonable grounds that the person—

a. has committed an offence in the place within the last 12 hours
b. by their conduct is causing a reasonable apprehension of violence to another person
c. is causing, or is likely to cause, an undue obstruction to others in the place
d. is present for the purpose of procuring or supplying drugs
e. is impeding, or attempting to impede, another person from lawfully entering or leaving premises or part of premises.

Related to the move-on power the Bill creates an exclusion order scheme within the Act to permit police members to apply to a court for an exclusion order in circumstances where a person has repeatedly been directed to move on from a particular public place. The order would have the effect of banning that person from the specified public place for up to 12 months.

Extracts from the second reading speech:

Clearer and more effective move-on powers

... Move-on powers may be applied in relation to one person or many.

... the Bill provides that move-on powers may be used in respect of people engaged in picket lines, protests and other demonstrations.

... the Bill expressly provides that police and PSOs may arrest a person who contravenes a move-on direction. The bill also assists the detection of such contraventions by providing that police may require a person being directed to move on to provide their name and address.

Move-on-related exclusion orders

Move-on powers can keep a person away from a public place for up to 24 hours, but no more. Consequently, a person may return to the place and engage in the same conduct the

\textsuperscript{18} 6(1) A member of the police force, or a protective services officer on duty at a designated place, may give a direction to a person or persons in a public place to leave the public place, or part of the public place, if the member or officer suspects on reasonable grounds that—

(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.
very next day. This can be a particular issue where police know that people are returning to a
certain area repeatedly, such as for the purpose of buying or selling drugs.

The Bill addresses these situations by enabling police to apply to the Magistrates Court for an
exclusion order against an individual.

The making of an exclusion order will be discretionary, and the court may only make an order if it is satisfied that:

- a person has been repeatedly directed to move on from the same public place or part of a
  public place; and
- an exclusion order would be a reasonable means of preventing that person from continuing
to behave in a manner that would be the basis for another move-on direction.

If a court decides to make an exclusion order, it can specify a duration of up to 12 months. ...
Once an exclusion order is in place, it will be an offence to contravene that order. The offence
will carry a maximum penalty of two years imprisonment.

The Bill amends the  Sentencing Act 1991 to insert a new Division 4 of Part 4 to create an alcohol
exclusion order scheme within that Act. Under the scheme, a court must make an alcohol exclusion
order from licensed premises for two years, where a person has been convicted of a relevant
indictable offence, and the court is satisfied that the person was intoxicated at the time, and that the
person’s intoxication significantly contributed to the offending.

Alcohol exclusion orders

... Under the requirements, a court must make an alcohol exclusion order where it is satisfied that:

- a person has been convicted of a relevant offence;
- the person was intoxicated at the time of the assault; and
- the person’s intoxication significantly contributed to the commission of the offence.

These orders will apply to most indictable offences against the person, ranging from homicides
to intentionally causing injury, as well as sexual assaults such as rape or indecent assault, and to
offences such as threats to kill and assaulting police.

Alcohol exclusion orders will prohibit the offender from entering specified licensed premises or
consuming liquor in any licensed premises anywhere in Victoria for a period of two years.

... A court may also allow a person to enter licensed premises for a specified purpose if there is a
good reason and the court considers it appropriate.

... Contravention of an alcohol exclusion order will be an offence, carrying a maximum penalty of
two years imprisonment.

Submissions received

The Committee has received and considered submissions from the following organisations. The
submissions will be posted on the Committee’s website.

Flemington and Kensington Legal Centre
Human Rights Law Centre
Victorian Equal Opportunity and Human Rights Commission
Fitzroy Legal Service Inc.
Law Institute of Victoria
Charter report

The Committee notes that its predecessor reported on the existing move-on powers provision when it was introduced in 2009.\(^9\) That Committee referred to Parliament for its consideration the questions of whether or not that provision (specifically, the ground of likely 'breach of the peace') was sufficiently clear and accessible to satisfy the Charter's test for reasonable limits on rights; and whether or not alternative grounds in other Australian legislation (including NSW's provision) were less restrictive means reasonable available.

The Committee observes that clause 3(6) preserves the existing exemption of people engaged in picketing, protest or expression from being required to move on because of a likely breach of the peace; and that clause 3(2)'s new grounds of apprehended violence, undue obstruction, drug trading and impeding access are similar to or narrower than existing grounds for the exercise of move-on powers in NSW.\(^\text{20}\)

The Summary Offences and Sentencing Amendment Bill 2013 is, therefore, compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

\(^9\) SARC, Alert Digest No 14 of 2009 (reporting on the Summary Offences and Control of Weapons Amendment Bill 2009).

\(^\text{20}\) Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s. 197(1).
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Summary Offences Amendment (Move-on Laws) Bill 2015

A Bill for an Act to repeal certain amendments made by the Summary Offences and Sentencing Amendment Act 2014 and for other purposes.

The Parliament of Victoria enacts:

1 Purpose

The purpose of this Act is to repeal certain amendments made to the Summary Offences Act 1966 by the Summary Offences and Sentencing Amendment Act 2014 in relation to move-on powers and related exclusion orders.

2 Commencement

This Act comes into operation on the day after the day on which it receives the Royal Assent.
3 Principal Act

In this Act, the Summary Offences Act 1966 is called the Principal Act.

4 Direction to move on

5 (1) In section 6(1)(c) of the Principal Act, for "safety; or" substitute "safety."

(2) In section 6(1) of the Principal Act, paragraphs (d), (e), (f), (g) and (h) are repealed.

(3) Section 6(1A) of the Principal Act is repealed.

(4) In section 6(2) of the Principal Act, omit "and may apply to an individual person or a group of persons".

(5) In section 6(5) of the Principal Act, for "Subject to subsection (6), subsections (1)(a) and (f) do" substitute "This section does".

(6) Section 6(6) of the Principal Act is repealed.

5 Arrest of person found in contravention of direction to move on

Section 6A of the Principal Act is repealed.

6 Requirement to give name and address

Section 6B of the Principal Act is repealed.

7 Exclusion orders

Division 1B of Part I of the Principal Act is repealed.

8 Transitional provisions

After section 62(9) of the Principal Act insert—

"(10) Section 6A as in force immediately before its repeal by the Summary Offences Amendment (Move-on Laws) Act 2015 continues to apply in respect of an arrest made under that section before the
commencement of the **Summary Offences Amendment (Move-on Laws) Act 2015**.

(11) An exclusion order made under Division 1B of Part I and in effect immediately before the commencement of the **Summary Offences Amendment (Move-on Laws) Act 2015** ceases to have effect on that commencement.

(12) On the commencement of the **Summary Offences Amendment (Move-on Laws) Act 2015**, the Chief Commissioner of Police is not required to provide to the Minister a report under section 6J (as in force immediately before its repeal) in respect of the period during which section 6J was in force."

9 **Repeal of amending Act**

This Act is **repealed** on the first anniversary of the day on which it comes into operation.

**Note**

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).
Endnotes

1 General information

scheme has been and whether it is achieving its objective in creating new jobs in Victoria. The government has made some small amendments to our amendment, and they have received the support of my Greens colleagues in the lower house.

That has brought the bill back here for final consideration by this chamber. I am delighted to say that we have achieved this in a very cooperative way.

On election night I said that Daniel Andrews certainly has a mandate to government but that the Greens also have a mandate to do our job, which is to enhance scrutiny in the upper house. In this case we have achieved an amendment to this bill which will lead to more transparency around how a specific and very important government program is being administered.

Motion agreed to.

**SUMMARY OFFENCES AMENDMENT (MOVE-ON LAWS) BILL 2015**

Second reading

Debate resumed from 26 February; motion of Mr JENNINGS (Special Minister of State).

Mr RICH-PHILLIPS (South Eastern Metropolitan) — I am pleased to rise this afternoon to speak on the Summary Offences Amendment (Move-on Laws) Bill 2015, which really highlights what this government is about. When we look at the legislative agenda of the Andrews government to date, and we are into our third substantive sitting week after the opening of Parliament, we see the bill debated earlier this afternoon, the Cemeteries and Crematoria Amendment (Veterans Reform) Bill 2015, which needed to pass but was a duplicate of a bill introduced by the previous government; we see the Wrongs Amendment (Asbestos Related Claims) Bill 2014, which was dealt with last sitting week but which again was picked up from work the former Attorney-General was involved with in addressing some of the issues of the Wrongs Act 1958 amendments of 2003, and on the notice paper we see three pieces of legislation which make minor amendments to the statute law with tidy ups and corrections to grammar and punctuation et cetera, all of which are very minor in nature. There was also the Back to Work Bill 2014, which the house dealt with last sitting week. It was meant to be a centrepiece of the Andrews government’s legislative agenda, but the bill contained no detail and no structure around how the Back to Work scheme was going to work.

I come to the bill before the house. It is really the first substantial piece of legislation introduced by the Andrews government. What does the Andrews government seek to have as its first piece of legislation in its term of office? Is it legislation about doing something in the education system? Is it legislation about addressing challenges in the health system? Is it legislation about making the lives of Victorians better? No. This legislation is about paying off the Andrews government’s union mates.

In the first 100 days of this government we have seen a trend where it is paying back favours to its union mates. Among the very first actions of this government over that 100 days was the repeal of the building and construction code of compliance. That was put in place by the previous government and the previous Minister for Industrial Relations to ensure safety and appropriate industrial practices on public sector building sites and to ensure that building projects undertaken for the Victorian government are done in accordance with the law. It is not a big ask to expect that projects undertaken for and on behalf of the Victorian government are undertaken in accordance with the law. But what we have seen as one of its first actions is this government revoking that code — to send a message to organisations such as the Construction, Forestry, Mining and Energy Union (CFMEU) that lawlessness is back in vogue, that under an Andrews government they can do whatever they like and that an Andrews government does not care about the rule of law —

Ms Shing interjected.

Mr RICH-PHILLIPS — on construction sites or in the industrial environment here in Victoria more generally. At the same time we saw the abolition of random drug and alcohol testing on state project construction sites. Again, this is a provision that the former Minister for Industrial Relations put in place to recognise that on safety —

Ms Shing interjected.

The ACTING PRESIDENT (Mr Ramsay) — Order! Ms Shing is on the speakers list and will be speaking next. I ask her to avail herself of the opportunity to speak at that time rather than making ongoing interjections.

Mr RICH-PHILLIPS — We had the bizarre situation where the government abolished the requirement for random drug and alcohol testing on construction sites — safety-sensitive environments — and instead proposed to have them in Parliament. We have a clear message coming from this government that
it does not want that sort of scrutiny and focus on workplace safety on construction sites where its mates in the CFMEU are involved. We now have before the house this piece of legislation, the Summary Offences Amendment (Move-on Laws) Bill 2015, which again is a sop to the government’s supporters in the CFMEU.

Over the course of the last four years we have seen a range of scenarios — industrial disputes, picket lines — where the conduct on picket lines was inappropriate.

Honourable members interjecting.

Mr RICH-PHILLIPS — Acting President, they are getting excited now.

Honourable members interjecting.

Mr RICH-PHILLIPS — They are paying off their supporters now with this legislation.

Over the last four years we have seen protests where there has been inappropriate conduct — for example, the conduct of the CFMEU and its protests at the Grocon building site on the former Myer store in central Melbourne. Contempt of court action against the CFMEU in the Supreme Court resulted in the largest judgement for contempt of court in the state’s history, and that judgement was subsequently upheld in the High Court. The conduct on that site during — —

Ms Pulford interjected.

Mr RICH-PHILLIPS — I will take up the interjection from Ms Pulford, who says we did not use those laws for that. Those laws were not in place at that time, but it was as a consequence of — —

Ms Pulford interjected.

Mr RICH-PHILLIPS — Ms Pulford by her interjections seems to be suggesting that the conduct on that site was appropriate, that it was an appropriate way for people to protest, to exercise and to express their view on the situation at that site. Ms Pulford is suggesting that what was seen at the Myer site was appropriate conduct by the people involved. The coalition was firmly of the view that it was not appropriate. We were of the view that that sort of conduct, that sort of intimidation and thuggery was not appropriate in any environment, be it an industrial environment or any other environment. The coalition parties do not support that sort of intimidation. We do not support the bullying and thuggery that was seen on that and so many other sites.

Last year the coalition was pleased to introduce amendments to the Summary Offences Act 1996 which put in place a framework to give Victoria Police officers and protective services officers (PSOs) the capacity to address that type of behaviour. We saw, through the insertion of new provisions into section 6 of the Summary Offences Act, criteria by which PSOs and Victoria Police could exercise powers in respect of moving people on, whether it was seeking exclusion orders or moving people on for conduct that was inappropriate in the circumstances.

Let us look at exactly what provisions were inserted into that legislation. New subsections inserted in section 6 stated in essence that a police officer or a PSO on duty at a designated place could give a direction to a person in that place to leave the place if the police officer or protective services officer suspected on reasonable grounds that certain things were happening. The coalition inserted section 6(1)(d), which says:

... the person has or persons have committed, within the last 12 hours, an offence in the public place.

This government is now seeking to delete that paragraph to repay its union mates. Is it unreasonable, in the context of a gathering or a protest et cetera, that a person who is reasonably suspected of having committed an offence in a place be asked to move on from that place? The coalition also inserted:

(c) the conduct of the person or persons is causing a reasonable apprehension of violence in another person.

This goes to the absolute heart of the issue of intimidation, thuggery and violence that we have seen at the sites.

Mr Herbert — All illegal under other acts.

Mr RICH-PHILLIPS — We hear Mr Herbert chip in. This is absolutely fundamental to the members of this Labor government. They have a lot of debts to repay to the union movement, and you can hear the protests coming from them. They know these provisions are completely reasonable. Is it unreasonable that a person who is reasonably suspected of causing a reasonable apprehension of violence in another person be asked to move on? Someone threatening and intimidating on a protest site is asked to move on, yet according to the government it is an inappropriate provision to be in the legislation. It is inappropriate for the police to have the power to move someone on who is causing a reasonable apprehension of violence in another person. It is unreasonable according to this government; it thinks someone should be able to do that without being moved on. A thug on a site should be
we saw that it was appropriate for members of Victoria Police and PSOs to have that capacity under the legislation, and we had confidence that they would exercise appropriate judgement in the use of the powers provided by the legislation. There has been no evidence brought to this chamber and there is nothing in the diatribe from the Attorney-General or the statement of compatibility that suggests that Victoria Police has in any way misused these powers — nor has there been any reason given as to why the powers currently in the act should not continue.

It is the coalition’s view that the provisions that were put in place along with the requisite exclusion order provisions of the legislation were appropriate at the time they were put in place in 2014. In Victoria over the last five years in particular we have seen an escalation in violence, intimidation and inappropriate behaviour, particularly in relation to industrial relations protests. That was unacceptable to the coalition government, and it is unacceptable to the vast majority of Victorians. The only people it does not seem to be unacceptable to are members of the Labor Party, which owes so much to the CFMEU and other trade unions.

The coalition government put these provisions in place last year because its members believed they were appropriate. They balanced the rights of protesters with the rights of other Victorians, and they recognised the professionalism and judgement of members of Victoria Police and PSOs. It was right that they were put in place last year, and members of the coalition supported them and were very pleased to see them enacted. We believe they remain appropriate, and for that reason we will oppose the bill.

Ms SIHING (Eastern Victoria) — I rise to speak in relation to the Summary Offences Amendment (Move-on Laws) Bill 2015. Before I get to the substance of the bill itself as it relates to the repeal of the amendments proposed by the Andrews government, I would like to take up a number of the points that were raised by Mr Rich-Phillips in his contribution as lead speaker for the opposition. Before I quote him, I would like to look at some of the statistics that are relevant to the bill that is now before the house. In the time that Mr Rich-Phillips spent talking, it took him only 2½ minutes to refer to ‘unions’. He mentioned ‘thuggery’ for the first time 7½ minutes in, and it took him only 5 minutes to mention the Construction, Forestry, Mining and Energy Union (CFMEU). It is true to form for those opposite, who are unhealthily obsessed with the curtailment of industrial associations, including employee associations.
To that end, I note that the shadow Attorney-General, Mr John Pesutto, wrote an article in the *Australian* of 27 January headed ‘Keep checks to prevent union militants flouting the law — don’t buckle to the demands of the CFMEU’. In good conscience I cannot allow this to be directly attributed to Mr Pesutto in his role as Victoria’s shadow Attorney-General, as it is a headline and a tagline that may have been put there by the editor in question. This is the *Australian*, so who would know? However, I went through the content of the article by Mr Pesutto, and there are 19 references to the CFMEU. This is a just-about perfect example of the ideological obsession those opposite have with removing proportionality, removing balance and removing what this bill will now achieve through striking a better equilibrium. Apparently, according to those opposite, the entire universe is going to fall apart, the sky will fall in and the existing federal and state legislative framework will cease to be operational or effective in any way, shape or form because the unions are going to take over everything.

In fact nothing could be further from the truth, because what this bill does — what government members have always said we would do — is remove the move-on powers that were brought in via the Summary Offences and Sentencing Amendment Bill 2013, which was passed in February last year. It removes those powers which go over and above — which are not just belt and braces but rather are belt and braces and tuxedo and onesie and another belt and a couple more items of clothing to keep the pants up! These additional provisions give rise to unintended consequences that create a significant disadvantage for people who are vulnerable and who should be in a position to be able to exercise their rights to movement, to freedom of expression, to participation in lawful industrial activity and to movement around in the community without the fear of an unintended consequence put in place by those opposite.

The former government’s provisions moved away from the objective criteria of the Summary Offences Act 1966. Those provisions enabled police and protective services officers (PSOs) to direct someone to move on where they reasonably suspected that person had committed an offence in a public place within the last 12 hours, was causing a reasonable apprehension of violence in another, was causing, or was likely to cause, an undue obstruction to another person or to traffic, was present for the purpose of unlawfully procuring or supplying, or intending to unlawfully procure or supply, a drug of dependence, or was impeding or attempting to impede another person from lawfully entering or leaving premises or part of premises.

These are impressive words, and if you were to read them in isolation you might think that this was decisive action creating a brand new landscape of law and order. But once you scratch beneath the surface it all just starts to fall apart, because police officers and PSOs, as I would hope those opposite understand, retain a wide variety of statutory and common-law powers which will still enable them to direct a person to move on from a public place where they suspect on reasonable grounds that the person is breaching, or likely to breach, the peace; the person is endangering, or likely to endanger, the safety of any other person; or the behaviour of the person is likely to cause injury to persons or damage to property or is otherwise a risk to public safety.

Secondly, this bill will provide that once again move-on powers will not apply in relation to a person who is picketing a place of employment, demonstrating or protesting about a particular issue or otherwise publicising their view about a particular issue. It is crucial to note that people are not simply being cast into the wilderness should they wish to exercise a legal right or seek to enforce a remedy through the courts or a regulatory framework. There is still capacity for injunctions to be sought. There is still capacity for the federal law to intervene to provide a remedy immediately and there is still capacity for the criminal law to operate.

Thirdly, the bill will repeal the move-on-related exclusion order scheme in division 1B of part I of the Summary Offences Act. That scheme enabled the making of exclusion orders prohibiting a person from entering a public place for up to 12 months. In relation to the removal powers and the exclusion orders, the unintended consequences — at least at their highest they might be couched as unintended consequences — are encapsulated by a submission from the Fitzroy Legal Service to the government. It was made in consultation with members of the Homeless Persons Union Victoria — there is the word ‘union’; do members opposite want to jump up and down about that? No, I did not think so — a collective of persons with lived experience of homelessness, who indicated as follows:

X is an Aboriginal woman without a birth certificate who has been unable to obtain Centrelink payments. She obtained a permit from Melbourne City Council to self friendship bracelets. Within the week that has just passed she was directed by police to ‘move on’. X told the police member she had a permit. She was told by police to leave the area for 24 hours or she would be charged with begging. No documentation was provided to her, and the area she was directed to leave was not stated. X was told the public space she was using was not available to her, this contradicted the
understanding she had derived from consultation with the council.

X has experienced long-term homelessness and is unable to access mainstream services. X stated there are no services available to women over the age of 26 experiencing homelessness and outlined the barriers to accessing support without documentation of her identity. The sale of her friendship bands in exchange for donations is her only source of income.

That statement accompanied the view expressed by the Fitzroy Legal Service, as one of the peak bodies within the community legal sector, that currently there are a very broad range of offences that may be alleged, with charges laid, searches conducted and arrest and summons powers used where persons have engaged in criminal offending. In addition to that there is the capacity for such powers in certain circumstances to be exercised where there is an anticipation on reasonable grounds that this has occurred.

This is not something that came like a bolt out of the blue. Labor has been unequivocal in stating that it would repeal these move-on laws because they are not reasonable and they are not proportionate. We oppose them ardently. In effect there is no evidence that the use of move-on powers has increased since the coalition’s changes came into operation on 28 May last year. Prior to those changes commencing Victoria Police had never recorded the use of move-on powers, therefore there are no figures to enable a comparison. On that basis I take issue with the statement made by Mr Rich-Phillips that there has been a steady escalation of violence, because presumably if that had been the case there would be data which supported the point.

While move-on offences are now recorded, officers are not required to specify the ground on which a move-on direction is issued. Consequently it is not possible to distinguish whether a recorded move-on power has been based on one of the original three grounds or on one of the five additional grounds introduced by the coalition. With regard to move-on exclusion orders, the government is only aware of Victoria Police applying for one move-on exclusion order. The court granted that application and made an exclusion order in that instance. That is a singular instance: one exclusion order has been issued since 28 May, when this amendment came into effect. Again I refer to the opposition’s obsession with seeking to dismantle the rights of groups to organise, to march, to gather or to express their views in a public place.

What this bill does is create a more appropriate balance between the use of move-on powers to maintain public order and the protection of the fundamental rights that Victorians enjoy to move freely, to express their views and to associate with whomever they choose. That may include associating with those opposite.

The changes introduced by the coalition last year had the potential to restrict legitimate protest in the state of Victoria, and as the powers now stand, police and PSOs can use their move-on powers in relation to any protest. This has the potential to harm some of the most vulnerable groups in our society, including the homeless, youth, the Koori community and people with mental health issues. Such groups are more likely to use and congregate in public places, thereby increasing the chance that they will be impacted by the coalition’s reforms.

The changes were an affront to the right of Victorian workers to engage in lawful industrial action. The key word there is ‘lawful’. It is lawful industrial action because it is permitted to be engaged in once the necessary approval and order has been sought and gained from the federal industrial umpire, the Fair Work Commission. Once that order has been granted, industrial action within the scope and contemplation of the order as issued may be taken for specific purposes, which are very clearly outlined.

A lawful approach to the way business is conducted on building and construction sites around the state is also amply covered by the federal framework. Those opposite failed to understand that the federal framework has entirely covered the field in relation to the way work can and must be performed and which directions can be and are issued to workplaces. The way in which occupational health and safety standards apply is also a matter contemplated in the federal legislation and set out comprehensively in the Victorian statute book. There are duties which apply to those in control of a site, to contractors and to workers themselves to make sure that they operate safely and lawfully.

Until the coalition’s amendments came into operation, move-on powers could only be used in very specific circumstances. The coalition upset that balance, and it upset that balance for no reason other than small political, tactical gains sought to be achieved by confining the issue to the union movement, one small ideological issue that it carps on about and makes out to be the death of any sort of appropriate balance in lawmaking. No doubt we will hear that again from other speakers.

The new arrest power in section 6A of the Summary Offences Act will be repealed on the basis that it was unnecessary. There are broad arrest powers and also broad powers under common law to ensure that offenders may be required to attend a court of
competent jurisdiction, to preserve public order, to prevent the continuation or repetition of an offence or the commission of a further offence, or for the safety — —

The ACTING PRESIDENT (Mr Ramsay) — Order! Unfortunately Ms Shing is out of time. I know there was more to come, I am sure we missed the best lines.

Ms PENNICUIK (Southern Metropolitan) — I am very pleased to speak on behalf of the Greens in the debate on the Summary Offences Amendment (Move-on Laws) Bill 2015 and to indicate that the Greens will be supporting the bill. It was just over a year ago that we were debating the bill introduced by the previous government, the Summary Offences and Sentencing Amendment Bill 2013. This bill essentially repeals the amendments made to the Summary Offences Act 1966 and the Sentencing Act 1991 last year. The Greens were strongly opposed to the Summary Offences and Sentencing Amendment Bill. That bill severely restricted the right to peaceful protest and subjected individuals to exclusion orders where no crime had been committed, where they had the audacity to turn up at a protest or demonstration more than three times in six months or five times in the year. It undermined democracy and expanded police move-on powers when there were already sufficient powers under the act and under other acts for police to deal with the issues that the bill ostensibly dealt with.

That legislation was opposed by the Greens as it was designed to shut down community protest and activism, including community opposition to government projects and decisions, such as the east-west tunnel. I also used the example of the ongoing protest against the construction of a McDonald’s in Tecoma, to which many people had definitely turned up more than three times in six months or five times in a year. Whether or not the protest was successful, at the end of the day this bill gave police the ability to move on people who were committing no crime except that of voicing their opposition to a project that was going ahead in their community.

In last year’s debate I mentioned protests including against the east-west link, the Tecoma McDonald’s and industrial picket lines, which are lawful. Over the years those kinds of pickets — in Victoria, Australia and the world — have been against employers who have flouted the rights of workers, and in many cases such protests have led to improvements in working conditions and the occupational health and safety of workers. It may be that people want to oppose the demolition of a building in their area. They may want to save a park in the area, they may want to save a school in their area, and they would all fall foul of this legislation.

We also argued that the most vulnerable in the community, such as those experiencing homelessness, would be disproportionately affected since they live in public places and would be more likely to be subjected to exclusion orders. Ms Shing just read out an excerpt from an email I know was circulated to all members of Parliament by the Fitzroy Legal Service regarding the practical application of these provisions against a particular homeless person. As we speak, from the service’s consultations with Homeless Law, it has sent me more examples of how the move-on laws are being used inappropriately in that regard.

At the time of the previous debate we strongly criticised the former government’s amendments to the laws as draconian and unnecessary — draconian and unnecessary because there were already sufficient powers for police in the Summary Offences Act 1966 and under the Crimes Act 1958. In fact if the government is really committed to people having the right to go about their lawful business without being arbitrarily stopped and searched, it should turn its mind to repealing the stop and search powers and the provisions that were added by the former government which took away the right of people with mental health issues and minors to have an independent person present when they were stopped and searched by police.

Members would have received a media release from the Law Institute of Victoria which welcomed the repeal of the move-on laws and the exclusion orders. The law institute was a very strong critic of the previous law. In a submission to the Scrutiny of Acts and Regulations Committee (SARC) in 2014 it said the amendments would:

"... limit the ability of individuals and groups to assemble and protest in public ... 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."

In its media release the law institute goes on to say:

"Public protest is one of the ways individual citizens can have their say between, and at, elections. Protest is a democratic right and should not be a matter of government discretion or permission."

And that is also why we strongly oppose the laws.
In addition to the law institute, other groups also opposed these laws and made submissions to the Scrutiny of Acts and Regulations Committee at the time. It is not all that often that groups in the community submit to SARC, but at that time the Homeless Persons’ Legal Clinic, Justice Connect, the Victorian Council of Social Service, the Victorian Equal Opportunity and Human Rights Commission, the Federation of Community Legal Centres, the Victorian Trades Hall Council, the Human Rights Law Centre and the Flemington and Kensington Community Legal Centre made submissions to SARC.

I mentioned at the time that we also received letters from Homeless Law, Youthlaw, the Western Suburbs Legal Service, MADGE Australia and a large number of ordinary citizens all protesting about the previous government’s amendments to summary offences and sentencing acts. We were very strongly opposed. I spoke at many demonstrations about the problems with the law at the time. I organised a petition against it, I called on the government to withdraw the legislation, I requested that SARC hold a public hearing into the bill before it was debated in the Legislative Council, and I moved a motion to refer it to the Legal and Social Issues Legislation Committee. Like all attempts to refer legislation to that committee, the government of the day voted against the motion. We also committed to seeing these laws repealed during the election, and so we welcome the government doing this, as it also committed to do.

This bill restricts the circumstances in which police officers and protective services officers (PSOs) may give move-on directions by repealing the additional circumstances introduced by the coalition in which move-on directions could be made. The circumstances revert to the original criteria under which police and PSOs could move people on based on an officer suspecting on reasonable grounds that a person or persons are breaching or are likely to breach the peace, or the person or persons are endangering or are likely to endanger the safety of any other person, or the behaviour of the person or persons are likely to cause injury to a person or damage to property or are otherwise a risk to public safety. These criteria existed previously under the Summary Offences Act, and under this bill the provisions will revert to them. One would have to say that these are broad criteria and already allow a broad discretion to police to act to move people on.

By contrast, the powers that were introduced by the former government allowed police and PSOs to move people on on only a suspicion, and the term ‘suspicion’ is very discretionary. The provisions under the former government’s laws include that the person has committed an offence in a public place. That offence could be any offence. The provision does not specify what type of offence it could be. As one submission to SARC stated, an offence could be jaywalking, failing to swipe a myki card or a similar offence. They are not grounds for asking a person to move on from a public place. They were just vague, subjective and discretionary uses of a move-on power when there were already quite broad criteria for the use of powers under the act. Those particular circumstances are repealed by this bill.

This bill also provides that PSOs and police officers will not have a specific power to give a move-on direction to a person picketing a place of employment, demonstrating or protesting about a particular issue, or publicising their view about a particular issue. The application of a whole lot of circumstances and move-on criteria to people engaging in those types of activities is probably the crux of the widespread opposition to this legislation.

I said at the time that the powers introduced by the former government had basically come out of nowhere. I had no understanding that the police were asking for these additional powers or that there had been any activities in the state of Victoria that required them. Therefore one could only come to the conclusion that they were about shutting down the ongoing protests that were happening in inner Melbourne over the east-west tunnel and the people turning up day after day to protest against that.

This bill will repeal section 6A of the Summary Offences Act 1966, which provides police and PSOs with a specific arrest power where they reasonably believe a person has failed to comply with a move-on direction without a reasonable excuse. It is intended that police and PSOs will now rely on the general arrest power in section 45B(1)(a) of the Crimes Act 1958 to arrest a person contravening a move-on direction.

The legislation brought in by the former government also added the possibility of a person being served with a penalty of a term of imprisonment — I think it was up to two years — whereas the previous penalty was 6 penalty units or a fine of around $600. That is quite a steep increase in the penalty for what is basically a failure to move on, and it is not comparable with other penalties under the Summary Offences Act or any other act.

Section 6B of the Summary Offences Act 1966 will be repealed by the bill before the house. This section currently empowers a police officer or a PSO to request
a person whom the officer intends to move on to state their name and address. This change will not affect any other powers that the police or PSOs may have to require a person to state their name and address in other circumstances under other legislation.

Clause 7 of the bill repeals division 1B of part 1 of the Summary Offences Act 1966. This means that police officers will no longer be able to apply to the Magistrates Court for an exclusion order where a person has repeatedly been directed to move on from a particular public place. I have already spoken about that provision. I thought it was a particularly egregious part of the previous legislation that people who were protesting about something they felt very strongly about, maybe even in the street where they live and in their own community, could fall foul of this provision. That is completely unnecessary.

The Greens are very pleased to support this bill. However, I make the point that the stop-and-search powers still exist under the act, and we have also opposed those. The problem with those powers is that they are an invasion of people’s privacy. A person may just be going about their own business and should not be, even on reasonable grounds, suspected of or thought to be doing anything wrong except for moving through a particular area, yet they may be subjected to the stop-and-search powers. We believe those stop-and-search powers should be repealed. At the very least, police should be, as they are in other jurisdictions, required to issue a receipt to anyone they stop and search. The receipt should display the date, time and name of the police officer who stopped them. This is needed because there is no oversight or monitoring of this power as it stands in Victoria.

I want to move on to the other issue related to the right to protest that is extant in this state, and that is the Wildlife Act 1975 as amended by the previous government via the Sustainable Forests (Timber) and Wildlife Amendment Act 2014, which was introduced last year by the coalition government to undermine the right to protest against duck shooting and logging in our national parks. The amendments to the Wildlife Act included introducing a sixfold increase in the penalty for certain persons who enter or remain in a specified hunting area and for approaching a person who is hunting. The act also increased by threefold the penalty for hindering or obstructing hunting.

On 4 February last year in this house I said of these amendments that:

Hindering or obstructing hunting is really about exercising your right to demonstrate against the hunting of our native waterbirds, which is also opposed by more than 85 per cent of Victorians, including those who live in regional Victoria, not just —

as is often said by hunting enthusiasts —

those who live in the city.

Shooting of our native waterbirds is opposed across Victoria.

The coalition government introduced exclusion orders that can be made by a court to exclude a person from a specified hunting area for the period specified in the order. That can be a day, a week or a whole season. Those exclusion orders are a way of preventing the committing of a further specified offence, which is continuing to protest against duck shooting. During the debate on those amendments I went to great lengths to demonstrate that a particular regional magistrate was very scathing of the department’s behaviour in its attitude towards protesters, and I said that I would be interested to see what magistrates would make of the new penalties under those provisions.

At the same time an environmental crime was not being addressed by the government where hundreds of rare and threatened species were being massacred during the duck hunting season and nothing was being done to prosecute anybody. As I stand here today, there have still been no prosecutions in relation to the massacre of 200 freckled ducks at Box Flat Nature Reserve.

The Labor government should also repeal amendments to the Sustainable Forests (Timber) Act 2004 made by the coalition government last year to stop protests against logging, to stop environmentalists from finding endangered species in areas the government plans to log and to prevent them from doing post-logging surveys. As my colleague Greg Barber said at the time, environmentalists and scientists:

... will not be able to determine whether state government-commissioned bulldozers were run through a rainforest gully or whether any other aspects had been complied with. That might include whether logging coupe roads had been breached and barred to prevent soil erosion, whether slashed material had been piled up around trees that are supposed to be retained but will die in the subsequent burn-off, or whether the proper buffers from each creek or drainage line had been maintained. They will not be able to do that because the government has created a no-go zone.

In summary, if the Labor government wanted to show consistency and a solid commitment to protecting the democratic right of all citizens to protest in all parts of Victoria, it would also repeal the coalition’s reforms made last year that undermine the right of citizens to protest against logging and duck shooting. However, the Greens are pleased to support this bill.
The ACTING PRESIDENT (Mr Ramsay) — Order! I thank Ms Pennicuik. She certainly covered some country there. In the standing orders there is provision for a point of order if members feel a contribution has nothing to do with a bill, but on this occasion there was silence.

Mr ONDARCHIE (Northern Metropolitan) — I rise to speak on this important bit of legislation, the Summary Offences Amendment (Move-on Laws) Bill 2015. I started by asking myself what the premise for this bill was and what motivated the Andrews government to do this, and then it dawned on me. Since the state election the Premier, Daniel Andrews, has gone to work every morning saying, ‘I owe, I owe, it’s off to work I go’, because he has to pay back his union mates, and this is where it started. His view is that you can go about your lawful business unless you disagree with the ALP. I think that is the driver for all of this. I will pick up a comment made by Ms Shing in her contribution to the debate today. She called this ‘a better equilibrium’, which is ALP speak for ‘let our union mates decide’. That is why we are going through this process.

Let us have a look at why this was such an important reform for the Napthine government to introduce in 2014. We extended and strengthened the grounds on which police can move on protesters. We removed the exemption for political and industrial protests for all but two grounds. Our changes strengthened the existing powers by providing that more move-ons may be ordered where police or protective services officers reasonably suspect a person has committed, within the last 12 hours, an offence in a public place; a person’s conduct is causing a reasonable apprehension of violence in another person; a person is causing, or likely to cause, an undue obstruction to another person or persons or traffic; a person is present for the purpose of unlawfully procuring or supplying, or intending to unlawfully procure or supply, a drug of dependence; or a person is impeding or attempting to impede another person from lawfully entering or leaving premises or parts of premises. It is the final point that I want to pick up.

Let us recall last year when there was a blockade outside the premises of Lend Lease, which at that stage may or may not have been a bidder for the east—west link project. Members of the public decided to block people from going to work because that company may have been a bidder for the east—west link project. The government cannot be serious when it says that it wants to wind back laws that enable people to go about their lawful business, but that is what is being put to this house today.

I will touch on Mr Rich-Phillips’s point about the Grocon blockade. The Construction, Forestry, Mining and Energy Union (CFMEU) blockaded Lonsdale Street and people going about their lawful business. When the police, who were doing a great job in helping people get to work, went down there on horseback, what did the protesters do? They punched the horses.

Mrs Peulich interjected.

Mr ONDARCHIE — They poked them in the eyes, as Mrs Peulich says, and these are the people the Andrews government is supporting today with this bit of legislation. Daniel Andrews must be so proud of the people who punched horses on Lonsdale Street. He must be so proud of the people who blocked Victorians from going about their legitimate business and going to their workplaces. Clearly the rules have changed in Victoria. Daniel Andrews may be the Premier, but John Setka runs this state.

As it turned out, the police deftly and appropriately brought that blockade to an end, but it had caused a lot of angst, a lot of trouble and a lot of distress for commuters, shoppers, pedestrians and business owners in the city of Melbourne, the world’s most livable city. What an image that must have been right around the globe as people blocked other people from going about their legitimate business.

For all its great work and chest beating, the CFMEU was hit with a fine of $1.25 million, which was probably the largest fine for contempt in Victoria’s history. The CFMEU decided to challenge that in the High Court, but the High Court rejected its leave to appeal. Let us have a look at what was said by Justice Cavanough, who heard the contempt proceedings against the CFMEU. I will read a small excerpt about Mr Setka and a colleague at that blockade approaching some of the Grocon workers who just wanted to go to work. Justice Cavanough said:

Shortly after the police horses had retreated, a group of about six persons broke away from the main crowd. They walked diagonally across Swanston Street to where most of the Grocon staff and employees were standing on the north-east corner. The CFMEU official, John Setka, was among them. So also was a Mr David Lythgow, who was known to McAdam —

a Grocon employee —

as a CFMEU shop steward employed by Mirvac —

not even Grocon —

another construction company.
Both of those individuals were swearing, using words that I refuse to use in this Parliament, and calling people the 'F' word and a whole lot of other things. These are the people that the Premier wants to stand by. The Premier must be so proud to stand alongside them.

Let us look at what another official of this very proud union said — and I want to make it clear that these are not people I support. This is what Mr Edwards, another CFMEU official said directly to the assembled mob, and I am quoting from Justice Cavanough’s judgement:

We are here to stay. We have laid siege, we have laid siege to this job and we’re not going away ... We’re not here to have a brawl ... We are disciplined, we are organised, and that’s what got us the wages and conditions that this industry pays.

Mr Edwards is also recorded as having said:

They want you come here for the next two days, for the next two weeks, for the next two months, for the next two years. It’s going to be a long job, right?

He continued:

The government wants to have a brawl with the unions ... They don’t like unions that do what we do — produce good wages and conditions.

We ain’t going away ... we ain’t going nowhere ... two days, two weeks, two months — here to stay. Right? If you’ve got a problem, don’t bring it here because it’s nothing to do with the unions. We’re not going away. Whatever provocation occurs, laugh at ‘em. Why? Because we should be happy. The police have shut down the city for us. Here to stay, right?

This is a union that has contempt for the law, contempt for women, contempt for the public, contempt for business. When is the Premier going to stop standing by this union? It is time for the Premier to speak some sense. After 107 days of an Andrews government what have we got? Failure upon failure. After 107 days of an Andrews government the Premier wants to pay money not to build an east–west link. Through the Tatts Group court case, the former Labor government committed the state to $540 million in compensation. As of today Victoria has paid $192.6 million in ongoing fees to the desalination plant. Thank you very much, Daniel Andrews.

We now have two more public holidays in this state, and small business right across the state is saying, ‘Gee, thanks for nothing, Daniel Andrews’. The people in Ballarat, where I visited last week, are trying to understand, and maybe the Premier can explain it to them. They want to understand what a public holiday associated with a grand final parade in Melbourne has to do with small business in Ballarat. What does that have to do with western Victoria? What does it have to do with northern Victoria? The man I referred to at the start of my contribution goes to work every day saying, ‘I owe, I owe, it’s off to work I go’.

It is payback-for-unions time in Victoria, and investor confidence is walking out of the state. Jobs are leaving the state. The Premier is trashing Victoria’s international reputation. In 107 days he has got Victoria stuck in reverse gear. Thanks for nothing, Daniel Andrews.

This bill is another example of the Premier pandering to his backers, to his union mates. He is putting Victoria’s reputation and the hopes and aspirations of Victorian parents and children — who are hoping to see jobs in this state — at risk. He should be ashamed of himself. I oppose the bill.

Ms TIERNEY (Western Victoria) — I rise to speak on the Summary Offences Amendment (Move-on Laws) Bill 2015. The bill is essentially about restoring the rights that were taken away from Victorians by the previous government. The move-on laws introduced by the previous government were a direct attack on the democratic rights of Victorians, and I argue they were completely unnecessary. The steps being taken now deliver on Labor’s commitment to repeal the Napthine government’s move-on laws.

The bill makes four main amendments to return Victoria’s move-on powers to their appropriate form, the form they were in before the Napthine government made its unnecessary changes last year. Under the previous government’s changes an expansion was given to the grounds on which police and protective services officers (PSOs) were able to give move-on instructions. This change by the previous government gave police and PSOs the power to enforce move-on directions merely based on a police officer suspecting that there is some likelihood that a person will cause an obstruction to another person.

Today’s bill winds back that expansion, as is appropriate. Under the amended legislation police officers and PSOs have the power to direct a person to move on from a public place where officers suspect that, firstly, the person is breaching or is likely to breach the peace; secondly, the person is endangering or is likely to endanger the safety of any other person; and thirdly, the behaviour of the person is likely to cause injury to a person or damage to property or is otherwise a risk to public safety. These terms are the original terms and the appropriate ones.

The bill amends changes made by the Napthine government that were a clear attack on the right of Victorian workers to engage in lawful industrial action.
At the time of these changes being made it was made clear by the government that the move-on laws could be used against legal picket lines at places of employment or outside places of employment. The amendments in this bill ensure that move-on laws do not apply to a person who is or persons who are picketing a place of employment or demonstrating or protesting about a particular issue. The right of all citizens to be free to express their opinion in a lawful and non-violent way goes to the very heart of democracy, which was undermined by the previous government’s move-on laws.

The third main amendment involves the repeal of sections 6A and 6B of the Summary Offences Act 1966. As a result of the previous government’s legislation those sections provided specific arrest powers for police and PSOs that were simply unnecessary. Police and PSOs already have sufficient powers under existing legislation — under section 458 of the Crimes Act 1958 in relation to appropriate reason for arrest and under section 456AA of the Crimes Act 1958 in relation to police officers obtaining the name and address of a person when appropriate.

The fourth main amendment proposed in this bill relates to exclusion orders where a person has been repeatedly asked to move on. Again the Napthine government’s move-on laws went too far in relation to division 1B of part 1 of the Summary Offences Act 1966, which consequently provided a power to prohibit a person from entering a public place for up to 12 months even though no crime had been committed. This is a clear limitation of a person’s right to freedom of movement and must be scaled back, and I am very pleased to be part of that tonight.

As I stated in my opening remarks, the winding back of the Napthine government’s undemocratic and draconian move-on laws was an election commitment made by the Victorian Labor Party. Labor made this commitment because there must be a real balance between the use of these laws to maintain public order and the protection of the fundamental right of all Victorians to move freely, to express their views and to associate with whomever they choose. This was destroyed by the previous government.

The amendments made by the previous government in 2014 were not only unnecessary and undemocratic, as I have mentioned, they also had the potential to be discriminatory and to harm some of the most disadvantaged groups in our community. Those who are homeless, those with a mental illness, young people and those in the Koori community are more likely to use and congregate in public spaces and are therefore more likely to be subjected to the previous government’s unbalanced move-on laws.

As I stated earlier, the previous government’s amendments were also an attack on Victorian workers’ rights to engage in lawful industrial action. The previous government’s amendments gave police the power to decide at their own discretion whether a picket line was legal or illegal; no court order was needed. In all areas where the coalition sought to make changes to the move-on laws in 2014, an imbalance was created. Labor promised to repeal those amendments and restore the balance, and that is what it is doing this afternoon.

Labor’s decision to repeal these laws has been strongly supported by all sectors across the community, including the Law Institute of Victoria, which strongly opposed the previous government’s moves to change the laws in 2014. I am pleased to be part of this debate this evening. This was an issue that was sorely felt by the community when it was inflicted on it by the previous government. It is my pleasure, as I said, to be associated with this bill, and I commend it to the house.

Sitting suspended 6.29 p.m. until 8.03 p.m.

Ms PATTEN (Northern Metropolitan) — I am very pleased to speak on the Summary Offences Amendment (Move-on Laws) Bill 2015. I will be supporting the bill, which repeals laws that are not only essentially discriminatory but also create greater social exclusion. In its few short years the Australian Sex Party has always fought for freedom of movement, freedom of assembly and most importantly freedom of expression.

As a newly elected member this is one of the few bills that I have read and will now speak on. As I read it, I was struck by the fact that the bill contravenes articles 9, 15, 19, 21, 26 and more of the United Nations International Covenant on Civil and Political Rights. I also consider it to be at odds with our own Victorian Charter of Human Rights and Responsibilities. The move-on laws silence legitimate protest. I say legitimate because they have never silenced the people who protest outside abortion clinics and who intimidate, harass and threaten with violence the women and staff entering those clinics. In raising that issue, a number of people have said to me, ‘If you say there should be freedom of speech, how can you try to stop those people?’ I have no problem with those people protesting however they want to protest — on the front steps and at the driveway of Parliament and in my office, for example — but not when they harass, vilify and intimidate the people going into those centres and clinics. I note also that the move-on laws were
never used to move on those protesters, so they were not effective in that area.

More importantly, the laws are discriminatory, particularly towards young people, sex workers, people with mental health issues and drug users. The Federation of Community Legal Centres noted that the move-on laws involve:

... granting police powers based on subjective predictions of future behaviour by individual officers.

Suspicion is a very low ground on which to base using the move-on laws. This reminded me of Tom Cruise.

Ms Shing interjected.

Ms PATTEN — Yes. Not that we want him to move on — or maybe we don’t! Do I do know whether members recall the film Minority Report. In it Tom Cruise ran the precrime unit and had psychic ‘precogs’ that lay in water and would predict crimes. They could arrest people before they committed a crime because they were precogs and psychic and had the knowledge that people were going to commit a crime. I do not believe that Victoria Police or even the Victorian government have precogs floating in a sink somewhere, so we are relying on suspicion, which has I have to say a pretty low bar.

In supporting the bill, I note also that the police have other existing move-on powers. They can move on persons breaching or likely to breach the peace, persons who are endangering or likely to endanger the safety of another person and persons whose behaviour is likely to cause injury to a person or damage to property or who are otherwise a risk to public safety. They are pretty wide powers to protect the public and property.

Other laws also offer tools for the police to protect the public and to govern public spaces. They can be applied in prohibiting property damage and in situations of people causing the obstruction of roads and footpaths; using obscene, threatening or indecent language; disorderly conduct; begging; loitering with intent; being drunk in a public place; or being drunk and disorderly. All those laws provide tools for police to keep our public and our public spaces safe.

Rather than move-on laws, we need to look at the laws around drugs. The police also talk about using move-on laws particularly when dealing with drug users. That is not because people are carrying drugs or breaking the law in any other way. It is because there is a suspicion that they are doing something that is immoral or that the police do not like. I would like us to move on drug law reform. I support the repeal of the move-on laws.

Mrs PEULICH (South Eastern Metropolitan) — I am very happy to make some remarks on the Summary Offences Amendment (Move-on Laws) Bill 2015. I thought the 2013 legislation was good legislation that struck a balance between individual rights and liberties, freedom of speech, the right to political protest and the right of people to move around their business every day without harassment and intimidation. It gave police powers that exist in laws in other jurisdictions around Australia and meant they are not bogged down by paperwork that takes them away from responding to critically important crimes, such as domestic violence, assault, burglary, rape, murder or other serious crimes.

Whilst I accept the fact that there are vulnerable people in fairly vulnerable situations, that is more a reflection of our society not really having addressed the issues which see people on the streets. Part of that, of course, was the move many years ago to deinstitutionalisation. It is not that I am a fervent advocate against deinstitutionalisation, but it has gone on to such an extent that many people are left on the streets to fend for themselves. I believe these laws, and certainly the figures show, strike the right balance.

Mr Dalidakis interjected.

Mrs PEULICH — Having been born under communism I do not think there is any person in this room who has a greater sensitivity to the rights of freedom of association, freedom of speech and freedom of belief than me. I was baptised in secret because the state would have been punitive to my parents if I had been baptised overtly in a church. My father, an innocent man, had been whisked away in a black maria by the communist regime and imprisoned. For many months we did not know whether he was alive or dead, and my mother was left with two small children to support and no means of income because under communism or socialism, if you did not work, you did not eat. I have a very different perspective from those who are romantic about socialist ideals. I have lived it, I hated it.

That is why I joined the Liberal Party. I am passionate about the ideology and the freedom of conscience which the Labor Party does not guarantee but my party does. I have no qualms whatsoever with the legislation that was introduced by the former Attorney-General, Robert Clark, in 2013.

This bill repeals the five additional grounds on which police can direct protesters to move on and which the coalition government introduced in 2013; it reinstates the exemptions for political and industrial protests to which move-on powers will no longer apply; and it
repeals the provisions allowing for exclusion orders where, for example, repeat offenders can be excluded from an area for up to a year.

We know the Labor Party is the political arm of the union movement. We saw that at the last state election. It was not the Labor candidates who were campaigning for a win; they were small targets, and no-one knew who they were. Luke Hilakari, the fake uniforms and the campaigns they were able to marshal on the ground for key seats were what delivered, or stole, seats and government — and mind you, a handful of seats on very narrow margins. They cannot claim a mandate because each and every one of us elected to this chamber has a mandate to represent the constituencies we were elected by.

Mr Daldalakis — On a point of order, Deputy President, the speaker has reflected poorly on the government by suggesting that it stole government, and I ask the member to withdraw.

Mrs PEULICH — On a point of order, Deputy President, there is no point of order. I did not vilify a member of Parliament or reflect on the chamber or either house. I believe precedent will show that it is certainly within the robust debate of this chamber.

The DEPUTY PRESIDENT — Order! There is no point of order because the collective was referred to, not the individual.

Mrs PEULICH — Thank you, Deputy President. All Australian states and territories have legislation giving move-on powers to police in some form. In the Australian Capital Territory — —

Mr Daldalakis interjected.

Mrs PEULICH — My superannuation is actually suspended while I am back here serving the Parliament. I am actually saving the Parliament money because my superannuation, which I earn as the member for Bentleigh in the Assembly, has been suspended since I returned to Parliament. The member is a bit of a know-all; I suggest he shuts his mouth and sits there and listens a little.

In the Australian Capital Territory move-on powers are included in the Crime Prevention Powers Act 1998. New South Wales has the — —

Mr Daldalakis interjected.

Mrs PEULICH — You are just a bully!

Honourable members interjecting.

Mrs PEULICH — I don’t respond well to being bullied. I will fight back, there is no doubt about it.

The DEPUTY PRESIDENT — Order! Mrs Peulich to continue, through the Chair.

Mrs PEULICH — The member has been well schooled. Move-on powers are included in the Crime Prevention Powers Act 1998, New South Wales has the Law Enforcement (Powers and Responsibilities) Act 2002 and the Northern Territory has the Summary Offences Act 1923. Move-on powers in Queensland are covered under the Police Powers and Responsibilities Act 2000, while South Australia has the Summary Offences Act 1953. Tasmania’s Police Offences Act 1935 includes powers to disperse people, and move-on powers form part of the Criminal Investigation Act 2006 in Western Australia.

And guess what? We still live in a democracy. The world did not end. Democracy did not die in Victoria, not in the brief period since this legislation was introduced. In fact we see protesters such as the east-west link protesters continue to make nuisances of themselves. But we know what it is all about. It is about treating the union movement softly, softly, and having two sets of rules. The Premier wants to test members of Parliament for alcohol consumption but takes away the same responsibility to do that in the workplace because of the union objections. In the lead-up to the election campaign we saw that Setka had been found guilty and had a long list of convictions. The Premier said we will have to wait until we see what the royal commission concludes. I am sorry, but they are convictions, those conclusions have already been reached. You would think the Premier would have stood against violence of any sort, whether it occurred in the workplace or in the home — of course he did not.

In fact we know full well that ordinary members of the Labor Party are aggrieved by the overwhelming power and control that union delegates possess. We even have Labor Party members attending some Liberal Party branches saying, ‘We don’t believe that these things happen on the ground. They used to happen in the Labor Party 20 years ago. They no longer happen now’. They bemoan the control and the influence that the union movement has over its parliamentary party.

Indeed we are not surprised that Victorian Trades Hall Council wants this repeal to be enacted. In a media release issued when the bill was introduced former Attorney-General Robert Clark said:

Every Victorian has the right to protest and express their views. However, when individuals resort to unlawful tactics
that threaten the livelihood of law-abiding businesses, employees and their families, they must be held to account.

He went on to say:

Police should be able to focus on protecting the community, not having to deal repeatedly with the same individuals at the same unlawful blockades. Exclusion orders will empower the courts to make longer lasting orders to tackle serial law-breakers intent on causing trouble for hardworking Victorians and their businesses.

Indeed it is a question of striking a balance. Penalties for contravention of move-on direction laws by jurisdiction show that the penalties in Victoria under the current legislation are midstream and substantially lower than those of the Northern Territory, South Australia, Western Australia and Queensland. It holds no terms of imprisonment, as does the legislation of Northern Territory, South Australia and Western Australia, which suggests that indeed we did get the balance right.

Community organisations are concerned about repeal of this legislation. In a joint statement the president of the Jewish Community Council of Victoria, Jennifer Huppert, and president of the Zionist Council of Victoria, Sam Tatarka, stated that the Jewish community has concerns about the proposed repeal of the move-on laws introduced by the previous coalition government. The statement reads:

The government’s proposed amendments to the move-on powers contained in the Summary Offences Act will deprive police of the power to direct people to move on even if they have reasonable grounds to suspect that there is or is likely to be a breach of the peace, or danger to the safety of any other person or if the behaviour is likely to cause injury to a person, damage to property or is otherwise a risk to public safety so long as the persons concerned are demonstrating or protesting about a particular issue.

It expresses concerns about the inability of police to respond to the boycott, divestment and sanctions (BDS) campaign — which has basically been run by anarchists and socialists and, I suspect, some Greens — and states that the campaign ‘has no role in a respectful and harmonious multicultural Victoria’. I say, ‘Hear, hear’. The statement continues:

‘Given the government’s stated opposition to BDS the proposed amendments represent a significant retrograde step in the protection of businesses and individuals from the impact of those who seek to boycott or blockade them for their connection to Israel’, said Mr Tatarka and Ms Huppert following the meeting. … We trust that if there is a repetition of the violence, abuse and intimidation that marked the campaign against Max Brenner and other retailers of Israeli products, the government will not hesitate to reinstate appropriate protections …

Similarly the Australian Israeli Jewish Affairs Council, AIJAC, also expressed concerns. Executive director Dr Colin Rubenstein, whom I significantly admire, issued a statement saying:

... we remain concerned that the repeal of the move-on laws will weaken the ability of the police to counter BDS blockades of business which, as the government says, have no place in our multicultural Victoria.

He goes on to say that the legislation needs to be monitored very carefully and ‘adjusted to allow people to go about their lawful business free of the discriminatory harassment the BDS campaign represents’.

This is payback for the favours that the union bestows upon the Labor Party day in, day out. We see each newly elected Labor MP pledging allegiance and subservience to their union bosses. This is a hand-in-hand campaign. Labor members have a lot of debts to repay for the role that Trades Hall played in the 2014 election campaign. We see this in the delivery of penalty rates and additional holidays without the understanding of their economic impact on jobs. In my portfolio of multicultural affairs I meet a lot of people from multicultural backgrounds who run small businesses who say to me that because of these additional holidays and penalty rates they will not be able to hire staff. Instead they will need to use family members to work those additional days.

This campaign of repayment is quid pro quo. We have the labour movement and the Labor Party working hand in hand and conspiring against the best interests of the state of Victoria and Victorians. In particular there are some real risks for our multicultural communities.

The figures show that a substantial number of infringement notices were issued for various actions, such as contravention of a police direction to move on, being drunk and disorderly in a public place and behaving in a disorderly manner in a public place, which pose safety risks to people who are in public places. We have seen that in the CBD. We bemoan that we had to introduce coward’s punch laws to deal with some of the worst offences.

The move-on powers were intended to defuse situations that can occur and escalate rapidly — and they occur prolifically in our community — without bogging down the police with additional paperwork and without necessarily giving people a criminal record by taking them to court. Ms Shing has advocated that the government can do that by taking people to court. I prefer the option of the move-on laws; I think it balances rights and responsibilities. It is not a workable
piece of legislation, and it will not protect everyone or their democratic rights in a measured way. I would urge the government to monitor the impact of this bill — —

The DEPUTY PRESIDENT — Time!

Mr BOURMAN (Eastern Victoria) — Hopefully my speech will be a little less rambunctious than the earlier ones. I rise today to speak on the Summary Offences Amendment (Move-on Laws) Bill 2015. As a former police officer I have a perspective on the move-on bill that perhaps only one other person in this chamber may have. I believe the criminal provisions of the Summary Offences Act 1966 provide a useful tool for day-to-day policing and should be retained.

Being able to move on disruptive individuals before they commit crimes is invaluable, as it is about crime prevention. A known drug dealer will not in most cases have his drugs on his person; they will be stashed elsewhere. If the criminal provisions of the principal act are removed by this bill, police will be able to search a known drug dealer under existing powers — the Drugs, Poisons and Controlled Substances Act 1981, I believe — and if they find nothing, they will not have any power under any legislation to do any more than that. If we keep the provisions relating to criminal acts, the police will be in a position to at least move this criminal on and disrupt his trade.

We are not talking about the average person passing through an area. For starters, someone passing through is passing through. We are talking about criminals, malcontents and troublemakers. Other mechanisms can be used to deal with these matters in most cases. However, as I pointed out, a known drug dealer cannot be moved on if a search finds nothing. Despite believing on reasonable grounds that the person will commit an offence, such as knowing the person is a drug dealer and finding them in an area known for its drug trade, without the move-on laws the police have no power to move them on.

In the case of people inciting violence, the common-law power of breach of the peace can be used, but I am not sure why anyone would prefer being arrested to being moved on. I am at a bit of a loss as to why groups that profess to be libertarians are leaving the police with more options to arrest rather than to simply move people on. The criminal provisions of the move-on laws are there to allow police to act while minimising arrests, unless offenders refuse to comply. It is simple: if you do not want to be arrested, go away. If you continue to return, then an exclusion order can be applied for via the Magistrates Court; it is not up to the individual officer.

In conclusion, I need to make it clear that I support the removal of the provisions that affect lawful and legal demonstrations. We should be able to protest peacefully, and people engaged in these legal and peaceful protests or demonstrations should always be allowed to continue. I will propose an amendment that retains some of the criminal provisions of the principal act. I wish to make the final point that in certain cases of protesting there are safety aspects that deserve their own legislation. These powers are designed to provide safety for protesters who deliberately and ignorantly put themselves in harm’s way.

Mr LEANE (Eastern Metropolitan) — I am happy to make a brief contribution to the debate on the Summary Offences Amendment (Move-on Laws) Bill 2015. I would like to step back to the time when these provisions were implemented by the previous government. It was at a point when I am sure the previous government believed it could control criticism of it to such a degree that there was a piece of legislation that stated that it would be against the law to criticise the then Treasurer, Michael O’Brien. I cannot remember what bit of legislation that was, but it was a doozy. It was at about the same time that the government brought in the move-on laws.

Mr Oudarchie — On a point of order, Deputy President, the member has just misled the house. He said there was legislation that was enacted to restrict the views of one member. I ask you to request that he withdraws that comment.

The DEPUTY PRESIDENT — Order! That is not a point of order, it is just debating the point.

Mr LEANE — I am sure there was that piece of legislation. The previous government went through this period when it implemented these provisions, what are called the ‘move-on laws’. Members of that government thought this would enable them to limit protest against them. They wished to limit protest if people were critical of something the government was implementing. They brought in these laws as a threat. They sought to limit people expressing their concerns around government initiatives and laws. We know that did not work, but in saying that I think it is clear that the previous government went through a period of thinking it could be Will Ferrell in The Lego Movie. Coalition government members thought they could create a world in which the first thing you heard when you turned on the radio was a song about how everything is awesome.

The previous government went through a period during which its members were making up words and statements that did not make any sense in relation to
their policies, like ‘game-changer project’. The government thought it could convince people of anything and control any criticism. As I said, that did not work. Today the Andrews government is bringing in a piece of legislation to take that away — to take away the existing threat. If there is angst or unhappiness with initiatives or legislation that this government is introducing, then people who want to protest peacefully and freely will not have this extra, extreme threat hanging over their heads.

We are in this weird space now. It is strange that we find ourselves in a position where the Andrews government has brought in means to get rid of Dorothy Dixers — and we all know that they were a farce — and we have the opposition saying, ‘That is not good enough. We are not happy with that’. Then we bring in a provision to make people feel more secure about protesting against something we may do, and the opposition is saying, ‘That is no good’. I think we find ourselves in a bizarre space. If this is a way for the coalition to say it is consistent, bully for it. We are saying that if groups want to protest against things that this government implements in the next four years, and maybe beyond that, if they are peaceful and do not break any criminal laws, then they have every right to do that.

Mr Davis (Southern Metropolitan) — I thank the house for the opportunity to speak tonight on the Summary Offences Amendment (Move-on Laws) Bill 2015. I, with many others in this chamber, remember the original bill, which sought to provide additional powers and security for the community, passing through this chamber. I believe those were the right laws. They were fair laws which sought to make our community safer and better in a number of respects. I listened carefully to other speakers tonight, and I pay tribute to the contribution to the debate made by Mr Bourman. A number of points are important to make.

Mr Leane — Mr Hoover.

Mr Davis — The unsophisticated contribution from Mr Leane will not assist anyone. Let me be quite clear —

Mr Leane — Don’t insult their intelligence.

Mr Davis — The points made by Mr Bourman about a number of matters around policing and drugs are important. I pay tribute to them, but I disagree with him on the matters he raised around safety more generally. The move-on laws were not in any way designed to do anything other than improve community safety. I am happy to have that disagreement with Mr Bourman, but I agree with him on the other points.

As the shadow Minister for Planning and also as shadow Minister for Local Government, my focus is particularly on the construction sector. Previous royal commissions clearly showed that additional costs and impacts were generated by the construction unions, particularly in Victoria. Those costs were 20 per cent to 25 per cent greater in Victoria and Western Australia, and that is significant. We know that a number of the unions in this state have sought to impinge on government and on private sector employers, whether it be at the Myer site or at major public construction sites like the one I was responsible for at the Victorian Comprehensive Cancer Centre. Those disgraceful union activities are reprehensible in every way. They not only add to the costs of major construction projects but they also make many employees on sites fearful and in some cases much worse than fearful. These are important matters that cannot be easily dismissed.

That a major association such as the Master Builders Association of Victoria has been speaking out in the last few days, pointing to the need for a clear set of guidelines and a code and calling for the national reintroduction of the Australian Building and Construction Commission is indicative of the fear felt by many in the building and construction industry. There are costs, but there is also basically fear —

Mr Leane interjected.

Mr Davis — No, it is only one part of this law, but it is an important part. My shadow portfolios in planning and local government are focused in part on construction, so I am very focused on these areas, and I understand their importance for Victoria. Additional costs are an important aspect here. The new government has stripped away the protections that were in the construction code, paying off the Construction, Forestry, Mining and Energy Union and its union mates right across the union movement.

Mr Ondarchie — We know who is running the state.

Mr Davis — That is exactly right, we know who is running the state. We know who has got them by a direct control mechanism. These move-on laws are a major democratic protection, so I am deeply concerned about what will occur if they are removed. Mr Bourman made a very simple point that this is about community safety, and I think he is right. The move-on laws were about dealing with a situation in which somebody has a known or real propensity to behave in
a way that is going to cause trouble. The police in those circumstances ought to have additional capacities, and these laws have provided those additional capacities.

If the government is successful, as it has been in the lower house, in removing these protections from the community, it will be of significant concern. I read the Scrutiny of Acts and Regulations Committee (SARC) report. It did not deal with the fact that the removal of these protections will impinge on the civil liberties and rights of individuals, because a number of thuggish and out-of-control unions need these additional controls, and there is a long history of this in Victoria, going back to the Builders Labourers Federation and Labor periods in the 1980s.

I am hopeful that the federal Parliament, and the Senate in particular, will reintroduce the Australian Building and Construction Commission. That would provide a significant protection. The code here in Victoria provided another significant protection, and these move-on laws provided a third part of those significant protections. The truth of the matter is that whilst our trade union movement is a very important part of our community that in many respects needs to be protected, it also needs to live within the law and behave in a way that the community respects and is comfortable with. The key thing is that this bill removes a number of those additional protections. For that reason, I am opposed to the bill, as are both of the coalition parties.

Mr Dalidakis — You support all liberties except the right to protest.

Mr Davis — Let me just say, as Mr Bourman correctly pointed out, that everyone supports the right to protest, but not the right to protest in a threatening or unreasonable manner or in a manner that police consider misbehaviour.

Mr Dalidakis — If it’s threatening or if it’s abusive, the police have plenty of powers. You’re incorrect, Mr Davis.

Mr Davis — The point is that these laws have provided additional protections. The points made by Mrs Peulich about the boycott, divestment and sanctions (BDS) movement protesters are also significant. There are some on the left of the Labor Party who would give the BDS protesters carte blanche to threaten and attack Jewish businesses and to cause significant divestment with huge impacts on businesses. That is reprehensible. In some circumstances these laws can provide additional protections for those businesses, and there is no question that many in the Jewish community support that.

We all want to see a community where people are able to peaceably put their point of view, peaceably protest and peaceably make their political points. We do not want a community where thuggishness is the order of the day and threats and intimidation are a significant part of community activity. That is unfortunately where some on the left of the Labor Party would see us land, and that is not something I want. For that reason I strongly support the coalition’s stance — this bill should not be passed, because it is a threat to our civil liberties. I take issue with SARC because it did not pick up that the removal of these protections would see the civil liberties of some people curtailed.

Mr Ramsay (Western Victoria) — I would like to make a small contribution to the debate on the Summary Offences Amendment (Move-on Laws) Bill 2015. I must say how disappointing it was to hear Ms Patten’s contribution. I got quite excited that she was entering the Legislative Council and adding to the broad church of this chamber, and I seem to remember her infamous statement that she was coming in here all guns blazing, that she would remove all that riffraff outside the fertility clinic in East Melbourne, create exemption zones and push the protesters away. She has shrivelled like a leaf in the sunshine. She has bowed to the Greens and bowed to Labor. I thought she had more oomph than that, but sadly she has wilted when she should be standing strong.

As for the Greens members, they are hypocrites. They care for the freckled duck in duck shooting season, but they are more than happy to have horses punched, kicked, spat on and poked, as we saw happen in protests at Grocon construction sites. There are many protests where you can see animals put in danger by the activities of protesters, yet we do not hear a whimper from the Greens about that. The Australian Sex Party and the Greens have sadly let us down in supporting the dilution of what was a very important reform of the move-on laws.

I note that Labor was very happy to use third-party endorsements throughout the election campaign. It talked about the fireys and the ambos — except they were not real fireys or real ambos, just people in fancy dress. As far as third parties go, the move-on laws we introduced were supported by the Victoria Police Association, the Victorian Employers’ Chamber of Commerce and Industry, the Master Builders Association of Victoria and the Australian Industry Group. All the key stakeholders in the business community of Victoria supported that reform, and they did so on the basis that the laws introduced by Premier John Brumby in 2009 had let us down. We all remember when John Brumby introduced the
vocational training competitive market, and what a bloody disaster that was.

Honourable members interjecting.

Mr RAMSAY — I am surprised there is no point of order.

I use that example to show that Labor has some history of introducing bills that need continuing refinement and have some disappointing aspects. This is certainly one of those bills.

One government member stated in their contribution that there were already laws in place to deal with people taking part in industrial and political protests, but that is not true. There were no such laws, and that is where John Brumby let us down in the legislation of 2009 — in failing to address the need for move-on laws in industrial and political protests. Where there are industrial and political protests there is usually antisocial behaviour and a hazardous environment. We have seen that with Grocon and Lend Lease. There is not a lot of life experience on the other side of the chamber, but I was at Mudgee. In previous roles I have been attacked by animal rights groups, the Blue Wedges and anti-GM organism protesters. I have been attacked by groups from across the spectrum of the protest lobby, including the Construction, Forestry, Mining and Energy Union.

Mr Dalidakis — That’s how you got into Parliament, the Victorian Farmers Federation pushed you on.

Mr RAMSAY — What Mr Dalidakis says is not true.

Under the law as it was before our amendments protest actions were completely exempt from move-on powers. Those laws, put in place by Labor, were designed to deal with the street yobbo influence. If Labor’s bill passes, the government will be completely exempting political and industrial protests or pickets from move-on laws, and that is why the Victoria Police Association and all the other key stakeholders are opposing this amendment to the principal act, with good grounds.

None of the grounds for ordering a person to move on apply to peaceful protest. I think it was Ms Pennicuik who stood up and waved the flag about the right of freedom of speech. Even Ms Patten entered the debate in relation to that as well. Yes, we have freedom of speech and we have the right to peaceful protest, and our laws did not affect those rights at all. In fact if we support Labor’s bill tonight we will not be protecting those who need it most — that is, the ordinary law-abiding citizens who go about their business or the police who are out there protecting us or the ambulance workers or the fireys — —

The DEPUTY PRESIDENT — Time, Mr Ramsay!

Ms CROZIER (Southern Metropolitan) — I am pleased to speak in the debate on the Summary Offences Amendment (Move-on Laws) Bill 2015. In doing so I remind those in the chamber that when the former Attorney-General brought these laws into the Parliament under the previous government, he gave assurances to the Victorian community that the police would have the powers to move people on. This was important, especially in light of what has recently been witnessed on the Grocon site, the union activity that has been well canvassed this evening. When one talks about the Grocon Emporium site, Victorians have a clear vision in their minds of the standover tactics of the Construction, Forestry, Mining and Energy Union (CFMEU) that were displayed there. It was very unedifying. It was unedifying for our state, it was unedifying for our country and it was unedifying for the workers who were lawfully trying to get to their work site. We saw certain individuals undertake activity which was not only unedifying but extremely dangerous.

When I was doing some research on this bill I came across a really interesting article, which was headed ‘All the right moves? Police “move-on” powers in Victoria’. The article talks about some of the background to why we introduced the move-on laws in Victoria in the last Parliament. In a paragraph with the heading ‘Potential changes to Victorian law’ the article says:

Both the Victorian Labor government and its Liberal opposition have advocated the introduction of ‘move-on’ legislation.

Tim Holding, then Minister for Police and Emergency Services, convened a task force to advise the government on key issues in the management of entertainment precincts, and to propose measures to safeguard amenity and community safety. The Inner City Entertainment Precincts (ICEP) Taskforce included state and local government, and statutory and regulatory authorities. A key recommendation made by ICEP was that the government investigate legislation to:

enable police to give a direction to a person in a public place if the police officer has reasonable grounds to believe that the person’s behaviour or presence in the place is causing or likely to cause fear to another person or persons.

The then opposition leader, Robert Doyle, announced that he was intending to introduce move-on laws where
office can direct people out of an area and can even arrest, and that was really the start of the development of the policy on our part. But it is interesting that the state Labor Party and then Labor government were also looking at this issue very closely.

Labor is pretty good at paying back those who support it. Indeed the CFMEU is one of the very strong unions that have demonstrated significant support for the Labor Party. Numerous articles have been written in recent weeks in relation to this issue, which talk about payback, the effect of the repeal of the move-on laws and how it will reward union activity and some of the undetected standover tactics used by various union members.

The government keeps describing the laws as ‘draconian move-on laws’, but when the then Attorney-General introduced the bill in Parliament he said that it was expanding the grounds on which police members and protective services officers may direct a person to move on from a public place and enabling police members to apply to the Magistrates Court for an exclusion order where they have repeatedly been directed to move on from a public place. The bill also amended the Sentencing Act 1991 by creating a new alcohol exclusion order that prohibits a person who has been convicted of a relevant offence from entering or consuming liquor in specified licensed premises in Victoria.

I think we all agree that peaceful protests occur on a regular basis. That is our democratic right. Nobody is denying people the right to exercise freedom of speech. To describe the laws as draconian is a little over the top, to say the least, but it is the way the government seeks to draw attention to this law. As other members have highlighted, in my area of Southern Metropolitan Region, where there is a significant Jewish community, members of that community are very concerned about the repeal of these laws. They have been the subject of the boycott, divestment and sanctions (BDS) movement, which was an unfortunate campaign that was run a couple of years ago, where businesses that were lawfully going about their business were subject to hostile and dangerous behaviour. It was completely unnecessary. It was seen as a slight on the rights of law-abiding businesses to conduct their business in the manner in which they were doing so. We are talking about a coffee shop, for goodness sake! What is wrong with that business undertaking —

Mr Ondarchie interjected.

Ms CROZIER — As Mr Ondarchie says, it is a small business undertaking its activities and allowing people to freely go into that coffee shop. Instead we saw a dreadful display of an unintelligent debate, an unintelligent protest and an unintelligent and ill-informed campaign by the BDS movement. I think the Jewish community has every right to be concerned about the repeal of these laws, because potentially that situation could arise again and again and the police and the protective services officers (PSOs) will not have the power to move people on as they did during that time.

Some of you may recall that in the Parliament we had protesters who refused to move. The PSOs could not remove the protesters, the police could not remove the protesters and so special forces —

Mr Ondarchie — Tactical response.

Ms CROZIER — So tactical response came in. I thank Mr Ondarchie. We could not go about the work we are doing tonight, debating the issues. They disrupted our place of work, and that is the point of having these laws — protesters who refuse to move on and who are strident in their views, disrupting a lawful place of work. It is something that the opposition believes in strongly. We had the support of significant groups within the community for these laws, as has been highlighted by the examples given in this debate. Should this bill be passed tonight I fear that we will see more of that activity on the streets, and that will be bad for business. We have enough challenges ahead of us, with the ripping up of contracts and the government saying one thing before the election and doing another thing after. The community is fast losing confidence in this government — if it had any at all.

Mr Herbert interjected.

Ms CROZIER — We will see, Mr Herbert — through the Chair, Deputy President. Confidence in this state is significantly declining. Businesses are questioning what this government stands for and are concerned about who is running the state. They are concerned that the unions are in control and that Daniel Andrews is simply a puppet of the union movement. Repealing these laws is just another step in ensuring more power for the unions, and that is something that this state definitely does not need.

Mr FINN (Western Metropolitan) — I was going to say that it gives me pleasure to rise to speak on this bill, but sadly it does not because this bill is a vote for intimidation. It is a vote for thuggery and bullying — things that the ALP in this state has unfortunately become almost synonymous with in very recent times. That is unfortunate in itself.
As I told the House when the move-on laws were first put before the chamber around 2013, a couple of years ago, I have been involved in a peaceful march which I organise every year with my committee. This is a bill that would have been very handy for the March for the Babies that was hijacked and ambushed by thugs in the streets two years ago. It would have been very handy for preventing the physical violence that occurred — the assaults on women and children, as well as men I have to say — at that march. I recall very well a policeman turning around to me on the lines and saying, ’If we had move-on laws, we would be able to do something about this.’ That is what the police officer said to me, and I will not forget it.

Mr Dalidakis interjected.

Mr FINN — I do not know why Mr Dalidakis is laughing. I do not know why he would find that funny. I do not know why Mr Dalidakis would find assaulting women funny. I do not know why he would find assaulting children funny. I do not know why he would find these things funny because I certainly do not. I do not find them even slightly amusing. I believe in protest. I believe in peaceful protest. I believe everybody has the right to express their view in a peaceful and lawful manner. Everybody has that right in a democratic society. Whatever our view is, we have the right to hold a protest if we are desirous of doing so.

It is a very simple proposition, and as I indicated I lead a march every year at which thousands of people protest against the obscene abortion laws in this state. I will be doing it again on 10 October this year, and if any members would like to come along, they would be very welcome. I do not oppose the right to demonstrate. I do not oppose the right to protest at all, but I do oppose intimidation, thuggery and bullying and I oppose physical violence, which this bill will allow if it is passed.

Of course we know whom members of the ALP are really out to protect with this bill. It is their mates in the trade union movement, and we have seen over recent months what their mates in the trade union movement are capable of doing. I do not know whether it was United Firefighters Union of Australia members — I do not know whether it was genuine firefighters; I doubt that very much — but my understanding is that it may well have been Construction, Forestry, Mining and Energy Union (CFMEU) members dressed as firemen who were out at the pre-polling booths and at the polling booths on the day of the election assaulting Liberal workers. I see that there are members of the Labor Party who are smiling. They know what I am talking about, and they are only too happy to accept that their people were involved.

I am actually in the process of preparing a dossier on incidences where Liberal campaign workers were assaulted, intimidated and bullied at polling booths in the lead-up to the last state election. I am told by my friends in Queensland that exactly the same thing happened in the lead-up to the Queensland election, and believe it or not — you would not read about this — as late as yesterday I was told by somebody in New South Wales that the union heavies were out throwing their weight around and literally belting people around at the pre-poll booths in New South Wales.

They are the people this bill is aimed at. They are the people who were out supporting the Labor Party prior to the last election. They are the people who conducted themselves in a despicable manner. They conducted themselves in a way that has no place in a democratic society. I challenge anybody on the other side of the chamber to get up and defend those people who assaulted Liberal campaign workers and intimidated others. I challenge members of the Labor Party to do that.

This bill is part of — I say part because there is a lot more involved — paying back their mates at the CFMEU, other trade unions and various other organisations that supported them in the lead-up to the last election. You can say one thing about members of the Labor Party: they remember their mates. They remember those who went out there and supported them through fair means and foul, and I have to say there was a bell of a lot more foul than there was fair. The ALP knows it got into government on the back of these activities, and this bill is about supporting those individuals and organisations who got the Labor Party elected last November.

The thing we have to remember about the laws that this government is seeking to repeal tonight is that if you are behaving yourself, there is nothing to worry about. If you are conducting yourself in a peaceful and legal manner, you have nothing to be concerned about. You will not fall foul of the law. If you protest against abortion, yellow trams or whatever you would like to protest against —

Mr Dalidakis interjected.

Mr FINN — You can protest against any number of things. You can protest against newly elected members of Parliament with huge egos, if you like. Mr Dalidakis may care to do that. I will provide the mirror for him to
do that. You can protest against anything you like, as long as it is done in a peaceful and law-abiding manner.

That is the nature of a democracy, and that is the case with the current laws. This bill is unnecessary to allow peaceful demonstration and peaceful protest in any way, shape or form. This is about allowing people who do not respect the law and who do not behave themselves to have free rein to do whatever they like whenever they like with whomever they like, and that is something this Parliament should take a strong stand on. The situation now allows peaceful protest but draws a line and says we will not allow people to abuse the system, to be violent or to be disruptive in an illegal manner. That is a very reasonable thing, and I cannot possibly work out why anybody would think otherwise, unless they have debts to pay, and that is what we are talking about here tonight.

We have heard from the Greens tonight, and it is always lovely to hear from the Greens — that may have been a lie — —

Ms Shing interjected.

Mr FINN — Let me assure Ms Shing that the green tie is purely as a result of the Finn, O’Keefe and Darcy heritage that I hold, which is very Irish indeed, so it is a delight to stand here on St Patrick’s night and not be at the Celtic Club with about 3000 others downing any number of chilled refreshments that may be passed my way.

This bill also brings to mind the fact that the Greens and elements of the left within the ALP, and possibly some of the right as well, are soft on crime. They have always been soft on crime and always will be soft on crime. I see across the chamber that the Minister for Training and Skills is shaking his head, but we know what some of these jokers think, and it is not pretty. Basically their view is that the police are somehow corrupt and will do the wrong thing. They automatically believe the police will do the wrong thing, but I do not accept that. I have seen Victoria Police in action over a long period of time in many different ways, and my support and confidence in Victoria Police is unshakable.

Mr Rich-Phillips — Tell us about Christine Nixon.

Mr FINN — I could tell you about Christine Nixon, Mr Rich-Phillips, but I have only 4½ minutes left, and I would need about three and a half weeks — —

An honourable member interjected.

Mr FINN — She might be out to dinner, and I might go and get a bouffant at some stage or even write a book.

Our friends opposite have a basic contempt for law and order in this state and for the police. They believe the police are against the workers. I say to them that the people they are supporting are not the workers. The people they are supporting are the union bosses and union hacks who send their mates out to harangue, to harass and to belt people up if need be. They are the people this government is supporting.

The DEPUTY PRESIDENT — Order! Mr Finn, there is no need to shout.

Mr FINN — Your shout? I am sorry, I am going back to St Patrick’s Day.

It comes back to a government that has total contempt for police and an attitude that is entirely soft on crime and owes big time to mates who deal in intimidation, thuggery and bullying as a part of their modus operandi and daily activity. That is what they do. They do not mind if they break the law, because that is what they do. The supporters of this government are happy to again be in a situation where they can go around harassing, intimidating and producing the sort of anarchy I have witnessed, resulting in assaults and the most appalling acts I have seen on the streets of Melbourne.

I urge members, even members of the government, as late as it is, to have a further think about this legislation. I ask them to think about the impact this legislation will have on law and order in this state. I ask them to think about what this legislation will do to the safety of the law-abiding citizens of this state. I ask them to stand up for ordinary Victorians, who just want to be protected by the law and have a police force that has the authority to do its job. This legislation is removing that authority from our police force, and that is wrong. As I have often said in this house, there are two things our police need to do their job properly: they need to be properly resourced, and they need the authority of the government and the Parliament to do their job.

Mr Herbert interjected.

Mr FINN — Christine Nixon wasn’t a real copper, she was one of your hacks, and you know it.

The police in this state deserve far better than what this bill provides, just as every decent hardworking Victorian deserves far better than this bill provides. I urge members of this house to reject this bill. The
people of Victoria will thank them enormously for doing so.

Mr Ramsay interjected.

Mr FINN — As you say, Mr Ramsay — you are spot on the money, as always — all Victorians deserve better than what this government is providing through this bill. I urge all members to reject this piece of legislation.

House divided on motion:

Ayes, 21

Barber, Mr
Carling-Jenkins, Dr
Dalidakis, Mr
Dunn, Ms (Teller)
Eideh, Mr (Teller)
Elasmar, Mr
Hantland, Ms
Herbert, Mr
Jennings, Mr
Leane, Mr
Melhem, Mr
Mikakos, Ms
Mulino, Mr
Patten, Ms
Perniciak, Ms
Pulford, Ms
Purcell, Mr
Shing, Ms
Springe, Ms
Symes, Ms
Tieney, Ms

Noes, 17

Atkinson, Mr
Bourman, Mr
Crozier, Ms
Dalla-Riva, Mr
Davis, Mr
Dunn, Mr
Finn, Mr
Fitzherbert, Ms
Lovell, Ms
Moirs, Mr (Teller)
O’Donohue, Mr
Ondarchie, Mr
Peulich, Mrs
Ramsay, Mr
Rich-Phillips, Mr
Woodridge, Ms
Young, Mr (Teller)

Pairs

Somyurek, Mr
Nationals vacancy

Motion agreed to.

Read second time.

Committed.

Committee

Clause 1

Mr HERBERT (Minister for Training and Skills) — Ms Shing will join me at the table.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — I refer to the statement of compatibility with the Charter of Human Rights and Responsibilities Act 2006, which was tabled with the introduction to this bill. In it the minister stated:

In my opinion, the Summary Offences Amendment (Move-on Law) Bill 2015, as introduced to the Legislative Council, is compatible with human rights as set out in the charter.

How did the minister reach that opinion?

Mr HERBERT (Minister for Training and Skills) — It is the government’s contention that the bill strikes an appropriate balance between protecting civil liberties and the need to maintain law and order. It is obviously and clearly compatible, because this bill enshrines the right to picket, protest and speak freely, the right to association — if it is not an illegal association — and the right to take part in public debate. I would have thought it certainly complies with that charter.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — I take the minister to section 21 of the charter, which the minister has said the bill complies with. Section 21 is headed ‘Right to liberty and security of person’ and states:

(i) Every person has the right to liberty and security.

It is a fairly straightforward provision, yet the bill that the minister has said is consistent with the charter seeks to remove the capacity for police and protective services officers to move people on when their conduct is causing a reasonable apprehension of violence in another person. The minister is introducing legislation which removes the capacity for police to move a person on when someone is threatened with violence. How is that consistent with the right to liberty and security for the third party who is thus threatened?

Mr HERBERT (Minister for Training and Skills) — It is pretty straightforward. In terms of the charter, the bill supports freedom of expression, freedom of association and freedom to take part in public life. With regard to the points that have just been made, of course if there is illegal activity, it is covered by the Crimes Act 1958 and a range of other legislation.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — Is the minister expressing the opinion that removing the capacity to move on somebody who is causing a reasonable apprehension of violence is consistent with supporting that person’s security?

Mr HERBERT (Minister for Training and Skills) — No. It is nothing of the sort.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — The minister states in his statement of compatibility for the bill that it is in fact consistent. He has now just said it is not consistent.
Mr HERBERT (Minister for Training and Skills) — It is pretty clear. There are three grounds which provide police with a broad base of move-on powers. They are quite explicit in the bill and, I would have thought, straightforward.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — He is inviting this! How is that — —

Mr Jennings — It is only you who is dancing.

Mr RICH-PHILLIPS — What was that?

Mr Jennings — You have been invited to the party, but it is only you who is dancing.

Mr RICH-PHILLIPS — How is it that the right to liberty and security, which the minister has said this bill is consistent with, is consistent with what the government seeks to do through its amendment to section 6(1)(e) of the Summary Offences Act 1966?

Mr HERBERT (Minister for Training and Skills) — The charter is of course about proportionality. I remind the member that in terms of this bill a police officer or a protective services officer will be able to use move-on powers in relation to persons who are breaching or likely to breach the peace or who are endangering or likely to endanger the safety of another person or whose behaviour is likely to cause injury to a person or damage to property or otherwise pose a risk to public safety.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — But not where that person is causing a reasonable apprehension of violence to a third party — that is, where somebody is threatening or intimidating a third party.

Mr HERBERT (Minister for Training and Skills) — I would have thought that the circumstances the member is alluding to would fall under those three points.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — How?

Mr HERBERT (Minister for Training and Skills) — We have breaching the peace, for a start, there is the element of endangering or being likely to endanger the safety of a person; and there is the element of causing injury to a person.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — In the second-reading speech the minister indicates that some of these provisions in the principal legislation are in the government’s, or the minister’s, view draconian — an excessive scope of power for Victoria Police. The minister, however, in his answer just then has indicated that in his view this section of the Summary Offences Act 1966 — section 6(1)(e) — is in fact already covered by other provisions in the Summary Offences Act. Can the minister clarify whether it is his or the government’s view that section 6(1)(e), which relates to a person causing a reasonable apprehension of violence in another person, is one of those provisions which the government regards as draconian or is one which the government regards as already covered by another provision?

Mr HERBERT (Minister for Training and Skills) — We believe it was unnecessary, or in the second place draconian, because it goes far beyond the scope of what is necessary under the law.

Mr DAVIS (Southern Metropolitan) — Referring to clause 1 and the repeal of certain amendments, I want to draw the minister’s attention to some specific examples in real life that have impacted significantly in our community. I want to draw his attention to the example of the Max Brenner chocolate group and the attacks and threats that have been made to that group through the boycott, divestment and sanctions (BDS) program that has been put in place by a number of groups across this state. I ask the minister how the government intends to respond to any future BDS movement threats and how it would seek to respond once these aspects are removed from the code should this bill be passed.

Mr HERBERT (Minister for Training and Skills) — I will make it absolutely clear: the government strongly opposes the boycott, divestment and sanctions (BDS) movement. We believe there is no role in a respectful and harmonious multicultural Victoria for that sort of activity. We have absolutely made that clear, but these laws do not do anything about that — they are window-dressing. It is very clear that there are appropriate activities an individual can undertake, but unlawful industrial action can involve the committing of a range of offences, including besetting, trespassing and obstruction of roads or footpaths. There is a whole heap of actions that trigger police powers under existing legislation outside of these move-on laws.

Mr DAVIS (Southern Metropolitan) — With respect to the minister, I think this set of provisions is an additional aspect in the armoury of the police. Also, I know that there are at least six members of the parliamentary Labor Party who support the boycott, divestment and sanctions movement, and I know the
movement has many supporters within the ALP organisation. Leaving that to one side, the substantive point is that this is an additional aspect in the armoury of the police. Where a Jewish business, such as the Max Brenner chocolate group, has protesters at large threatening the business with the explicit stated intention of penalising and closing that business, or where an individual may have threatened or actually committed an offence, a police officer could use these provisions to move on such a political activist.

I accept the minister’s point that he certainly personally would not want to see someone commit a political action of that type. I absolutely accept that, but there are some in our community who would seek to exploit the hole that would be created by the removal of these provisions to reinvigorate the BDS movement. In this context I ask the minister what provisions the police will be left with to move on an individual who is known to have created trouble or has threatened to create trouble, because these provisions would have been useful in moving on such a potentially racist and threatening individual.

Mr Herbert (Minister for Training and Skills) — There are a few things inherent about illegal activity: if it is illegal activity, it is illegal activity. There is a whole range of crime legislation the police can act on, and we will continue to look at the legislation to see if there are gaps in the law in terms of protecting individuals and businesses from unlawful and violent activity. This is about move-on laws, though. Individuals can take other actions and measures to prevent unlawful protest and seek compensation for illegal activity. There is a whole range of measures, including injunctions and the recovery of damages resulting from illegal activity through the courts. There is a whole range of existing provisions remaining in the act. On the member’s point, as I said earlier, there are three areas of the original move-on law the government supports, and they remain in this bill: they are breaching the peace, endangering the safety of others and causing injury to a person or damage to a property. They are in this bill.

Mr Davis (Southern Metropolitan) — With the greatest respect, suggesting that a Jewish business might seek compensation or recovery after the fact as a way forward is frankly not good enough, I am afraid. I am disappointed in the minister’s response to that point, and I want to put on the public record that if he thinks that is good enough, I do not believe the community does.

I was pleased to hear the minister say that he will look at gaps in the law. I wonder if he might outline by what steps or process the government or he or his counterpart in the lower house will look at gaps in the law?

Mr Herbert (Minister for Training and Skills) — Certainly any imputation that I support the actions of that blockade I would take — —

Mr Davis — On a point of order, Deputy President, I was at pains earlier to indicate that I did not believe the minister would in any way condone that. In fact I very strongly believe that he is a person of great principle and would not in any way condone that. I want that recorded.

Mr Herbert — I make the point that this is a pretty straightforward bill. We have had a lot of debate in here — there has been almost hysteria from some people — but it is a very simple proposition. We opposed the former government’s bill because we thought it went too far in curtailing the whole area of civil liberties of people who had not committed a crime. We of course believe that strong legal action needs to be taken against illegal demonstrations or other illegal activity. However, we believe in the right of people to protest, and we believe in supporting the civil liberties that underpin our society.

On the existing law, which is what we are really talking about, there is a wide range of measures beyond what we are talking about today which provide the police with a whole range of powers in relation to a range of offences. Those offences include undue obstruction of a footpath or road; wilful trespass in a public place; wilful trespass in a private place; besetting; behaving in a riotous, indecent, offensive or insulting manner; disorderly conduct; property damage; and causing nuisance or allowing nuisance to exist where the nuisance is or is liable to be dangerous to health or offensive in the terms of the public health act. The act also places duties on councils to investigate such nuisances.

There is a range of provisions which we believe are sufficient. They are outside the scope of this bill. We are happy to debate them in relation to other bills, but we believe that in the act there is already a whole range of measures which will protect the rights of the police to act where it is appropriate.

Mr Davis (Southern Metropolitan) — I thank the minister for his response. He has indicated that he believes that the current law is sufficient. I take from that that there is no intent to look at gaps in the law through some other process. I was momentarily hopeful that the government was seeking to remove these laws but to replace them with some process by which it
would look at gaps in the law and perhaps seek to plug those gaps. Now I understand that that is not the case, so I record that and thank the minister for his response.

When the minister mentions civil liberties, I cannot help but ask: what weight, what right and what credit is given to those businesses that seek to lawfully carry out their activities and seek to lawfully go about their business and their civil liberties, which can be infringed directly by some protesters, in particular the BDS protesters that I have referred to and that he repudiates? I accept that he repudiates those groups, and I certainly repudiate them strongly. Given the actions of those groups that he repudiates, what protections are really there for the civil liberties of those businesses? I do not think the civil liberties will be adequately protected if this bill removes this additional layer of protection.

Mr Jennings (Special Minister of State) — I indicate for the committee’s benefit that Mr Davis spent a lot of time in his contribution thinking about, ventilating and responding to the issues that the minister just laid out on the table, which — —

Mr Davis — I thanked him.

Mr Jennings — Mr Davis thanked him.
Mr Davis also recognised that the minister outlined provisions of the Summary Offences Act — from my count at least half a dozen — that create a rigorous framework which the police have within their armoury to protect the businesses that he is interested in. At the start of his contribution Mr Davis acknowledged that the minister had just responded by outlining at least half a dozen provisions, and then through a circular pathway he ended up asking exactly the same question that he had asked previously as if the answer did not exist. Through his contribution he erased the answer of the minister and asked us to start again.

This is a method I have seen Mr Davis apply on many occasions in many debates and in many instances in this chamber, and I think that at quarter to ten at night it would not be wise for the committee to go down a vortex to rub out the minister’s answer as if it did not exist — to record it, note it, respond to it and raise new issues, but not to go back and start again.

Mrs Peulich — Surely he can defend himself.

Mr Davis (Southern Metropolitan) — I think Mrs Peulich summarises correctly. I hope the minister can defend himself, but he clearly needs the support of the leader to do that. Nothing will erase the fact that the minister has indicated that he will not look at gaps in the law once this is removed, nothing will indicate that the minister is seriously engaged with the issue of the civil liberties of those businesses and nothing will erase the fact that he has indicated to the chamber in an unfortunate point that it is a matter for those businesses to recover after the event and to seek compensation after their businesses have been thumped into oblivion.

Mr Herbert (Minister for Training and Skills) — Talk about being verbalised! Nothing could be further than the truth, but I am happy to add some more laws that are available and that apply. There is conduct endangering a person under the Crimes Act 1958. There is conduct endangering life under the Crimes Act. There is causing nuisance and allowing nuisances to exist and there are nuisances to be liable for under the Public Health and Wellbeing Act 2008. If Mr Davis wants, I can repeat them ad nauseam, but there are all those other measures that I indicated earlier in relation to general offences for which for the police have powers right now in terms of action that police can take.

Mr Davis (Southern Metropolitan) — At one point the minister indicated that he may be prepared to look at gaps in the law after this repeal occurred, if it occurs, but he later indicated that he would not look at gaps in the law created by the repeal of these measures. Whilst he may list a long range of so-called remedies in the law, the fact is that the move-on laws have been effective in closing down a number of demonstrations, particularly those in front of Jewish businesses. I, for one, want to record that I am concerned that the steps being taken in this bill will lead to unfortunate outcomes. I reiterate my goodwill towards the minister personally in the sense that I do not think he has a racist bone in his body — but alas some in our community do. This set of provisions did create a significant capacity to deal with those matters, and I am very concerned that if they are repealed, a number of those characters — some associated with Labor and some not — will get off the leash again.

Mr Herbert (Minister for Training and Skills) — Can I be clear, it is not that I intend to make new laws or not to make new laws. The government will continue to monitor the situation, as every government does. We are here to make new laws as things change. In relation to this bill we believe there are a number of existing protections. The issue should not be about scaremongering, quite frankly, and I am sure that is not the intention, but these things can get out of hand. This is a very simple bill. It is an election mandate; it is something we said we would do, and we are doing it.

Mr Davis (Southern Metropolitan) — I want to be quite clear that concern for businesses — Jewish
businesses, frankly, in the context of boycott, divestment and sanctions — is not scaremongering. It is a very real concern. Businesses have been threatened. There is a very clear pattern of behaviour by some. It is not scaremongering to be concerned about those businesses and what will occur. I thank the minister for his contribution, but I want to be quite clear. At first he said he would look at gaps in the law, but he has retreated from that. Now he has said that the government will, from time to time, look at things in — and I am going to use a phrase here which he did not use — effectively an ‘ad hoc’ way.

There is no process for after these laws are removed. If things get out of hand after their removal, businesses are threatened, people are hurt and there is economic damage, then the government will look again, perhaps in an ad hoc way, at dealing with these matters. I, for one, do not believe that is good enough. The concern is that looking at things in an ad hoc way, after the event, when the protections have been removed and — if I can use another well-known phrase — the genie is out of the bottle, is not good enough.

Mr HERBERT (Minister for Training and Skills) — I think we are going around in circles.

Ms FITZHERBERT (Southern Metropolitan) — I have a question that flows on from an answer the minister gave to a question from Mr Davis several questions back. The minister was taking the house through an array of existing legal provisions which he said can be used in place of the move-on provisions, thus rendering them unnecessary. If my memory serves me correctly, he referred to existing legal provisions regarding illegal industrial action. My question is this: precisely how would those provisions have assisted the people at Max Brenner in the face of the disgraceful boycott, divestment and sanctions protests that they were subjected to? How would those provisions have helped them?

Mr HERBERT (Minister for Training and Skills) — I thank the member for her point. The issue here is about illegal industrial action. We heard Mr Finn talking about trusting the police. We do trust the police. The point I was making is that there are a range of illegal activities, there are a range of laws under a range of legislation that police can use for illegal industrial or civil disturbance. The police have those powers; they can use them.

Ms FITZHERBERT (Southern Metropolitan) — I asked a quite specific question, which was: exactly how could the existing legal provisions regarding illegal industrial action have been used at Max Brenner? I fail to see how there would have been coverage under the federal act, and I would like that to be explained to the house.

Mr HERBERT (Minister for Training and Skills) — I just cannot see how the boycott, divestment and sanctions dispute was an industrial one; I am sorry.

Ms FITZHERBERT (Southern Metropolitan) — My point is that it was not an industrial dispute; it was a civil protest, if I could put it that way — a very uncivil civil protest. The minister mentioned earlier in response to specific questioning from Mr Davis about that precise set of protests an array of what he said were existing legal provisions that could have been used in that situation. He mentioned the existing legal provisions regarding illegal industrial action. Now he has told us that it was not an industrial dispute, which seems to suggest to me that those provisions could not in fact have been used.

Mr HERBERT (Minister for Training and Skills) — We are talking about industrial action generally. The industrial action is covered under the Fair Work Act 2009 and regulations; it is also covered under tort law. It is something that is quite separate.

Ms FITZHERBERT (Southern Metropolitan) — But my original question to the minister was: how does it apply and how is there coverage at the Max Brenner site?

Mr HERBERT (Minister for Training and Skills) — I honestly think the member is misunderstanding what I say. A whole heap of issues apply. There are laws, trespass, besetting, obstruction of roads and footpaths. They all apply to what is a civil dispute, as opposed to an industrial dispute which is covered under the Fair Work Act.

Ms FITZHERBERT (Southern Metropolitan) — I am not asking about that range of legal provisions. I am asking very specifically about illegal industrial action, as defined under the federal Workplace Relations Act 1996. How would that have helped the people at Max Brenner? The minister is telling me it was not an industrial dispute, which I think clarifies for the house that they could not have used that act at all to help them.

Mr HERBERT (Minister for Training and Skills) — I think the member is misunderstanding me. I was not talking about boycott, divestment and sanctions, and industrial action. If we are talking about the boycott, divestment and sanctions issue, then that is covered by other laws.
Mr RICH-PHILLIPS (South Eastern Metropolitan) — I take the minister back to the second-reading speech, where the government refers to changes introduced to the Summary Offences Act 1966 last year and describes them as draconian, antidemocratic and unnecessary. Those changes and the repeal in the legislation being proposed this evening relate to section 6(1) of the Summary Offences Act. The legislation lays down eight categories with respect to the power for police and protective services officers to move on people under various circumstances. Is it the government’s view that the capacity to move on a person who is or persons who are breaching or likely to breach the peace is antidemocratic or draconian?

Mr HERBERT (Minister for Training and Skills) — We retain the capacity to move on people under the three remaining grounds, and that is more than adequate. It is all about proportionality.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — Is it the government’s view that section 6(1)(a) is one of the provisions that is draconian and antidemocratic?

Mr HERBERT (Minister for Training and Skills) — I am not quite sure where the member is going with this, but 6(1)(a) is one of the measures we are keeping.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — With respect to the capacity to move on a person who is or persons who are endangering or likely to endanger the safety of another person, does the government regard that as antidemocratic and draconian?

Mr HERBERT (Minister for Training and Skills) — The legislation has eight powers, and we are keeping three. We are talking about the whole eight, which we think are unnecessary, basically politically motivated and more about rhetoric than reality.

Mr RICH-PHILLIPS (South Eastern Metropolitan) — With respect to the capacity to move on a person who is likely to cause injury to a person or damage the property of another person or is a risk to public safety, is that capacity antidemocratic or draconian?

Mr HERBERT (Minister for Training and Skills) — We are retaining that measure. Once again, we consider the aggregate of the eight measures to be draconian, as opposed to the three principal measures that we think are more than adequate.
unnecessary and what you have described as draconian and antidemocratic. The government has expressed the view that it is draconian and antidemocratic, and I ask again: how is moving on a person who is obstructing another person draconian?

Mr HERBERT (Minister for Training and Skills) — It is very simple. We believe that those measures that were put in place by the previous government are on the whole unnecessary. They are covered by other provisions and are not proportionate in terms of the whole legislation.

Mr DAVIS (Southern Metropolitan) — I will be very brief. I have two short questions. What happens under your law when a police officer wishes to move on a protester and does not feel comfortable arresting them as they are engaged in a political protest?

Mr HERBERT (Minister for Training and Skills) — If there were a breach of the law, why would a police officer not feel comfortable about arresting a person?

Mr DAVIS (Southern Metropolitan) — Because part of the authority of a police officer is being taken away in this process.

Mr HERBERT (Minister for Training and Skills) — As I said, we can think of hypothetical situations as much as we like, but it is absolutely clear in this legislation that we are continuing to ensure that police and protective services officers have the power to move on a person if they reasonably suspect that a person is breaching or likely to breach the peace, that a person is endangering or likely to endanger the safety of another person or that the behaviour of a person is likely to cause injury to a person or damage to property or is otherwise a risk to public safety. Police will make their own judgements; that is clear.

Mr DAVIS (Southern Metropolitan) — I have to differ.

Progress reported.

Business interrupted pursuant to standing orders.

ADJOURNMENT

The PRESIDENT — Order! The question is:

That the house do now adjourn.

Shepparton rail services

Ms LOVELL (Northern Victoria) — My adjournment matter is for the attention of the Premier, and it is about Shepparton passenger rail services and commitments he made when visiting Shepparton in July 2013. My request is that the Premier honour his 2013 commitment for improved rail services to and from Shepparton and that this be made a priority for the 2015-16 budget.

An article in the Shepparton News of 20 July 2013 headlined ‘Rail eyes opened’ outlines a visit to Shepparton by the then Leader of the Opposition and now Premier, Daniel Andrews, along with a sizeable delegation including Jacinta Allan, who is now Minister for Public Transport, as well as the current Minister for Planning, Richard Wynne, and former member John Lenders. In the article Daniel Andrews is reported as lamenting the state of transport services for the area, particularly as compared to other regional cities. After being briefed by council on the fundamental inadequacy of the train service to and from Shepparton, which at that point had only three services a day and no train that reached Melbourne before 9.10 a.m., Mr Andrews indicated Labor would support a Sprinter rail service to Seymour. Mr Andrews is quoted as saying:

I think what is surprising is that over such a long period of time, there has not been enough attention given to this very important region.

I’m happy to concede there needs to be more done around the Shepparton rail issue and transport options.

Mr Andrews is also reported as saying there was a good argument for a faster and more frequent Sprinter service from Shepparton to Seymour.

During just one term in government the coalition listened to the Shepparton community, significant improvements were made to the timetable and an additional morning service that reached Melbourne before 8.00 a.m. was added to the Shepparton line. During the election campaign the coalition further promised an additional weekday service from the Southern Cross station to Shepparton and a return service on Saturday and Sunday. Unfortunately Labor made no election commitments to Shepparton for rail services or anything at all.

I have already hosted the Leader of the Opposition, Matthew Guy, in Shepparton. He came up on the train, and he too agrees that the quality of service for Shepparton residents is not up to par. Since both sides of the house are in agreement that the service to and from Shepparton is simply not good enough, I fully expect the Andrews Labor government to honour the comments made by Daniel Andrews in 2013 to improve rail services for the city. In the article Mr Andrews is quoted as saying:
When the law says you don't need to ask why: how a cancer patient ended up in prison

Wednesday, 10 June 2015

When Ari (not his real name) was arrested for missing a payment on his significant infringements debt, no one asked him whether his cancer or his subsequent inability to work much had played a part.

Ari, a machine operator who was waiting for a particular cancer treatment, had been following court orders and making payments on his Citylink fines for two years before he defaulted.

It may have been his poor proficiency with English that prevented his situation becoming known as he was taken to prison, but the absence of a legal requirement to ask would see him remain there for some weeks.

'That is the unfortunate reality when imprisonment in lieu orders apply to repayment arrangements as they did in Ari's case, Broadmeadows Managing Lawyer Tom Munro explained.

'It's all done by computer, so there's a record of when you pay into the court and there's a program that checks to see if there's been a default and if you're two minutes late with a payment, an auto alert is sent to the sheriff's office. They get a warrant and lock you up.'

It was a distressed relative who told his story at a night session run by the Fitzroy Legal Service. Night Service co-ordinating lawyer Adrian Snodgrass and day service lawyer Jane Vasey prepared an affidavit and presented medical materials to the Magistrate's Court showing the change in Ari's circumstances.

The Court expedited the hearing and sought out a Victoria Legal Aid lawyer to apply for revocation of the warrant.

After hearing Tom's arguments, the Magistrate ordered Ari's release and discharged his fines in full.

Ari, who appeared in court via video link from prison, was overwhelmed by the prospect of release and broke down in tears as the translator's words sunk in.

'It is sad that a man suffering from cancer was sent to jail for a month when he should never have been sent to jail,' Tom said. 'Unfortunately with no judicial
oversight of imprisonment in lieu breaches, this will happen again.’

Jane described Ari’s imprisonment as ‘deeply concerning’, saying it denied him urgent treatment.

‘There are systemic issues with the infringements system, both in terms of process and basic concepts of proportionality,’ she said.

‘Tax evasion involving much greater sums of money does not attract the same level of draconian response.’

How we can help

Read information about Fines and infringements.

Last updated: 10 Jun 2015

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MAGISTRATES COURT TRANSCRIPT IN RELATION TO ACCUSED IN PENALTY ENFORCEMENT HEARING TO VARY/REVOKE PAYMENT ORDER PREVIOUSLY MADE BY THE COURT — BREACH TO ATTRACT IMPRISONMENT IN LIEU

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<tr>
<th>Party</th>
<th>Transcript</th>
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<tbody>
<tr>
<td>SOL</td>
<td>Your Honour, I appear on behalf of Mr P. Your Honour, as you know, this is a part heard matter and I am not Nick Powers. He is unfortunately unavailable to attend today due to a change in his professional circumstances.</td>
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<tr>
<td>MAG</td>
<td>Yes</td>
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<td>SOL</td>
<td>I have provided your clerk with a copy of an aid memoir which may be helpful, which just sets out the chronology of this matter. As I took carriage of the file it became -</td>
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<td>CLERK</td>
<td>I am just working out who has file, and where it is.</td>
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<td>MAG</td>
<td>The aid memoir? Yes, thank you.</td>
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<td>SOL</td>
<td>So, it includes a chronology just because as I said this has been a relatively protracted hearing. Also, the submissions that we make in respect of the law, which unfortunately essentially sets out what has been put on an earlier occasion, which is that there is no crystallised mechanism by which Your Honour can make an order to discharge the remaining portion of the fines, but there is nothing precluding Your Honour from doing so.</td>
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<td>MAG</td>
<td>Right, but there is no authority which goes directly to this point on the questions of infringements. The submission that are made, and if I look at point 5 in sub-paragraph 4, it talks about the criminal jurisdiction.</td>
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<td>SOL</td>
<td>Yes, so that's because I have looked into what earlier case law may be specific in respect to infringements — and I did that all day yesterday, searching for a case that might provide some leading judgment for this matter — and I am relatively confident in saying that there is none on this particular point. Has Your Honour made those -</td>
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<td>MAG</td>
<td>No, that's right. That would be my view.</td>
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<td>SOL</td>
<td>And I've also devised through the file that — as you rightly point out — the matter of Taha [Victorian Toll &amp; Anor v Taha &amp; Anor; State of Victoria v Brookes &amp; Anor [2013] VSCA 37], whilst useful in relation to the matter of construction of the legislation, is not to this particular point. So I suppose that my submission is then side-tracked to saying that this is what the court does in other situations — so it wouldn't, in my submission, be unusual to make a similar order in this regard. The only other thing I draw your attention to Your Honour is that there was a change to the Sentencing Act recently, which now allows for court-imposed fines to be dealt with by way of either discharge or through a variety of different means, which I understand was only brought into effect very recently. In my submission that would indicate that the</td>
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<td>MAG</td>
<td>legislature are willing to have courts revisit earlier decisions -</td>
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<td>SOL</td>
<td>You're talking about 48N?</td>
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<tr>
<td>MAG</td>
<td>Yes.</td>
</tr>
<tr>
<td>SOL</td>
<td>In relation to a Community Corrections Order?</td>
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<tr>
<td>MAG</td>
<td>Sorry, if you don't mind, I only just found this... just going to refer to my...</td>
</tr>
<tr>
<td>SOL</td>
<td>Your multi-purpose device? That's alright.</td>
</tr>
<tr>
<td>SOL</td>
<td>So, the court now has new powers when dealing with a person who is arrested for failing to pay court-imposed fines or contravening a fines work order, where they can now discharge the fines in full or in part, adjourn the proceedings, make an instalment order or an imprisonment order, whereas this is -</td>
</tr>
<tr>
<td>MAG</td>
<td>What section?</td>
</tr>
<tr>
<td>SOL</td>
<td>Section 69G of the SA and S83ASA -</td>
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<tr>
<td>MAG</td>
<td>Capital A?</td>
</tr>
<tr>
<td>SOL</td>
<td>Yes, capital ASA, that is in respect of -</td>
</tr>
<tr>
<td>MAG</td>
<td>So section 69G of the <em>Sentencing Act</em> and S83ASA of the...?</td>
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<tr>
<td>SOL</td>
<td>Also of the <em>Sentencing Act</em>.</td>
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<tr>
<td>SOL</td>
<td>Which provides new powers to the court in respect of dealing with court-imposed fines. I've also been reading around the topic Your Honour and I understand that this was part of a multi-faceted approach to coordinate fines, particularly considering that they're one of the most frequently -</td>
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<tr>
<td>MAG</td>
<td>Was there a second reading speech in relation to that which might provide assistance in a case like this?</td>
</tr>
<tr>
<td>SOL</td>
<td>To be honest, I haven't read the Second Reading Speech because I only located that at lunchtime.</td>
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<tr>
<td>MAG</td>
<td>Alright, well that's some progress, because we weren't there yet as far as I was concerned.</td>
</tr>
<tr>
<td>SOL</td>
<td>My understanding is that the court has made these orders in the past and that it is also the case that it is the express provision that gives the court the capacity to vary the instalment order where a material change in circumstances can be shown, which indicates the legislature's intention to take those change of circumstances factors into consideration.</td>
</tr>
<tr>
<td>MAG</td>
<td>Well your client is well and truly there on the change of circumstances, there is no difficulty in that regard. Certainly, if I can express it this way, the Court will be bending over backwards to find a way to assist Mr B. I just haven't felt that I've had the legislative basis to do that so far, but we might have a window of opportunity now.</td>
</tr>
<tr>
<td>SOL</td>
<td>Yes. It is my submission that it should be finalised today -</td>
</tr>
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</table>
MAG  Well, I'm not going to because I'll have to give reasons and I need to look at the sections that you've dealt with and it is very unfortunate for Mr B to keep having to come back in his obviously difficult health -

SOL  If I could just speak to the provisions that I gave Your Honour, my understanding is that those are relation into court-imposed fines -

MAG  Yes. So these are infringements...

SOL  So there is not going to be something that is specifically on-point in my research in consideration. I have spoken to other practitioners who have said that they have had instances where they have had similar orders made. The Magistrates' Court Act is another piece of legislation that I have considered and it is silent on the issue in respect to your jurisdiction to dispose of these fines. I'm just loathe to adjourn the matter simply for another hearing that may not necessarily be precisely on point.

MAG  No, well, there's no doubt of it, but ultimately I am – certainly not today – in a position to give my decision.

SOL  Yes Your Honour.

MAG  So that's, well, you'll have to come back.

SOL  Yes. The only other option that may be open to you is to grant a permanent stay as opposed to discharge of the fines.

MAG  What I propose to do is adjourn it for some lengthy period, but I will certainly look at it and it may be that I give you an opportunity for it to be abridged for you to come back earlier. But in the meantime at least Mr B has got – it's very unfortunate for him that clearly he has this hanging over his head, but as I've said I'll look at these additional provisions that you have drawn my attention to. They might be of limited or not limited assistance, but more importantly it won't involve your client being jailed, which is the main part in relation to all of this that we clearly want to avoid.

SOL  Yes. And hopefully the chronology and the matters before the court can be added to the Court file, so at least there can be some crystallisation of our position as representation for the applicant. The only other question I ask is: is there anything further that we should prepare in the adjournment period?

MAG  Well that's what I'm indicating. Once I've looked at it in more detail, if I feel it needs to come back for further submissions -

SOL  That will be communicated to us?

MAG  Yes. And what is your name again?

SOL  Jane Vasey and it's Fitzroy Legal Service. We've always had carriage of the matter – it was originally briefed but I'll maintain the appearances hereafter. Should I provide my email address to your clerk?

MAG  Yes.

SOL  Thank you Your Honour.
<table>
<thead>
<tr>
<th>MAG</th>
<th>All right, now I’m just looking at a date. Has Mr B’s health been stable since I last saw him?</th>
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<tbody>
<tr>
<td>SOL</td>
<td>It has Your Honour. I enquired as to whether there would be any more medical reports to be provided and there wouldn’t, but there is some indication that his condition may continue to deteriorate.</td>
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<tr>
<td>MAG</td>
<td>Is it relatively held at bay at the moment?</td>
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<tr>
<td>SOL</td>
<td>Yes Your Honour.</td>
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<tr>
<td>MAG</td>
<td>Excellent. Well, I’m pleased to hear that at the very least. [X] of December at 2pm? Sorry, that’s not right. [X] of December it is.</td>
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<tr>
<td>SOL</td>
<td>I actually looked on the Melbourne Magistrate’s Court website to see if any judgments have been provided by this court that speak to the issue but there doesn’t seem to be anything.</td>
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<tr>
<td>MAG</td>
<td>I hear what you are saying in relation to other Magistrates and that may well be the case but they certainly haven’t expressed their wisdom more generally to the collegiate body. In fact, quite the contrary, so that might be right but I can assure you there is not a shared view. I can certainly say that it is hoped that there might be some legislative amendment to actually try and fix what was regarded as, really, an injustice.</td>
</tr>
<tr>
<td>SOL</td>
<td>That’s right, because there is no mechanism by which you can make the order that you propose to make.</td>
</tr>
<tr>
<td>MAG</td>
<td>Exactly.</td>
</tr>
<tr>
<td>SOL</td>
<td>So there isn’t one that says you can’t and there’s nothing that says you can, so I understand where it’s held up.</td>
</tr>
<tr>
<td>MAG</td>
<td>Yes, so there was certainly hope that Parliament would see fit to provide a mechanism to be able to do it.</td>
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<tr>
<td>SOL</td>
<td>Well as I said, I did read a quite lengthy submission from the Sentencing Advisory Council, who have done a lot of research about court-imposed fines and what changes should be made. Some of those have been adopted, some haven’t.</td>
</tr>
<tr>
<td>MAG</td>
<td>Well, so, that’s where it’s at and I have to say it: if I had… well, as you well know, I have to apply the law as I understand the law to exist. Unfortunately there may be some laws on which I may well have a different personal view, but I’m still bound to apply the law however unpleasant or uncomfortable that is. The point on that at the moment is that that decision would not go in your client’s favour and I’m not…</td>
</tr>
<tr>
<td>SOL</td>
<td>I’m assisted by your indication that there’s not a unified view in terms of the bench in relation to your capacity to do as your propose.</td>
</tr>
<tr>
<td>MAG</td>
<td>But I’m well aware that in your client’s case, if I were to apply the law... I mean I’m still considering it and I will look at it further, but I would be concerned because I would think there would be an injustice to your client.</td>
</tr>
<tr>
<td>SOL</td>
<td>Well that may be the opportunity then for taking the matter to a higher court, because it wouldn't be suitable that the man be remanded, in my submission.</td>
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<tr>
<td>MAG</td>
<td>No. That's right.</td>
</tr>
<tr>
<td>SOL</td>
<td>I'd be happy if there were a decision of a higher court that provides some guidance.</td>
</tr>
<tr>
<td>MAG</td>
<td>There's no reason why it can't be taken up with the Parliament to urgently look at it.</td>
</tr>
<tr>
<td>SOL</td>
<td>Yes, well FLS does a lot of law reform work -</td>
</tr>
<tr>
<td>MAG</td>
<td>Well that might be a good thing to do.</td>
</tr>
<tr>
<td>SOL</td>
<td>Yes, well the organisation has already been looking at criminal records quite ferociously -</td>
</tr>
<tr>
<td>MAG</td>
<td>Well, there's plenty of scope so I could only encourage you in that regard. It's now May and it's not coming back until December.</td>
</tr>
<tr>
<td>SOL</td>
<td>So, is there any suggested course of action that you would -</td>
</tr>
<tr>
<td>MAG</td>
<td>Well, I would have thought that would be a matter for FLS to make such representations to the Attorney General who actually deals with the legislative program in relation to any reforms.</td>
</tr>
<tr>
<td>SOL</td>
<td>Well, Your Honour, we will definitely consider that course.</td>
</tr>
<tr>
<td>MAG</td>
<td>Alright. I did say the [X] of December?</td>
</tr>
<tr>
<td>SOL</td>
<td>Yes, at 2pm.</td>
</tr>
<tr>
<td>MAG</td>
<td>It says it's a non-sitting day. [To clerk] Can you check that? Just take a seat, I have to check on that day. All right, matter is adjourned to X of December at 2pm.</td>
</tr>
<tr>
<td>SOL</td>
<td>As the court pleases. May I be excused?</td>
</tr>
<tr>
<td>MAG</td>
<td>You can. Thank you.</td>
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