

Joint Submission to the Scrutiny of Acts and Regulations Committee

Attention	Lizzie Blandthorn MLA Chair, Scrutiny of Acts and Regulations Committee
Date	3 August 2018
Legislation	Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018
Status	Introduced by the Attorney-General Second reading moved: 25 July 2018
Submitted by	Law Institute of Victoria Federation of Community Legal Centres Victoria Human Rights Law Centre
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Overview

The Law Institute of Victoria, the Federation of Community Legal Centres Victoria and the Human Rights Law Centre seek to jointly contribute to the Scrutiny of Acts and Regulations Committee's ('SARC') consideration of the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 (the Bill).

The Bill was introduced to the Legislative Assembly by the Attorney-General on 25 July 2018.

Our joint position is that these laws are dangerous, unnecessary and should not pass the Victorian Parliament.

We are strongly concerned that the Bill:

- I. unjustifiably limits rights and freedoms; and
- II. is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities ('the Charter').

The Bill amends the current unlawful association notice scheme in Victoria as set out in Part 5A of the *Criminal Organisations Control Act 2012*. The scheme will now apply to children as young as 14 years of age, exposing them to a 3-year prison sentence if a notice is breached. The Bill lowers the rank of a police officer who can issue a notice from Senior Sergeant to Sergeant and also reduces the threshold for issuing an unlawful association notice.

The Bill's statement of compatibility claims that the Bill contains sufficient safeguards to ensure that rights and freedoms have not been arbitrarily infringed. We believe however that the safeguards are insufficient to protect members of the community from unfair treatment and are particularly insufficient to protect vulnerable people subject to an unlawful association notice. Safeguarding against abuse of power does not remedy the fundamental problems with these laws.

We are also seriously concerned about the Bill's abolition of *de novo* appeals of criminal cases from the Magistrates and Children's Court to the County Court. We believe that the Bill will not reduce delays in the criminal justice system and will place a significant financial burden on those engaging with the system. *De novo* appeals against conviction and sentence are an essential means by which access to justice and consistency of justice are upheld in Victoria, and the removal of the appeals is likely to create inequality in the justice system.

Human rights concerns

The right to peaceful assembly and freedom of association

We are deeply concerned that the Bill limits the right to peaceful assembly and freedom of association¹ and it is our view that the Government has not justified the limitation on these rights.

Unlawful association notices are neither necessary nor proportionate to prevent crime, and it is deeply concerning that the Bill will make it easier for these notices to be issued. Under the new provisions the police will not have to consider whether issuing a notice will actually prevent serious crime.² The police will only have to establish that the person has been associating with the subject of the notice without considering whether the association may be for non-criminal purposes such as of sharing ideas, engaging in political communication, or participating in groups that are not related to criminal activities.³ The duration of three years for a notice to apply is an excessive period of time and will prevent people from engaging in legitimate activities that may not have criminal intent.

It is our view that giving IBAC oversight of the notices will not be sufficient to safeguard these rights.⁴ Oversight simply provides some degree of protection against abuse of power – this is different to protecting against human rights abuses. We believe that there are other ways to prevent serious crime through other, less restrictive means.

¹ *Charter of Human Rights and Responsibilities Act 2006*, s 16.

² Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7.

³ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7.

⁴ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 19.

The right to freedom of expression and freedom of movement

The Bill may unreasonably limit the right to freedom of expression.⁵ The Bill enables unlawful association notices to be issued without considering whether the notice is necessary to prevent the commission of an offence.⁶ The only relevant consideration is whether the person who is the subject of a notice has been convicted of an applicable offence.⁷ We are concerned that notices may be used in situations not envisaged by the Bill that may have little or no connection with preventing the commission of a serious crime, such as moving on people who are experiencing homelessness.

The limitation on the freedom of movement⁸ for those subject to a notice is also concerning as it may impact a person's ability to choose where they live, including children and vulnerable persons who may not have the capacity to make other appropriate living arrangements. The exceptions for those who will be considered 'relatives' under the Bill is not comprehensive and it may still affect families and living situations, as well as other activities such as work and school.⁹ The Bill's statement of compatibility does not adequately address these issues and it is our position that the right to freedom of movement may be arbitrarily restricted.

Right to recognition and equality before the law

The Bill in its current form goes beyond justifiable limits on the right to equality and equal protection before the law without discrimination.¹⁰

The statement of compatibility states that the Bill contains sufficient safeguards to protect three classes of persons considered 'vulnerable' by limiting the duration of an unlawful association notice, ensuring that an unlawful association notice can only be issued to these classes of persons by a Senior Sergeant, and increasing scrutiny of these notices. It is our view that this Bill should not be passed, however at the very least those classified as vulnerable persons should not be captured by this scheme as their ability to comply with a notice is significantly limited (due to factors such as youth or impaired ability) and they will be disproportionately impacted.

A report conducted by the NSW Ombudsman on similar laws in NSW, 'The consorting law, Report on the operation of Part 3A, Division 7 of the Crimes Act 1990, found that Aboriginal and Torres Strait Islander people are disproportionately affected by anti-consorting laws, as are young offenders.¹¹ The statement of compatibility does not address the fact that evidence shows that these laws will have a disproportionate impact on young people and vulnerable communities.

⁵ *Charter of Human Rights and Responsibilities Act 2006*, s 15.

⁶ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 3.

⁷ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7.

⁸ *Charter of Human Rights and Responsibilities Act 2006*, s 12.

⁹ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 3.

¹⁰ *Charter of Human Rights and Responsibilities Act 2006*, s 8(3).

¹¹ Ombudsman of NSW *The Consorting Law: Report on the operation of Part 3A Division 7 of the Crimes Act 1990*, 62.

It is also significantly concerning that the failure of a Sergeant to identify someone as a ‘vulnerable person’ will not invalidate the notice, and a vulnerable person will then have to personally seek to have the notice reviewed, which will be labour and cost intensive.¹² The provision of information on how to review the notice is not an effective safeguard for vulnerable persons.¹³

Regarding the removal of *de novo* appeals, the Bill disadvantages those with matters in the Magistrates Court who are unrepresented and have not received adequate legal advice, as well as those who have had a serious criminal offence tried summarily in the Magistrates Court.¹⁴ *De novo* appeals represent an important opportunity for people to have their matter considered in the County Court. Without this opportunity, a ‘safety net’ for the summary jurisdiction system is lost and those with limited, or without, financial resources, or those who face more serious sentences, are significantly disadvantaged.

The right of children in criminal proceedings and the protection of families and children

We are deeply concerned that the unlawful association scheme will now apply to children as young as 14 years old.¹⁵ It is our view that imposing limitations on children will not disrupt serious and organised crime to an extent that would justify the limitations placed on children’s rights. It is again concerning that Senior Officers will no longer have to consider whether a notice is necessary to prevent the commission of an offence. For these reasons, we think that the Bill does not reflect the right of a child to protection that is in their best interests and is needed by reason of them being a child,¹⁶ nor does it adequately protect the Charter right to protection of families and children,¹⁷ as it fails to account for the complexity of family relationships that may not be accommodated for under the exceptions.

Under the Bill, children may be subject to the same punishment as adults if they are found to be in breach of a notice, despite their status as a “vulnerable person”.¹⁸ In our view the right of a child convicted of an offence to be treated in a way that is appropriate for their age and the principle that children should only be detained as a measure of last resort¹⁹ has been unreasonably limited through the provisions in the Bill.

Further, the removal of the County Court avenue of appeal for Children’s Court decisions will have a significant impact on children and young people. It is our view that the fees required for appeal to the Supreme Court are an unjustifiable burden on young people and will severely limit their capacity to actively and fairly engage with the justice system. We

¹² Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 10.

¹³ Parliament of Victoria *Legislative Assembly Daily Hansard*, Wednesday 25 July 2018, 25.

¹⁴ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 23, 50.

¹⁵ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7.

¹⁶ *Charter of Human Rights and Responsibilities 2006 (VIC)* s 17(2).

¹⁷ *Charter of Human Rights and Responsibilities 2006 (VIC)* s 17(1).

¹⁸ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 5.

¹⁹ *Charter of Human Rights and Responsibilities 2006 (VIC)* section 23(3); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 37(b).

would like to note that appeals to the Supreme Court are limited to errors of law which will again narrow their ability to appeal. This is contrary to the rights expressly provided for in the Charter, and in our view the Bill goes beyond reasonable limitation of these rights.²⁰

Right to privacy and reputation

The provisions in the Bill go beyond justifiable limits on the right to privacy and reputation.²¹

The Bill will require the police to disclose if a person named in an unlawful association notice has a conviction.²² The police will not have to gain the consent of the person who is the subject of the notice despite the profound impact the notice may have on that person's autonomy and privacy.

The Charter provides that everyone has a right not to have their privacy, family, home or correspondence unlawfully and arbitrarily interfered with.²³ Although the Bill limits the circumstances in which a person's criminal record may be disclosed²⁴ the existence of a notice unjustifiably limits a person's right to privacy.

Notices may also damage a person's reputation, protected under s 13(b) of the Charter, within both the wider community as well as the family unit by portraying association with that person to be dangerous or unsafe. As the Bill lowers the threshold for the issue of an unlawful association notice²⁵ there is a greater likelihood that a person may be subject to an unfair notice. The NSW Ombudsman Report found that more than three-quarters of the notices issued to children and young people were unlawful.²⁶ The review rights provided to IBAC in the Bill²⁷ will not be sufficient to account for the damage to reputation resulting from the original notice.

Right to be presumed innocent in criminal proceedings

Under section 25 (1) of the Charter a person charged with a criminal offence has the right to be presumed innocent until proven guilty.²⁸ The Bill limits this right by shifting the onus of proof onto a person defending themselves against the offence of unlawful association.²⁹

The Bill's statement of compatibility claims that the imposition of a legal burden on the defence is compatible as the prosecution may find it difficult to prove elements of the matters giving rise to a defence.³⁰ However, given that the offence will apply to children as

²⁰ *Charter of Human Rights and Responsibilities Act 2006*, s 17(2), 23.

²¹ *Charter of Human Rights and Responsibilities Act 2006*, s 13.

²² Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7 (7).

²³ *Charter of Human Rights and Responsibilities Act 2006*, s 13(a).

²⁴ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7 (8).

²⁵ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 7 (1).

²⁶ Ombudsman of NSW *The Consorting Law: Report on the operation of Part 3A Division 7 of the Crimes Act 1900*, 39.

²⁷ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 19.

²⁸ *Charter of Human Rights and Responsibilities Act 2006*, s 25(1).

²⁹ Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018, s 3, 5.

³⁰ Parliament of Victoria *Legislative Assembly Daily Hansard*, Wednesday 25 July 2018.

young as 14 and the importance of the presumption of innocence the burden of proof should still lie with the prosecution.

Additionally, this Bill creates a novel attack on the presumption of innocence, in that the Bill itself pre-empts guilt of a person by association with a person who has been convicted of an offence. The criminal proceedings are only instigated after the right to presumption of innocence has been violated.

Right to a fair hearing

We are deeply concerned that the abolition of *de novo* appeals to the County Court will unjustifiably limit the right to a fair hearing.³¹

We believe that the changes in the Bill will not create a more expedient justice system as is claimed in the Bill's statement of compatibility.³² This is because there is likely to be an increase in adjournments and delays, an increase in VLA fees due to the intensive preparation required for summary matters and a significant increase in the demand on resources at the Magistrates Court.

For these reasons, the limits on the right are not justified. It is our view that there are less restrictive alternatives which could be adopted to improve the operation of criminal appeals in Victoria.

Right to protection of cultural rights

We are concerned that the Bill will have a significant impact on the rights of Victorians to enjoy their culture. Under section 19(1) of the Charter, all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practice his or her religion, or to use his or her language.³³

The Bill limits the right to protection of cultural rights by restricting a person's ability to enjoy their culture by communicating with persons with the same cultural, religious, racial or linguistic background. It may also undermine a person's efforts to preserve their culture through engaging in cultural activities with a person named in an unlawful association notice.

Under section 19(2) of the Charter, aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community to enjoy their identity and culture, maintain and use their language, maintain their kinship ties, and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.³⁴

The Bill recognises that Aboriginal and Torres Strait Islander people are 'vulnerable persons' under the unlawful association scheme. However, the Bill does not contain

³¹ *Charter of Human Rights and Responsibilities Act 2006*, s 24(1).

³² Parliament of Victoria *Legislative Assembly Daily Hansard*, Wednesday 25 July 2018.

³³ *Charter of Human Rights and Responsibilities Act 2006*, s 19(1).

³⁴ *Charter of Human Rights and Responsibilities Act 2006*, s 19(2).

sufficient safeguards to protect them from the disproportionate impact of the scheme. This is particularly concerning in light of the statistics that show that Aboriginal and Torres Strait Islander people are over-represented in the criminal justice system. These impacts are also relevant to the right to equality and equal protection before the law without discrimination under section 8(2) and 8(3) of the Charter.

Although the Bill expands the definition of ‘relative’ to include a person who under Aboriginal or Torres Strait Islander tradition or social practice is the person’s relative, this does not go far enough to protect their cultural rights to engage in broader family or cultural practices. The NSW Ombudsman Report observed that the practice of issuing notices under the legislation was problematic and recommended procedures and training to police (recommendation 15).³⁵ This was particularly relevant to counter uncertainty in the definition of ‘family member’, which could lead to police inappropriately issuing warnings regarding consorting to members of Aboriginal communities.

³⁵ Ombudsman of NSW *The Consorting Law: Report on the operation of Part 3A Division 7 of the Crimes Act 1900*.