



HUMAN RIGHTS
COMMISSION

Secretary
Standing Committee on Planning,
Public Works and Territory and Municipal Services
ACT Legislative Assembly
GPO Box 1020
ACT Canberra 2600

Dear Ms Derigo

Inquiry into the Crimes (Bill Posting) Amendment Bill 2008

Thank you for the opportunity to comment on the Crimes (Bill Posting) Amendment Bill 2008 (the Bill).

The ACT Human Rights Commission is established under the *Human Rights Commission Act 2005*. The Commission comprises the Human Rights & Discrimination Commissioner, and Children & Young People Commissioner, Health and Disability Services Commissioner.

The Bill

The Bill would amend the *Crimes Act 1900* (ACT) by replacing an existing provision with a strict liability offence relating to the unlawful affixing of paper or placards to public property, and private property without the consent of the occupier/owner. We consider that the Bill raises serious human rights concerns and may be inconsistent with the right to freedom of expression protected under s. 16(2) of the *Human Rights Act 2004* (ACT) ('HR' Act). The offence relating to bill posting on public property is also likely to have a disproportionate impact on young people whose behaviour would be criminalised, and may be inconsistent with the rights of children to special protection under s. 11 of the HR Act (with the right to freedom of expression set out more fully in article 13 of the UN Convention on the Rights of the Child), as well as possibly indirectly discriminating against young people.

These human rights issues are not as problematic in relation to the Bill's creation of a new obligation on event promoters to take reasonably practicable steps to ensure that events are promoted without unlawful bill posting, with an offence where this duty is breached.

Freedom of expression

Section 16(2) of the HR Act provides that:

(2) everyone has the right to freedom of expression. This includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

The offences inserted by the Bill impose a limitation on the right to freedom of expression, as they would prevent both the imparting and receiving of information through notices or posters affixed to public property. Bill posting on public property such as telegraph poles or other structures is a traditional medium of communication of a range of information, including notices of political meetings and protests, as well as details of musical and theatrical performances and other events. There is a strong difference between private and public property protection, and the character of commercial as opposed to other community interests.

The Explanatory Statement to the Bill suggests that:

alternative means of expression for such information are available – and more effective at letting interested parties know about events and venues – such as electronic social networking, SMS phone messaging, internet advertising; all of which can now be accessed by mobile telephone.

However, these methods of communication require access to technology (by both the sender and intended recipient of information) which is not necessarily available to people who are the most marginalised and disadvantaged. Bill posting, by contrast, is a low cost, low technology medium accessible to use and view by those with few resources and enabling communication with a broad public audience.

In the Canadian case of *Re Forget* McFadyen J. observed that:

[A]fter the invention of modern printing technology, posters have come to be generally used as an effective, inexpensive means of communication. Posters have been used by governments to publish notices dealing with health, immigration, voters' lists, recruitment of armies, etc. Posters have been used by political parties, private and charitable organizations and by individuals. They convey messages, give notice of meetings and fairs.... [I]n societies where the government tends to repress opposition ideas, posters are the only means of communicating opposition ideas to a large number of people.¹

Proportionality of the limitation

Under s.28 of the HR Act, human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. This determination of the 'proportionality' of limitations requires an assessment of the nature of the right affected, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve this purpose.

The amendments in the Bill would prohibit all 'unlawful' bill posting on public property in the Territory. The Explanatory Statement to the Bill suggests that despite the wording of the offence, this is not a 'blanket ban,' because:

¹ (1990) 74 D.L.R. (4th) 547, at pp. 557-58.

the government has provided locations, such as public notice boards and information pillars, where advertisements, posters and placards can be affixed without fear of prosecution.

Where a clear licence is given by the government in relation to such spaces, bill posting would presumably not be 'unlawful', and would not amount to an offence under the Bill. However, these sites where posting is permitted are not specifically protected, or even referred to in the Bill. Also these sites could be changed or permission revoked by the government at any time without the public necessarily knowing. The Explanatory Statement provides no indication of the location, extent or adequacy of these notice boards and information pillars as a vehicle for public communication. Accordingly, in assessing the limitation imposed by the Bill, it is necessary to consider that it could potentially impose a significant or indeed absolute prohibition on bill posting in public places. At a minimum, the location of these venues should be notified, such as by regulations.

In *Ramsden v. Peterborough (City)* the Canadian Supreme Court considered a similar by-law which prohibited all bill posting on public property.² The issue was whether the absolute ban on such bill posting infringed the Charter guarantee of freedom of expression, and if so, whether that infringement was a proportionate limitation. The Court found that it did infringe freedom of expression, and that it was not a proportionate limitation. It was agreed that the bylaw served an important objective and that bill posting on utility poles could constitute a hazard for traffic and for utility workers. Also abandoned posters or those left for an unreasonable lengths of time may constitute visual and aesthetic blight, and contribute to litter. The Court accepted that the law did not specifically target a particular type of expression and was aimed solely at ensuring safety and reducing visual pollution. However, the Court considered that the total ban on bill posting was not the least restrictive method available for achieving this aim. Other options canvassed included specifying or regulating the location, size of posters, the length of time that a poster might remain in any location, the type of substance used to affix posters, and requiring that the posters be removed after a certain specified time. Iacobucci J concluded that:

Moreover, the benefits of the by-law are limited while the abrogation of the freedom is total, thus proportionality between the effects and the objective has not been achieved. While the legislative goals are important, they do not warrant the complete denial of access to a historically and politically significant form of expression. I would agree with the majority of the Ontario Court of Appeal, at p. 294, on this point that "[a]s between a total restriction of this important right and some litter, surely some litter must be tolerated".

In our view these considerations apply equally to the Bill. Alternatives to a blanket prohibition should be considered, including specific legislative recognition (even delegated) of protected areas for public bill posting. The fact that the offence is proposed to be one of strict liability simply increases our concerns, as offences will be dealt with by penalty notice, and there will be little opportunity for judicial review of the operation of the prohibition in each case. The Bill would be more likely to be compatible if it only targeted corporations who were benefitting from free advertising at the expense of building owners, who are

² [1993] 2 S.C.R. 1084.

responsible for repairing damages and cleaning walls, especially in the case of heritage buildings. Freedom of expression is more readily protected for political, educational, intellectual or artistic issues, as opposed to commercial interests such as tobacco advertising.³

We note that the Memorandum of Compatibility for the Bill suggests that concerns regarding the consistency of the offences with the right to freedom of expression can be rectified through an exercise of the interpretive power in s.30 of the HR Act. It is argued that:

the word 'unlawfully' in section 120(2) can, and indeed must, be read down such that it does not encompass the actions of people engaging in the prescribed conduct in furtherance of their right in section 16(2) of the HRA. Alternatively, depending on one's perspective, section 30 of the HRA could be seen to 'read in' a qualification to the word 'unlawfully' such that the person will only be guilty of an offence where they (a) engage in prescribed conduct in contravention of a statutory provision or a rule of common law (be it criminal or civil law) and (b) the person is not acting within the scope of the right contained in section 16(2) of the HRA.

In our view it is problematic and contrary to the intention of the HR Act, for legislation to be deemed compatible with human rights where it is, on its face, inconsistent with human rights, with the proviso that it can be read down at a later stage by the courts. If there is an inconsistency, it should be rectified in the drafting of the Bill to ensure that the law is clear to all who might be affected by it. To do otherwise is counter-productive in the compatibility process, as well as confusing.

We are particularly concerned that the government seeks to rely on such an interpretation in relation to an offence designated as one of strict liability, where the decision to issue a penalty notice will in fact be made by police officers or other officials, and most recipients of a penalty notice will not seek to challenge the notice in court, so as to get the advantage of a beneficial construction of the provision by the judiciary. This situation further demonstrates the problematic approach of relying on officers not trained on human rights law to make complex decisions about proportionately and interpretation before issuing an infringement notice.

Under s.31 of the HR Act rights may be interpreted by reference to international law, including treaties that Australia is a party to. Article 40 of the UN Convention on the Rights of the Child ('CRC') requires that children who come into conflict with the law must be dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence – this obligation is reflected in s.20 of the HR Act. Article 6 of the UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") provide greater detail of these protections:

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of

³ E. Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998' 2008 *New Zealand Law Review* 243.(1990),

proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

Finally, research undertaken by the Commission has found that only 50% of children or young people will actually complain if they feel that they have been treated unfairly, with this percentage dropping to 40% when the situation which led to the child or young person's dissatisfaction involved an interaction with the police. This demonstrates a problem with the adoption of strict liability offences for offences which disproportionately affect young people.

Section 11(2) of the HR Act provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. Article 12 of the UN CRC states that governments must 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'. Article 13 provides:

The child shall have the right freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of the child's choice...

Section 8 of the HR Act protects the right to recognition and equality before the law without discrimination. In our view these rights may also be engaged by the Bill, as bill posting is a medium of communication used more frequently by children and young people, including secondary and tertiary students, to impart and receive information about a range of matters from networking events to political rallies and protests. Paragraph 7(1)(l) of the *Discrimination Act 1991* covers age discrimination in many areas of public life, and s.8(1)(b) includes indirect discrimination where a condition is likely to have the effect of disadvantaging people in specified groups (such as young people). Although s.30(1)(a) makes a technical exception for legislation, such a provision in this Bill would go against the spirit of discrimination law.

It is likely that the prohibition on bill posting will disproportionately impact on these rights of children and young people in its application.

Conclusion

In our view, the Bill imposes significant limits on the right to freedom of expression, and the rights of children and young people, protected under the HR Act. These limitations do not appear to be proportionate to the aim sought to be achieved by the legislation. Alternative means of achieving the legislative objectives should be considered, as well as clarifying where public noticeboards are located that are not subject to the prohibition, eg by regulations etc. We agree with the LA Scrutiny Committee's report of 2 February 2009 which states that the term 'unlawful' in relation to posting bills on public property is so unhelpfully

vague 'as to provide no guidance to a person who wishes to know what he or she might do to without breaching the law'.

We would welcome the opportunity for further discussion of the issues raised by the Bill. Please contact Gabrielle McKinnon (only available Wednesday-Friday) or Brianna McGill on 6205 2222 if you require further information about any of the issues raised in this submission.

Yours sincerely,


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Children & Young People Commissioner


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