

Summary Offences and Control of Weapons Acts Amendment Bill 2009

Submission to the Scrutiny of Acts and Regulations Committee



The Summary Offences and Control of Weapons Acts Amendment Bill 2009 (the Bill) infringes human rights in many ways. The Statement of Compatibility sets out some, but by no means all, of the human rights that are unreasonably and disproportionately limited by the Bill.¹

The Human Rights Law Resource Centre submits that SARC should do three things.

1. SARC should ask the Police Minister to articulate the particular public safety and security risk that the Bill seeks to address, and to provide cogent evidence of that risk.

It is unclear exactly why the police powers in the Bill are necessary. The language of the material supporting the Bill is vague, stating that the Bill will 'enhance police powers to tackle violence and disorder', and referring to increases in 'offending and anti-social behaviour in public places, especially in the CBD and entertainment districts.'² But plainly the powers in the Bill are not confined to the CBD and instead provide police with extremely broad state-wide powers to search and move people.

Where the Government wishes to pass a law that infringes human rights, at the very minimum it must provide a specific, evidence-based justification for its actions³. Any legislative response to public violence should be based on, and targeted at, actual threats to public safety and not to community alarm about violence, which even the Chief Commissioner of Police has admitted can be out of proportion to the actual threat.⁴

2. SARC should recommend that the Bill not be passed in its current form, given that it includes unreasonable and disproportionate limitations on human rights.

¹ See Statement of Compatibility in Hansard, Thursday 12 November 2009, p 69-70. The other infringements are set out at Annexure A of this submission.

² See Statement of Compatibility in Hansard, Thursday 12 November 2009, p 64 and Explanatory Memorandum, Clause 3, p 2.

³ See section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [144] – [156] (per Warren CJ).

⁴ See report in *Herald Sun*, 19 November 2009, <http://www.heraldsun.com.au/news/national/simon-overland-says-melbourne-violence-not-so-bad/story-e6frf716-1225781365160>.

The Statement of Compatibility effectively states that parts of the Bill contain limitations on human rights that are not necessary, reasonable or demonstrably justified, as required by s 7 of the Charter. The Annexure to this submission sets out the other unreasonable limitations on rights which are not discussed in the Statement.

The Victorian Charter establishes a framework in which it is possible to maintain public safety and also to ensure the enjoyment of Charter rights. Under the Victorian Charter, human rights can be limited in order to protect pressing and overriding public or social needs, such as public safety, public order and the enjoyment of other rights. This is a balancing of different interests, requiring the limitation on human rights to be reasonable, necessary and proportionate. Therefore, if the Government wishes to legislate to maintain public security in response to real threats, it is not necessary to pass laws which *unreasonably and disproportionately limit* human rights.

3. If the Bill is to be passed, SARC should recommend that, at the very minimum, the amendments proposed in Annexure A of this submission be adopted.

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Annexure to HRLRC Submission to SARC – Summary Offences and Control of Weapons Acts Amendment Bill 2009

Clause of Bill	Human Rights and other Concerns	Amendments Required to Alleviate Concerns
<p>Move on powers</p> <p>Proposed new section 6 of the <i>Summary Offences Act</i></p>	<p>Moved on for what you might do: The test for the exercise of the move on powers is far too broad, vague and arbitrary, including being moved on for future conduct such as that a person 'is likely to' endanger the safety of others.</p> <p>'Breaching the peace' is uncertain and unnecessary: Attaching move on powers to a 'breach of the peace' is unnecessary and uncertain, and creates the potential for abuse.</p> <p>Discriminatory application of move on powers: Move on powers are prone to be applied in a discriminatory and disproportionate way against the most marginalised and disadvantaged groups in our community, including people who are homeless, young people, Aboriginal people and people experiencing mental health issues. For example, in NSW, 79% of all directives and 48% of all directions are issued to people under 17.⁵ The move on powers would therefore infringe rights to equality and non-discrimination in section 8 of the Victorian Charter.</p> <p>Directions to move on can be given orally (new s 6(2)), with no accountability mechanism for persons affected, which is of particular concern given the penalties to be applied.</p>	<p>The Government has not articulated why the move on powers are necessary at all. They should be removed from the Bill.</p> <p>At the very minimum, the Bill should be amended to:</p> <ol style="list-style-type: none"> 1. Remove the references to 'is likely to' in proposed new section 6 of the <i>Summary Offences Act</i>, to ensure that police do not use move on powers in relation to anticipated future conduct. 2. Remove proposed new subsection 6(1)(a) of the <i>Summary Offences Act</i>, which refers to 'breach of the peace' in its entirety. 3. If move on powers are included, then the powers should only be able to be exercised in certain areas in the vicinity of particular licenced premises or precincts, so as to avoid discrimination against groups that rely on public space, including people who are young, homeless or have mental illness. 4. Safeguards should also be included in the Bill to protect against discriminatory application of the powers and to ensure transparency and accountability by the police. In particular, the law should ensure that any person asked to move on be given a receipt which sets out: (i) the name and station of the police officer; (ii) the legal basis for the move on; (iii) the person's rights; (iv) the reason the person has been moved on; and (v) why the police chose that person. 5. The police should also be required to keep a record of the following data: (i) the officer's details; (ii) the date, time and place of the stop or direction to move on; (iii) the reason for the stop or direction to move;

⁵ NSW Ombudsman, *Policing public safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act (1999)*.

		(iv) police assessment of the ethnicity of the person; (v) vehicle registration (if any); (vi) what the officers were looking for (if anything) and anything they found; and (vii) name or description of the person stopped (if the person doesn't give their name).
<p>New offence of Disorderly Conduct</p> <p>Proposed new s 17A of the <i>Summary Offences Act</i></p>	<p>Offence of Disorderly Conduct is vague and uncertain and prone to discriminatory application: The offence of disorderly conduct requires a subjective assessment by police officers of whether behaviour fits the vague and uncertain standard of being of a 'disorderly manner'. Such broad discretions are prone to abuse, and to discriminatory application in similar ways to the move on powers (see above).</p>	<p>6. Clause 6 of the Bill should be removed, and no new offence of disorderly conduct introduced. There are clearly already adequate summary offences to enable the police to deal with disruptive or dangerous behaviours.</p>
<p>Random search powers</p> <p>Proposed new section 10G of the <i>Control of Weapons Act</i></p>	<p>Random searching breaches privacy and children's rights unreasonably, unnecessarily and disproportionately: The Statement of Compatibility clearly states that this provision is incompatible with the rights to privacy and children's rights in the Charter, which means that they contain unreasonable, unnecessary and disproportionate limitations on Charter rights (see pages 69 and 70 of Hansard).</p>	<p>7. That proposed new section 10G of the <i>Control of Weapons Act</i>, which contains the power for police to search people in a designated area without any suspicion of wrongdoing, be removed from the Bill.</p> <p>8. That if police powers to randomly search people are retained in the form proposed by new section 10G of the <i>Control of Weapons Act</i>, that the Bill be amended to ensure that children are not subject to random searches under the Act. A child should be defined in accordance with the <i>Convention on the Rights of the Child</i>, in which a child means any person under the age of eighteen years (Article 1, CROC).⁶</p>
<p>Strip searching</p> <p>Proposed new section 7 of the Schedule</p>	<p>Strip searching breaches the right to privacy and children's rights: The power to strip search people in public places is an infringement of the right to privacy and children's rights.</p> <p>Given the extremely invasive nature of a strip search, they</p>	<p>9. Section 7 of proposed Schedule 1 to the <i>Control of Weapons Act</i> should be deleted. The government has not established why the police require the power to conduct a pre-arrest strip search.</p> <p>10. That if police powers to strip search people are retained in the form proposed by new Section 7, Schedule 1 of the <i>Control of Weapons Act</i>,</p>

⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1249 UNTS 13 (entered into force on 2 September 1990). Australia has ratified the Convention and is bound by its terms.

<p>to the <i>Control of Weapons Act</i></p>	<p>must only be conducted post-arrest where there compelling grounds exist to believe the person has committed an offence and that a strip search is justified on the grounds of that belief. The search must be conducted inside a police station by a person of a gender of the searched person's choice.</p>	<p>that the Bill be amended to ensure that children are not subject to strip searching under the Act. A child should be defined in accordance with the <i>Convention on the Rights of the Child</i>, in which a child means any person under the age of eighteen years (Article 1, CROC).</p>
<p>Search powers in designated areas Proposed sections 10C to 10L of the <i>Control of Weapons Act</i></p>	<p>Search powers impact on freedom of speech and protest rights: These new powers have the potential to have a significant detrimental effect on freedom of speech.</p> <p>Victoria Police could publicly declare an area where they know a protest is to occur (eg: World Economic Forum) and would then have powers to search any people in that area, including peaceful protesters and bystanders, without a warrant or any suspicion they are carrying weapons. The exercise of these powers, and indeed even foreshadowing prior to a protest that they will be used, could significantly deter people from attending a protest, given the risk they will be arbitrarily searched by police.</p>	<p>11. The new search powers in designated areas should be limited so that they cannot be applied in response to pickets, demonstrations and protests.</p> <p>12. Proposed sections 10C to 10L of the <i>Control of Weapons Act</i> should be amended to include a provision similar to the proposed section 6(5) of the <i>Summary Offences Act</i>.</p>
<p>Tests for designating areas Proposed new sections 10D and 10E of the <i>Control of Weapons Act</i></p>	<p>The test for designating areas is too broad: For planned designations, an area can be designated if there is one single incident of violence or 'disorder' involving a weapon in the past 12 months and a likelihood that the violence or disorder will reoccur. Most metropolitan and regional areas of Victoria are likely to meet that threshold.</p> <p>The fact that the area designated is only vaguely limited to no 'larger than reasonably necessary' compounds the lack of safeguards around the exercise of the power. It is broad and vague and permits a wide discretion for police. Does it allow police to designate a pub, a street, a city block, a sports stadium, an entire suburb or town - and then search, without needing a warrant or any suspicion whatsoever, anyone in</p>	<p>13. The circumstances in which the Chief Commissioner can designate a search area should be narrowed, for both planned and unplanned designations. Proposed sections 10D(1) and 10E(1) of the <i>Control of Weapons Act</i> should be amended to narrow the circumstances under which the Chief Commissioner can designate an area.</p> <p>14. Proposed sections 10D(2) and 10E(3) should be amended to provide that the designated area be subject to an absolute area limit (eg: 500 square metres). This would be similar to the way the Bill imposes a time limit on the designation in proposed sections 10D(3) and 10E(4) (no longer than necessary <i>and</i> at most 12 hours).</p> <p>15. Further, we recommend that designated areas must include or adjoin at least one licensed premise.</p>

	<p>that location?</p> <p>In his media release of 9 August 2009, Premier Brumby noted that the measures contained in the Bill were aimed to 'crackdown on trouble-spots and target liquor related crime', in order to 'make our communities and our entertainment precincts safer for all Victorians'. If these comments reflect the Government's true justification for the introduction of these measures, sections 10D and 10E should limit the designation of an area to those areas proximate to licensed venues.</p>	
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