

**SUBMISSION ON THE PROPOSAL FOR A PEACEFUL  
ASSEMBLIES BILL**

**PREPARED FOR THE DEPARTMENT OF JUSTICE**

**CATHOLIC COMMISSION FOR JUSTICE DEVELOPMENT  
AND PEACE (MELBOURNE ARCHDIOCESE)**

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## 1. INTRODUCTION

1.1 The Catholic Commission for Justice Development and Peace, Melbourne (CCJDP) aims to help educate and give leadership to the Catholic and wider community in the gospel message of justice and in the social teachings of the church in the areas of public policy. The CCJDP charter requires that it work for justice in local and national structures, public and private. It seeks to achieve these ends through research and analysis working with parish networks, public forums, in schools and the media. The Commission's role is to prepare submissions and make representations to government, politicians, public enquiries and others. It monitors development and implementations of social policy as it affects social justice and performs an advocacy role on a variety of social justice issues. The Archbishop and Bishops of the archdiocese of Melbourne appoint the members of the Commission.

1.2 The CCJDP welcomes the opportunity provided by the Department of Justice to comment on its Exposure Draft Bill and Community Discussion Paper on Peaceful Assemblies. It welcomes too, the Parliamentary Scrutiny of Bills and Regulations Committee's earlier recognition of the importance of human rights (in its review of the *Unlawful Assemblies and Procession's Act 1958*), which has informed the development of the discussion paper and the Bill. In particular, the Commission applauds the citation of Article 21 of the International Covenant on Civil and Political Rights (ICCPR), which Australia has ratified, as relevant and states:

*The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protections and freedoms of others.*

## 2. CONTEXT

2.1 The CCJDP welcomes the repeal of the existing Act. It also welcomes the proposed legislative recognition of a right to peaceful protest.

2.2 Despite ratification of the ICCPR, civil rights in Australia are not as well protected as in many other countries. There is no Bill of Rights as in the US Constitution, the South African and Canadian Charters and New Zealand's Statutory Bill of Rights. Australia has witnessed the denial of citizens' rights by States, notably street marches were banned under the Bjelke-Petersen government in 1977-8 and 1982. The potential to restrict the right to assemble occurs in a wider context of wide ranging and at times intrusive powers of the Executive. The Commonwealth Senate Legal and Constitutional References Committee, noted in 1995 that:

*The various legal rules for the arrest and detention of individuals are not subject to any explicit limit on state power. The State and Commonwealth*

*parliaments both have wide powers to violate individual civil rights; their only real limitation is that they are democratically elected.*<sup>1</sup>

2.2 In a sense the right of peaceful assembly, set out in the ICCPR above, is a 'negative' right, as it is about limiting what government can do. It is intended to safeguard the individual against the abuse of power.

2.3 The Bill must be considered in the social context of rising opposition to aspects of Globalization – or more accurately *economic liberalization*. In the past year, Melbourne has witnessed increasing public protest against symbols or organizations representing Globalisation or alleged poor corporate behaviour: S11, M1 protests and the weekly Friday night protest outside Nike's Store at Bourke St Mall. In this sense, there is a social debate occurring on a range of issues of public concern. Public assembly is one of the main forms of raising awareness.

2.4 Such debate, by means of public assembly, is the essence of democratic society. It is worth bearing in mind that the anti-globalisation protests are part of a global social movement. Such a movement may be viewed in the same light as earlier social struggles – for women's rights, indigenous rights, labour rights etc, which were considered dangerous to the social order at the time but have become an accepted part of our practice and respect for human rights today.

### **3. CONCERNS**

It is in the light of these observations that the CCJDP raises some specific concerns about the draft Bill:

#### **3.1 Right to Assemble:**

The draft Bill acknowledges the right to assemble peacefully (Section 5. (1)) but qualifies this with the proviso: (2) " ...subject to such restrictions as are necessary and reasonable in a democratic society in the interests of – (c) the protection of the rights and freedoms of other persons; [including]:

3. (a) the rights of members of the public to enjoy the natural environment; and
- (b) The rights of person to carry on business and other lawful activities."

The discussion paper explains the 'central purpose' of these latter clauses of the Bill [3. (a) & (b)] is "to achieve an appropriate balance between these two equally valid rights."<sup>2</sup>

3.2 Mr Justice Mason observed in a case on the freedom of communication (it is reasonable to expect that the High Court would recognise an implied right of assembly as being related to the freedom of communication) that some restrictions on this freedom may be permitted but "must be no more than is reasonably necessary to achieve the protection of the competing public interest". He noted:

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<sup>1</sup> Commonwealth Senate Legal and Constitutional References Committee, Discussion Paper, May 1995, pp.58-9.

<sup>2</sup> Discussion Paper, viii.

*Generally speaking, it will be extremely difficult to justify restrictions imposed on the freedom of communication which operates by reference to the character of the ideas of the information. But, even in these cases, it will be necessary to weigh the competing public interests, though ordinarily paramount weight would be given to the public interest in freedom of communication.*<sup>3</sup>

Similarly, restrictions on the right to assemble should be viewed carefully in considering the competing public interests and rights. **An explicit acknowledgement of Article 21 of the ICCPR in the Bill would serve to reinforce this point and would be an important reference and educative tool regarding the human right which the Bill aims to promote and bring into domestic application.**

3.4 A feature of Victoria's democracy is community tolerance and respect for public debate which implicitly recognises that some 'give and take' between citizens is allowed within society. For instance, it is recognised that freedoms of some citizens to freely moved might be temporarily inconvenienced by other citizens exercising their rights of assembly: e.g. traffic may be blocked or redirected during a march. Similarly protestors' rights to assemble outside, say, a sports shoe store, may be restrained by laws to the extent that they don't come within a certain distance of the entrance and so don't interfere with shoppers seeking to enter and leave the store.

3.5 The police have a positive role to play and can do so successfully under the existing system. The police have the tools to manage by means of the existing, adequate by-laws and traffic regulations and criminal law (covering riot, rout, causing injury, damaging property, offensive behaviour etc). Moreover they can manage such situations through a cooperative approach of the City of Melbourne Planning Team made up of Victoria Police, VicRoads and others.

3.6 The police in exercising their discretion in managing assemblies preserve public tranquility. As O'Neill and Handley have observed:  
" Careful training and wise guidance are crucial, for police tactics in handling a disturbance can often determine whether the crowd disperses peacefully or whether the disturbances escalates into a riot."<sup>4</sup>

#### **4. Specific Proposals for Amendment of the Bill**

It is right and proper that the proposed legislative acknowledgment of the right of peaceful assembly should be so couched as to indicate the way in which the exercise of that right is to be balanced against the exercise of other rights. Clause 5(2) proposes that the right should be subject only to such restrictions as are necessary "and reasonable" in a democratic society. The addition of those words serves to qualify and to limit the "restrictions" not only to those which "are necessary" but also are additionally "reasonable". Obviously one of the principal

<sup>3</sup> Australian Capital television Pty Ltd v Commonwealth (the Political Broadcasts Case), (1992) 177 CLR 106.

<sup>4</sup> Nick O'Neil and Robin Handley, Retreat from Injustice: Human Rights in Australian Law, Armadale, 1994, p.181.

reasons underlying the proposed enactment of Clause 5 is that of public education. We suggest that the additional qualification of “reasonableness” in addition to “necessity” would be made more apparent if there were added, in such a way as to relate to both Sub-Clauses (a) and (b) of Clause 5(3), the words “without unreasonable interference”. That would result in Clause 5 being in the following terms:

**“5. *Right to Assemble Peacefully***

- (1) *A person has the right to assemble peacefully with others in a public place.*
- (2) *The right to assembly peacefully with others in a public place is only subject to such restrictions as are necessary and reasonable in a democratic society in the interests of—*
  - (a) *public safety; and*
  - (b) *public order; and*
  - (c) *the protection of the rights and freedoms of other persons.*
- (3) *In sub-s.(2)(c), a reference to the rights of other persons includes—*
  - (a) *the rights of members of the public to enjoy the natural environment; and*
  - (b) *the rights of persons to carry on business and other lawful activities*

*without unreasonable interference.”*

**4.2 Giving of Order to Disperse**

Clause 6 would confer a power to give a direction to disperse an assembly to the Chief Commissioner of Police, the Chief Magistrate, at the request of the Chief Commissioner of Police, a delegate of the Chief Commissioner of Police, or to a Magistrate delegated by the Chief Magistrate. The submission will deal later and separately with the issue of delegation. This paragraph of the submission is concerned only with the proposal to confer the power of giving the direction upon the Chief Commissioner.

Obviously the exercise of the power to give a direction to disperse does not of itself render any person guilty of an offence or render any person liable to be dealt with in any way, whether physically or otherwise. What the giving of the direction does do is to create a factual situation which may become an essential foundation, or setting, for the commission of an offence by any person who was a member of the assembly and who failed, without reasonable excuse, to disperse within fifteen minutes of the direction being given. It follows that the power to give a direction to disperse does not of itself confer any additional power on the police generally, and at most might confer a power upon a particular delegate of the rank of senior sergeant or above.

In other words, Clause 6 gives a power to give a direction to disperse the exercise of which may render a person who fails to comply guilty of an offence. Normally it is Parliament which prescribes the circumstances, conditions or events which may constitute a criminal offence. Clearly Parliament cannot exercise that function in all circumstances, and particularly not in the case of an assembly which is, or is likely to become, a riotous assembly. In fact, the giving of the direction has the effect of turning what would otherwise be a peaceful assembly into a riotous assembly for the purposes of the continued exercise of the right to peacefully assemble.

We have no objection to the proposed conferral of the relevant power upon the Chief Magistrate, save as indicated in the next paragraph. However, in our submission, the power to give such a direction should not be conferred upon the Chief Commissioner of Police. It is important to not only acknowledge, but to implement, in so far as is possible, the doctrine of the separation of powers. The Chief Commissioner of Police is a member of the executive, whilst the Chief Magistrate is a member of the judiciary. Where it is impracticable to expect the usual legislating arm of a democracy, Parliament, to declare certain conduct to potentially become unlawful, it is our submission that the delegation by Parliament of that power should not proceed beyond a delegation of the power to the judiciary. There should be no further delegation, or other delegation, to a member of the executive, whether the Chief Commissioner of Police or otherwise.

**4.3** The proposed Clause 6(2)(b) would give to the Chief Magistrate a power to give a direction to disperse to an assembly if:

- (1) The assembly is a riotous assembly; or
- (2) The Chief Magistrate reasonably believes the assembly may become a riotous assembly.

Clearly, the exercise of the power in the first-mentioned circumstance involves the making of a judgment by the Chief Magistrate that the assembly is indeed a riotous assembly; that is, by definition, “an assembly, whether stationary or moving, which is being carried on in a manner involving unlawful physical violence to persons or unlawful damage to property”. Equally, the second situation requires the making of a judgment by the Chief Magistrate; namely a judgment that the Chief Magistrate reasonably believes the assembly “may” become a riotous assembly. In our submission, the word “may” provides an inappropriate test. The discussion paper which was issued last year by the bipartisan Parliamentary Scrutiny of Acts and Regulations Committee used the expression “is threatening to” rather than the expression “may”. Alternatively, the expression “may become” might be replaced by the expression “probably will become”, thereby making the test which is to be applied by the Chief Magistrate one involving ‘probability’ rather than possibility..

As to that submission, we note that should the Chief Magistrate mistakenly conclude that a particular assembly is not threatening to become (or probably will not become a riotous assembly), he might readily cure that mistake upon the assembly becoming riotous, and there upon give the necessary and appropriate direction to disperse.

#### 4.4 Delegation of Power to Give Direction to Disperse

Issues around the conferral and exercise of a power to delegate must be considered in the context that the giving of a direction to disperse is likely to be a rare event, that the police already have wide powers to arrest a person involved in "unlawful physical violence to persons or unlawful damage to property, the conduct which renders an assembly 'riotous' and that occasions for the exercise of a power of delegation would be even more rare than giving a direction to disperse.

Clause 6(3) proposes that the Chief Commissioner of Police may delegate his or her powers and functions under that section to a member to the police force "of the rank of senior sergeant or above or a class of members of the police force of that rank or above". If our primary submission, that the power to give a direction should not be conferred upon the Chief Commissioner, is accepted, then clearly Clause 6(3) would disappear. However, if that submission is not accepted, we suggest that Clause 6(3) must be recast so that the power can be delegated only to a specified member of the police force of, or above, the rank of senior sergeant, and that it can be delegated only in respect of a particular assembly. As drafted, Clause 6(3) would authorise the Chief Commissioner of Police, if he or she thought it proper to do so, to, immediately upon the Bill becoming law, give a general blanket delegation to all members of the police force who for the time being occupied or held the rank of senior sergeant or above. If such a blanket delegation were given, or indeed any generalised delegation were given, the judgment as to whether or not an assembly was a riotous assembly, or the judgment as to whether the assembly was likely to become a riotous assembly, would be given by Parliament not merely to a member of the judiciary, nor merely to a senior member of the executive, but to any one of a large number of members of the police force.

If it is intended that the power to delegate should be exercised by the Chief Commissioner only on a particular occasion or in respect of a particular assembly, then Clause 6(3) requires appropriate amendment. Our basic objection to the concept of delegation is this: in our submission, the person who is empowered to give the direction to disperse must make a personal judgement as to whether or not such a direction should be given. Such a judgment can only be made by a person at the scene who has an ability to personally perceive and assess the situation. The exercise of a power to delegate would be dependent upon the necessarily-incomplete description by some other person of what is happening at the scene.

**4.5** Clause 6(4) gives the Chief Magistrate power to delegate his or her powers and functions to "any" magistrate. The observations made in the preceding paragraph about the importance of the person who is to make the judgment being at the scene and having personal knowledge is repeated, as is the objection to the giving of some blanket authority. In our submission, the power of the Chief Magistrate to delegate should be confined to a power to delegate to a specified magistrate in respect of a specified particular occasion or assembly. The existing dispersal of Magistrates throughout Victoria and the likelihood of advance knowledge of a possible formation of a riotous assembly

should assuage any concerns that prompt action be available. In so far as the power to delegate is one which, it is proposed, could only be made “by instrument”, it may be desirable for the Bill to make it clear that notification of such a delegation by instrument can be conveyed to the delegate by fax or electronically.

#### **4.6 Offence to Fail to Disperse**

We note that Clause 8 effectively creates an offence of failing, without reasonable excuse, to disperse within fifteen minutes of a direction to disperse being given. In our submission, a person should not be at risk of becoming liable to committing that offence unwittingly as a consequence of being unaware that the direction to disperse had been given. A person in a large assembly, such as occurred in the vicinity of the casino last year, may not be in a position to have heard the giving of the direction. A person at the western end of the casino would certainly not hear any such direction given at the eastern end, and, from a practical point of view, it would seem sensible that if a direction to disperse were to be given in such a situation, it should be repeated at various points. We recommend that consideration be given to an appropriate amendment to Clause 8 to make it clear that a person can become guilty of an offence of failing to disperse only if the person knows that the direction to disperse has been given. That might be achieved by inserting the word “knowingly” before the word “fail”, or by adding a sub-clause stating in terms that “reasonable excuse” includes a lack of knowledge of the giving of 'the order' to disperse.

#### **5. Conclusion**

We request that the various submissions made herein be implemented. We would be happy to appoint one or two representatives of the Commission to attend any meeting which might be convened for the purpose of furthering public discussion of the issues raised by, and arising from, the proposed Bill. As indicated in paragraph 2.1 above, we support both the proposal to repeal the existing *Unlawful Assemblies and Processions Act* and the proposal to legislatively confirm the right to assemble peacefully.