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Criminalising Grossly Offensive Public Conduct

The Crimes Legislation Amendment Bill 2022 (Vic)

1. Liberty Victoria welcomes the opportunity to provide this comment on the Crimes Legislation Amendment Bill 2022 (Vic) (**the Bill**).

2. Liberty Victoria is committed to the defence and advancement of civil liberties and human rights. We seek to promote compliance with the rights recognised by international law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). We are a frequent contributor to federal and state committees of inquiry.

3. Liberty Victoria is opposed to the proposed new offence of engaging in grossly offensive conduct in public.[1] It should not become law. At the outset, Liberty Victoria refers to and adopts the article by Ms Tania Wolff, President of the Law Institute of Victoria, "'Pusey law' could result in people being jailed unfairly", published in the Age on 27 June 2022 and available here.

4. The Bill seeks to respond to particular conduct by Mr Richard Pusey that understandably outraged the community, and in particular his recording of dying police officers. It should be remembered that Mr Pusey was sentenced for his conduct during that incident to 10 months' imprisonment (with three months' imprisonment imposed for the common law offence of committing an act that outrages public decency). The reasons for sentence of his Honour Judge Wraight are available here.

5. There is an important legal maxim that 'hard cases make bad law'; the law should be slow to evolve based on outlier or unique cases, including those that have outraged standards of public morality. This is even more so in circumstances where the Government has acknowledged that the proposed new charge may never be used.

6. The proposed new offence does not define particular conduct or harm which is sought to be prohibited. The offence requires that the offender engage "in conduct that grossly offends community standards of acceptable conduct". The offence is punishable by up to 5 years' imprisonment.

7. Because the prohibited grossly offensive conduct is (deliberately) left undefined and ambiguous, the proposed offence will not act as a deterrent. The gravamen of the offence is a matter of moral opinion where reasonable minds might differ as to whether the threshold of "gross offence" has been met in a particular case.

8. The Bill creates an offence that can, and probably will, be expanded over time, and where exceptions and defences contained in the Bill could be easily whittled away (for example the indication in the Bill that the offence does not extend to language that is "profane, indecent or obscene" or mere intoxication).

9. In Australia there is already a troubling history of police taking action against forms of expression that some have regarded as highly obscene, such as the removal of Bill Henson's artworks from public display and the prosecution of the artist Paul Yore.

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[1] Crimes Legislation Amendment Bill 2022 (Vic), cl 4: new proposed s 195K *Crimes Act 1958* (Vic).

10. It is of course accepted the proposed offence has a defence for artistic expression engaged in "reasonably and in good faith", but again reasonable minds might well differ as to when that defence is made out. Consider, for example, the significant public controversy over the 'Piss Christ' work (considered below), which some may well regard as grossly offensive and not protected by a 'reasonable' and 'good faith' artistic expression defence.

11. In short, there is no demonstrated need for this new offence. Mr Pusey was dealt with by the law as it stands and was successfully prosecuted and imprisoned for his conduct. We should be slow to expand the power of the executive to regulate morality in relation to what some may regard as grossly offensive conduct.

12. The purpose of the criminal law is to particularise and prohibit particular conduct that, as a society, we refuse to tolerate because it violates the basic rights of life, bodily integrity and/or property. There are, of course, some hate speech offences under racial and religious vilification laws, but generally the law should be very slow to expand to encompass other forms of offensive conduct and speech. Prohibition and censorship should be used sparingly. Consistently with this approach, as an organisation we have called for the removal of the categories of "offend" and "insult" from s 18C of the *Racial Discrimination Act 1975* (Cth) because in our view it sets the bar too low for the commencement of legal proceedings and possible sanction.

Scope of the Proposed Offence

13. The proposed indictable offence of engaging in grossly offensive conduct in public is intended to replace the common law offence of outraging public decency.

14. The impugned conduct is any behaviour that "grossly offends community standards of acceptable conduct", in circumstances where:

    a. That conduct is engaged in at a public place, or

    b. Is seen or heard by a person in a public place.

15. The accused person must know or be reckless as to whether they are in a public place or whether their conduct *is likely* to be seen or heard by a person in a public place. This does not include being seen or heard through electronic communication.

16. The fault element of engaging in grossly offensive conduct is that the accused must have known that their conduct would likely grossly offend community standards of acceptable conduct; or, if they did not know, then a reasonable person would have known. This is highly problematic.

An offence punishable by a significant period imprisonment should require a purely *subjective* test as to whether it was known the conduct was grossly offensive as opposed to being assessed against the standard of what *should* have been known.

17. The Bill makes it clear that conduct does not grossly offend community standards just because the person uses profane, indecent or obscene language; or because the person is intoxicated. That is an important protection, but one that may very well be removed by subsequent amendment. Further, it is still likely that police will recommend this charge be issued against people from vulnerable communities who may be significantly intoxicated and/or have serious mental health issues in circumstances whether their conduct is alleged to have been more than merely "profane, indecent or obscene language" and/or more than mere intoxication.

18. It is not necessary to prove that any person was actually offended.

19. There are a number of defences available. It is a defence if the offensive conduct was engaged in reasonably and in good faith—

    a. For a performance, exhibition or distribution of an artistic work; or

    b. In the course of any statement or publication made, or discussion or debate held, or any other conduct engaged in for a genuine political, academic, educational, artistic, religious, cultural or scientific purpose, or a purpose that is in the public interest, or in making or publishing a fair and accurate report of any event or matter of public interest.

20. It should be made clear those defences must be disproven by the prosecution beyond reasonable doubt once raised on the evidence, as it the case with other defences under s 322I of the *Crimes Act 1958* (Vic). To do otherwise could see an accused person raise a reasonable doubt as to whether a defence is made out but still be found guilty of the offence because they have not established the given defence on the balance of probabilities.

21. As noted above, the proposed offence carries a maximum penalty of 5 years' imprisonment. It would be triable summarily. A prosecution requires the consent of the Director of Public Prosecutions. That consent is an important safeguard, but it is insufficient.

Purpose of the Proposed Offence

22. The second reading speech of Ms Natalie Hutchins MP, Minister for Education, indicates that the proposed offence is intended to be a "fit for purpose" response to the behaviour of Mr Pusey. Minister Hutchins describes the behaviour of Richard Pusey as having "caused extreme

distress to the families of the victims and their friends and colleagues. It also shocked and appalled the wider Victorian community". She further explains:

> In a modern society, we expect that public spaces are maintained as places of decency and dignity that all members of our society can safely enjoy free from intimidation and distress. This reform is not about punishing low level offensive behaviour that might simply be annoying or mildly offensive to some people, and not concern others at all. It is about protecting more fundamental values and ensuring that the criminal law can appropriately respond when these fundamental values are breached and significant social harm is caused.[2]

23. The purpose of the proposed offence is described as follows: "to ensure that the public is protected from the harm and distress that result from exposure to grossly offensive public behaviour".[3]

24. The Statement of Compatibility to the Bill also acknowledges that it burdens freedom of expression, but asserts that the limitation is justified:

> …the offence seeks to balance the right of a person to hold and express an opinion with the countervailing duty to respect the rights and reputation of other persons as well as protecting public order and public morality. Any limitation on the right to freedom of expression is therefore reasonable and justified in the circumstances.[4]

25. The Statement of Compatibility addresses the broad manner in which the provision has been drafted:

> To be less restrictive, the offence could be cast less broadly—for example, by specifying the exact kinds of behaviour envisaged to be captured, or by stating what community standards of acceptable conduct are. However, this would mean the offence would not be sufficiently flexible to capture unforeseen types of conduct. Additionally, if the Bill articulated specific community standards, the offence would not be adaptable to changing societal attitudes and values. This would mean that the offence could continue to capture conduct that the broader community has come to find tolerable or less offensive—effectively becoming more restrictive over time.[5]

26. Accordingly, the offence is intended to protect public standards of decency by punishing and potentially imprisoning people whose behaviour grossly violates social norms. The "harm" that the law intends to address is other people's feelings of distress.

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2 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 June 2022, 2641 (Minister Hutchins).
3 Ibid 2639.
4 Ibid 2637.
5 Ibid 2637.

Assessing Community Standards

27. In the second reading speech, the Minister asserted that the standard of grossly offensive conduct is objective. She said:

> It is a question of fact whether the conduct is grossly offensive to community standards. The concept of community standards is an open and objective one. Recognising that community standards change and evolve over time, and that offensive conduct must be considered in its context, the Bill does not include any specific standards or factors. The courts have applied a reasonable person test when interpreting the meaning of community standards and have looked to contemporary standards of a multicultural, partly secular and largely tolerant, if not permissive, society (*Pell v Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391).[6]

28. However, the reality is that the concept of community standards is highly amorphous. The Victorian community comprises many thousands of communities with diverse ethnicity, language, culture, and history. The Victorian community is made up of many individuals and many groups with differing and conflicting values. Identifying "the community" involves an act of interpretation which may inevitably give greater weight to some voices over others.

29. The Minister asserts in the second reading speech that the Courts are well placed to assess what amount to community standards. To demonstrate her point, the Minister refers to the case of *Pell v Council of the Trustees of the National Gallery of Victoria*.[7] In that case, the issue before the Supreme Court of Victoria was whether it should grant injunctive relief to prevent the Defendant from hanging Andres Serrano's photograph 'Piss Christ' in the National Gallery of Victoria. The grounds brought by the Plaintiff were: (a) to hang this painting would offend s 17(1)(b) of the *Summary Offences Act 1966* (Vic) insofar as it would amount to the exhibiting or display of an indecent or obscene figure or representation; and (b) it would be in breach of the common law misdemeanour of publishing blasphemous libel.

30. In its short reasons for judgment the Supreme Court (Harper J) observed that the Court did not have the role of art critic, and to attempt such a function "would take the court into places in which it has no business to be".[8] In acknowledging the limits of what the Court can properly be asked to rule upon, Harper J quoted Landau J, the judge who presided over the trial of Adolf Eichmann in Israel, "[t]he courts, he said, speak with an authority whose very weight depends

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6 Ibid 2642.

7 [1998] 2 VR 391.

8 Ibid 392.

upon its limitations".[9] Further, as Sir Owen Dixon observed, "[t]here is no other safeguard to judicial decisions in great conflicts than a strict and complete legalism".[10]

31. Whilst the Minister quotes from the following passage to support her argument that the Courts are capable of deciding upon such matters, in full the passage actually articulates the Court's discomfort with the task at hand:

> The question whether this photograph is indecent or obscene is, given its religious context, and given that the court must have regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society, is not easy. The fact that the indecent or obscene quality of the photograph comes not from the image as such, but from its title and the viewer's knowledge of its background, does not make the task easier.[11]

32. Ultimately the Court refused to grant injunctive relief. At the heart of the judgment was not the Court's decision about whether or not the photograph was in fact obscene or indecent or offended community standards. Rather, it was not safe to decide in advance whether the photograph would contravene the criminal law. Due to the risk of prohibiting conduct that might in fact be lawful, the Court refused to grant the injunction.

33. The Court's discomfort at the task before it in this case should serve as a warning. The Court in effect could not decide if an artwork would contravene the particular offences cited, and was not prepared to decide on the balance of probabilities. At stake was the exhibition of a photograph, and not a person's liberty, and yet the Court was very wary of transgressing the proper bounds of the Court's function.

Deterrence and the Need for Precision

34. The proposed offence requires a determination by the decision-maker of what grossly offends community standards, without any precise definition. In any given case this is likely to be highly contested. As such, it cannot be known in advance with certainty what conduct the offence will capture. It is in fact by design that the offence would "capture unforeseen types of conduct" and would "be adaptable to changing societal attitudes and values".[12] In effect, the Minister concedes that the intended subject matter of the offence remains "unforeseen", therefore unknowable in advance, and subject to change. That is not a proper basis for the drafting of criminal laws.

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9 Ibid.
10 Ibid 393.
11 Ibid 395.15-20.
12 Ibid 2637.

35. Prevention of crime is an important purpose of the criminal law. Specific deterrence is intended to be achieved through the potential imposition of punishment. Further, by imposing punishment, it is expected that others will be generally deterred from engaging in similar conduct.

36. Clear and prospective laws that are knowable in advance are a cornerstone of the rule of law and fundamental to a society that values individual freedom. People should be able to know in advance what conduct is prohibited. Their criminality – and their liberty – should not be contingent upon a standard that can only be known once a fact-finder subjectively discerns whether amorphous community standards have been grossly offended.

37. The charge is likely to be selectively used. Reasonable minds will differ on what constitutes "grossly offensive" conduct, and what constitutes a legitimate defence. The consent of the Director of Public Prosecutions is an important protection but one that can be removed by amendment.

38. The indeterminacy of the proposed offence will likely result in any charges being strongly contested. Paradoxically, this may result in much more attention being given to the allegedly grossly offensive conduct in the public arena. Some alleged offenders may desire that attention in order to amplify their public profiles.

39. For the above reasons, Liberty Victoria is strongly opposed to the Bill. As a community we can both deplore the conduct that has lead to the introduction of the Bill (and which resulted in the punishment of Mr Pusey) and yet resist calls to expand the criminal law. This is especially so in circumstances where the Government has indicated that it may be that the offence is never used. The offence is unnecessary, highly ambiguous, and may well be misused and result in the executive and courts dealing with highly politicised matters which the criminal law is, in general, ill-equipped to deal with.

40. Thank you for the opportunity to make this comment, and please do not hesitate to contact me if I can provide any further information through the Liberty Victoria Office on (03) 9670 6422 or info@libertyvictoria.org.au. Thanks too for the assistance of Ms Isabelle Skaburskis in the preparation of this comment.

Michael Stanton

President, Liberty Victoria