

31 January 2014

The Hon Richard Dalla-Riva MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
MELBOURNE VIC 3002

Dear Mr Dalla-Riva

### **Submission on the *Summary Offences and Sentencing Amendment Bill 2013***

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) seeks to contribute to the Scrutiny of Acts and Regulations Committee's (**Committee**) consideration of the *Summary Offences and Sentencing Amendment Bill 2013* (**Bill**). The Bill was introduced into the Legislative Assembly on 10 December 2013. It raises a number of human rights issues that the Commission has an interest in.

The Commission notes that the Committee has a role in considering and reporting on whether Bills introduced into Parliament are compatible with the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**). The Commission writes to you to share some of its concerns in order to assist the Committee in this process.

### **Key human rights issues**

The Commission recognises the important aims of the Bill in improving options to manage public safety including the ability to lawfully enter and leave premises. We understand that the Bill has been prompted by concerns about protests and pickets and a commitment to deter and prevent lawless behaviour on our streets including alcohol-fuelled violence.

We note that the *Summary Offences Act 1966* contains a range of existing provisions that give police options to address these issues. Police are given broad discretionary powers to move on persons where they suspect on reasonable grounds that the person is or is likely to: breach the peace; endangering a person's safety; cause injury or property damage; or is otherwise a risk to public safety<sup>1</sup>. In addition, the *Summary Offences Act 1966* makes it an offence to:

- obstruct a footpath or road (s 4(e))

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<sup>1</sup> See s 6. The Commission notes that the current move on powers include an exception clause which protects the democratic rights to freedom of assembly, association, expression and protest when a person is picketing a place of employment or protesting about a particular issue.

- breach the peace (s 9(g))
- post bills or deface property (s 10)
- using profane, indecent or obscene language or threatening abusive or insulting words in a public place (s 17)
- behaving in a riotous indecent offensive and insulting manner in a public place (s 17)
- behaving in a disorderly manner in a public place (s 17A)
- assault (s 23), and
- being found drunk in a public place (s 13)

The Bill proposes to introduce further powers which increase the scope and breadth of police move-on powers and create new exclusion orders, which can be used in ways that will significantly impact upon rights contained in the Charter such as the rights to freedom of assembly, freedom of movement, privacy and freedom of expression and protest.

The Government states that these amendments “better protect our community from lawless behaviour on our streets and to deter and prevent alcohol fuelled violence”<sup>2</sup>.

The Charter provides a statutory framework for human rights scrutiny of all proposed legislative action. This framework requires that where government seeks to limit and infringe upon human rights, it must be held accountable for those infringements and it must provide a cogent evidence-base and justification for its actions<sup>3</sup>. The Commission is concerned that there needs to be a clear evidence base for why the current powers are not adequate. This is an important element in considering whether limitations on human rights are reasonable and can be demonstrably justified in a free and democratic society.

### **Extended powers to move people on and issue alcohol exclusion orders**

Laws need to be tailored to their purpose and government powers which encroach on people's freedoms in a democratic society need to be reasonable and justified. The Bill and accompanying material makes a statement about its aim in facilitating community protection and public safety, but does not explain the need for increased powers in this area.

Section 7(2)(e) of the Charter directs that any least restrictive means reasonably available to government should be employed when seeking to limit and infringe upon rights. In considering this Bill and its implementation, there should be a strong focus on the limitation on rights being the least rights restrictive option available to meet the public policy aim.

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<sup>2</sup> See Second Reading Speech, *Summary Offences and Sentencing Amendment Bill 2013*, p 4681.

<sup>3</sup> See section 7(2) of the Charter and Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 at [144]-[156].

The Bill will confer new powers on police, the operation of which have the potential to have an impact on people's basic democratic freedoms. They can also be exercised on the broad basis that there is a 'reasonable suspicion' that something is likely to happen in the future.

Without further justification, some of the powers could lead to disproportionate outcomes. For example, a person can be banned from all licensed premises. This would include licensed restaurants and cafes and major sporting events. The connection of this ban to the issue being addressed, and its impact on personal liberties and family life (protected by section 17 of the Charter), raise questions of proportionality.

There have also been concerns raised with the Commission in the past about the likely impact of similar laws on vulnerable groups.<sup>4</sup> Research in other jurisdictions shows that the impact of move on powers is disproportionately felt by minority groups such as homeless people, Indigenous Australians, people experiencing mental health issues, and young people<sup>5</sup>.

The Commission notes that the potential adverse impact of these laws could be compounded by a lack of understanding of their broad reach and the serious consequences for breach of the move on or exclusion orders (such as two years imprisonment). For example, will people understand that an alcohol exclusion order means they can't go to a licensed restaurant with their family? In this context, the Commission believes that the Bill should include safeguards such that those persons subject to a move on order or (alcohol) exclusion order will be given proper guidance as to the consequences of those orders in a way that is accessible and understandable to them. The consequences for people are significant enough to warrant legislative protections.

The Commission notes that these proposed laws, if passed, must operate and be implemented in accordance with existing legislative protections of rights and responsibilities, such as the Charter. These can come up in a range of contexts, for example, people exercising freedom of expression (protected in section 15 of the Charter) and people exercising cultural rights (protected in section 19 of the Charter). For example, where the public place that is the subject of a police move on direction or exclusion order is an area of cultural heritage significance to the Aboriginal people of Victoria, Victoria

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<sup>4</sup> For example, the Commission reported in its 2008 Report on the Operation of the Charter, the City of Greater Bendigo resisted calls to enact move-on local laws because of their proven capacity to operate in a discriminatory manner, particularly in relation to Indigenous community members, young people and homeless people. Moreover, in NSW, the NSW Ombudsman has reported that 79% of all directives and 48% of all directions are issued to people under 17 in *Policing Public Safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act (1999)*.

<sup>5</sup> Empirical research conducted in Queensland in 2006 demonstrate the disproportionate impacts of move on powers on homeless communities: See Monica Taylor & Tamara Walsh 'Nowhere to Go: The Impact of Police Move On Powers on Homeless People in Queensland', The University of Queensland, (November 2006). Indigenous Australians appear most likely to be moved on compared to other community members. A detailed 1995 study found that Indigenous young people were over-represented at every level of the justice system except police cautions. Carrie Chan and Chris Cunneen note that police use move-on powers against Aboriginal people at a massively disproportionate rate in *Evaluation of the implementation of NSW Police Service Aboriginal Strategic Plan*, Institute of Criminology, University of Sydney. Report commissioned by NSW Police Service and the NSW Ombudsman, 2000.

Police must be cognisant of the native title right to protect lands and waters of importance, including the right to enter and have access to these places.

In addition, the Commission notes that Victoria Police members are public authorities under the Charter<sup>6</sup> and are therefore obliged to act compatibly with the Charter, including giving proper consideration to human rights when taking decisions<sup>7</sup>. The Commission notes that these obligations are not expressly highlighted in the Bill, nor are they included as any safeguard in the implementation of the extended police powers. The Commission believes that if Parliament passes these laws, Victoria Police's Charter obligations should be expressly stated as a safeguard in the operation and implementation of these new laws.

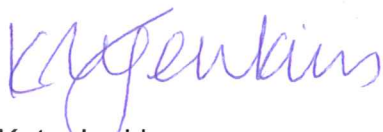
### **Monitoring the impact of these law in practice**

In circumstances where government is seeking to impose limitations on Victorians' rights and freedoms, which are statutorily protected under the Charter, the Commission is concerned that there has been no consultation with the community during the development of the Bill or prior to its introduction into Parliament.

If Parliament passes these laws, the Commission believes there should be a commitment from government to monitor and report on the laws' operation and impact, as well as to review their operation after two years. This will go some way to ensuring transparency and accountability in their use and will provide an opportunity for the community to consider whether the laws are achieving their stated purpose and impose reasonable, necessary and proportionate limitations on human rights that are justified in a free and democratic society.

If the Committee would like further information regarding this submission, please feel free to contact me on 9032 3403 or [kate.jenkins@veohrc.vic.gov.au](mailto:kate.jenkins@veohrc.vic.gov.au).

Yours sincerely



Kate Jenkins  
Commissioner

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<sup>6</sup> See s 4(1)(d) of the Charter.

<sup>7</sup> See s 38 of the Charter.