

Position: the new offence of engaging in grossly offensive public conduct

We oppose the creation of the new offence of engaging in grossly offensive public conduct set out in the *Crimes Legislation Amendment Bill 2022* which was introduced into Parliament on 22 June 2022. We are concerned by the broad ambit of the proposed offence which could disproportionately impact vulnerable community members and carries significant penalties (5 years maximum imprisonment).

We understand that the proposed offence is being considered in response to Richard Pusey's conduct in the aftermath of the Eastern Freeway tragedy in March 2020. We recognise the horrific nature of this incident and the public concern this incident generated. However, the proposed legislation designed to respond to a specific incident, may have far-reaching consequences for communities that are marginalised and already overrepresented in the criminal justice system.

We also highlight the need for caution in expanding public decency offences before the government has had an opportunity to consider and address key recommendations of the Inquiry into Victoria's Criminal Justice System (the **Criminal Justice Inquiry**). This includes recommendations for the review of offences linked to underlying forms of disadvantage, including public decency type offences, and the strengthening of independent police oversight mechanisms.

Impact on vulnerable groups

We are concerned that the proposed offence could capture a broad spectrum of conduct and have a disproportionate impact on people who are vulnerable or who are already overrepresented in the criminal justice system. Many people that Community Legal Centre's assist experience forms of psychosocial disability. We are deeply concerned that people living with mental illness will be criminalised under the proposed offence. Given the broad and subjective nature of the proposed offence, it could capture people experiencing a psychotic episode or psychological distress whose conduct may be perceived by members of the public as 'grossly offensive'. This shifts focus from a public health response to a criminal response.

We are concerned that the proposed offence affords police a wide discretion in terms of assessing public propriety and decency and could result in discriminatory application of the proposed law to groups that experience systemic racism and over-policing. This was a key issue raised in relation to the public drunkenness offence which the Victorian Government committed to repealing. The Expert Reference Group found that the criminalisation of public drunkenness discriminates against vulnerable people, and in particular Aboriginal and/or Torres Strait Islander people, Sudanese and South Sudanese communities, people experiencing homelessness, people with substance abuse and people experiencing mental ill-health.¹ While we appreciate that these laws are framed differently,

¹ Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney General, August 2020, p.1.

we consider that similar risks arise given the broad and subjective nature of the proposed law and the focus on public propriety.

We highlight generally that harsher criminal laws made in response to a specific incident have led to profound unintended consequences in other contexts. For example, changes made to the *Bail Act 1977* (Vic) in 2018 in the context of a horrific tragedy and heightened public concern, have had significant unintended consequences for vulnerable women, particularly Aboriginal and Torres Strait Islander women.² The high rates of women in prison on remand³ can be attributed to such legislative changes. The Victorian Law Reform Commission's *Review of the Bail Act* in 2007 considered that '[g]ood policy should be informed by the broad range of cases that come before our justice system, not one particular case or type of case'.⁴

Insufficient safeguards

We understand that the proposed legislation is intended to mitigate this risk through the requirement for consent from the Director of Public Prosecutions (DPP) for prosecution to proceed and the inclusion of a fault element. We do not consider that these mechanisms are sufficient to safeguard against the potentially disproportionate impact the proposed law may have on marginalised members of the community.

In practice, police are responsible for laying charges and it is unlikely that the DPP would be involved at the time that the police make the decision to charge an accused person. Similarly, the fault element does not avoid a person being initially charged with an offence which could lead to lengthy involvement in the criminal legal system.

Contrary to recommendations of the Criminal Justice Inquiry

The proposed law is inconsistent with the recommendations of the Parliament's Legal and Social Issues Committee's Criminal Justice Inquiry. The disproportionate impact of public-behaviour type offences on people experiencing disadvantage, mental ill-health and poverty was recognised as part of this Inquiry. A number of stakeholders to the Criminal Justice Inquiry raised issues relating to the classification of criminal offence provisions and the need to reclassify certain indictable offences that are demonstrated to be linked to disadvantage and poverty. This included offences which fall within a similar category to the proposed public decency offence, such as offences related to public nuisance, unlawful assembly, public drunkenness, begging, offensive language, and alcohol and drug use.⁵ The Criminal Justice Inquiry recognised the importance of reviewing and reclassifying offences as summary offences which may be linked to income inequality, mental ill-health or

² Legislative Council's Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system*, March 2022, p.453.

³ 55 per cent of women in prison were on remand (as at March 2022). See Corrections, Prisons and Parole, Monthly time series prisoner and offender data, available at <https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data> (accessed May 2022).

⁴ Victorian Law Reform Commission, *Review of the Bail Act – Final Report*, October 2007, p.21.

⁵ Legislative Council's Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system*, March 2022, p.478.

substance use, in order to focus on diversion and rehabilitation rather than further criminalisation.⁶

The committee recommended that the Victorian Government undertake a review of relevant legislation, including the *Summary Offences Act 1966* (Vic), in relation to offences often linked to underlying forms of disadvantage. It was recommended that a review should assess which indictable offences could appropriately be reclassified as summary offences, and whether any summary offences are appropriate for decriminalisation.⁷ The creation of a new public decency indictable offence is not aligned with this recommendation and should not be introduced before a review of existing offences has occurred.

This underscores the importance of ensuring that there are stronger mechanisms for police oversight before expanding police powers to assess public propriety and decency. We do not support the introduction of any new public decency offences while the systemic review into police oversight is underway and prior to the establishment of an effective and independent oversight mechanism for alleged police misconduct which was recommended as part of the Criminal Justice Inquiry.⁸

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27 July 2022

⁶ Ibid, p.479.

⁷ Ibid, p.480.

⁸ Legislative Council's Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system*, March 2022, p.256.