



124 Johnston Street (PO Box 297)
FITZROY. VIC. 3065
(DX no. 96611)

Phone: (03) 9419 3744
Fax: (03) 9416 1124
Email: enquiries@fitzroy-legal.org.au

A Community Legal Centre

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

3rd February 2014

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

Re: SUBMISSION TO SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Fitzroy Legal Service has had opportunity to review the submissions put forward by the Flemington & Kensington Community Legal Centre, Human Rights Law Centre and the Law Institute of Victoria and seeks to endorse their contents.

In addition to the points raised therein relating to freedom of association and freedom of assembly we wish to raise concerns around two further areas of concern as they relate to protected rights under the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('the Charter'), and the criterion set out in section 7 of the Charter.

1. Background

- 1.1. 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.
- 1.2. Public order offences have a greater impact on communities who are more reliant on public spaces. Many of these community members may be homeless, are in treatment for substance dependence, have conditions associated with their mental health or acquired brain injury, are experiencing significant poverty. Under sentencing orders, bail conditions, and engagement with the ARC list, complex arrangements are reached to ensure any exclusion orders do not compromise community support for health, work, family, and take into account therapeutic jurisprudence objectives directed to addressing the underlying causes of offending.
- 1.3. We note the proposed laws will 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. The breadth of the discretionary elements of the laws also will necessarily provide increased opportunity for prejudice and discrimination to inform decision-making, whether consciously or not.
- 1.4. To our knowledge there has been no consultation with relevant stakeholders such as state funded and philanthropic community services, health services, harm reduction services, homeless services, mental health professional bodies, and local councils.

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1.5. Additionally, the laws would be functionally in opposition to a range of protocols directed to long term objectives of community reintegration and recovery where offending is in the lower range of criminal conduct – for example drug diversion, police and PSO protocols and training in relation to homeless, mental health, access to needle syringe programs to prevent the spread of HIV and Hepatitis C into the Victorian community.

1.6. We submit that such consultation should occur before these laws proceed to vote, and that their terms must be amended to provide for appropriate safeguards to protect these vital community interests and strategies.

2. Freedom from arbitrary arrest and detention & prohibition on deprivation of liberty except in accordance with law - enforcement mechanisms

2.1. We note the enforcement stages of these laws operationally are fundamental to assessing 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 liberties.

2.2. A move on power requires only a reasonable suspicion (a belief or impression not supported by evidence) that relevant conduct is or may occur, and that the individual subject to the order need not be personally responsible for the relevant conduct or impression generated. Three further key features of great relevance to the balancing exercise envisioned by the Charter. Under the new laws arrest powers are extended to cover a failure to comply with a move on direction. 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. The central consideration for that decision is whether the exclusion will prevent further move on directions. Where a person engage 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.

2.3. We note in relation to these enforcement mechanisms that they facilitate a process whereby a person who has not committed a criminal offence may effectively be incarcerated. It makes very real the likelihood that non-violent political demonstrators may become political prisoners. It also provides for a criminalization process that will affect the most marginalized and vulnerable members of the community bypassing the need for criminal offending and satisfaction of the ordinary burden of proof (or any burden of proof beyond mere subjective suspicion) in a criminal proceeding.

2.4. We submit that this approach to enforcement, in circumstances where no criminal offending has occurred or is alleged, cannot be found to be demonstrably necessary in a free and democratic society. We note that where criminal offending has occurred or is alleged, bail and sentencing conditions are available to prevent recidivism and/or public safety where deemed appropriate. We further note that there has been significant investment in the community and health sector in those locations that are deemed ‘hot spots’ in Melbourne. These services operate to serve long term objectives of facilitating harm reduction and treatment, as well as providing in many cases court mandate treatment episodes.

3. Specific grounds for exclusion

3.1. We note under the amendments, 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.

- 3.2. Under present laws, a reasonable suspicion by a police member that a person is in possession of drugs 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.
- 3.3 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.
- 3.4 We submit this infringes the right to freedom from arbitrary arrest, the presumption of innocence, freedom of movement, the right to a fair trial. This amendment cannot be shown to be necessary in a free and democratic society given there are laws in existence to address the precise conduct covered by its ambit.
- 3.5 The amendments also include the criteria: Where the conduct of person(s) is causing a reasonable apprehension of violence in another person.
- 3.6 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/indecent 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 - where a course of conduct generating fear is alleged.

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 is we submit self-evident.

- 3.7 Again we note no consultation with community stakeholders has to our knowledge occurred.

4. Extended powers to arrest and imprison in relation to existing criteria

- 4.1. We note in relation to the extension of the power to arrest in relation to breach of the peace is currently governed by lengthy authorities identifying the ambit of that power, in terms of the balance to be struck between community safety and the rights of the individual. We submit it is not necessary or consistent with that line of authorities to extend the enforcement mechanism in the way proposed. We submit further that existing law strikes the appropriate balance consistent with the Charter.
- 4.2 In relation to the remaining criteria, we note that the existing law sufficiently governs the field (e.g. obstruction of footpath or road). Additionally we strongly submit that the existing modes of enforcement should not be extended in the way proposed, for the reason that the ambit of the criteria does not meet any of the ordinary thresholds for intervention in the liberty of a person – reasonable belief, mens rea, actus reus, presumption of innocence, right to a fair trial.

4.3 We would strongly encourage the Committee to engage in consultation with key stakeholders from the legal and community sector in relation to these laws, which have extremely broad implications for community cohesiveness, health, harm reduction, social inclusion, therapeutic jurisprudence, and the efficacy with which community organizations can support these longer term objectives.

Conclusion

We are grateful for the opportunity to make submissions in relation to these important issues. We stress the importance of objective criteria and evidence under which police can exercise powers as central to the rule of law and accountability in the exercise of police force upon the individual, and the necessity that consideration is given to liberty of the person and freedom from arbitrary arrest.

About Fitzroy Legal Service

Fitzroy Legal Service is a community legal centre providing assistance to the community through Duty Lawyer Services at the Neighbourhood Justice Centre, free legal advice through the Night Service five nights per week, and a casework legal practice focused on family law, criminal law, infringements and victims of crime. Fitzroy Legal Service also employs a full time Drug Outreach Lawyer.

Yours faithfully,

Fitzroy Legal Service

Per

Meghan Fitzgerald

Manager Social Action, Law Reform, Policy

Tel: (03) 9419 3744

Email: mfitzgerald@fitzroy-legal.org.au