

ALL THE RIGHT MOVES?

Police 'move-on' powers in Victoria

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Public open spaces have long played an important role in urban development.¹ Traditionally, public open space has been viewed as an important facilitator in passive and active recreation; however, public space is increasingly viewed as an important space for social interaction and contributing to the general well being of a community.²

At common law, every citizen has the right, and every constable the duty, to take reasonable steps to prevent a breach of the peace occurring in their presence (*Albert v Lavin* [1982] AC 546, 548 (Diplock LJ)). Police officers have relied traditionally on the offence of loitering to effect the removal of 'undesirables' from public spaces, either by requesting those citizens to move-on or, in some circumstances, by affecting an arrest. Police use this power even where there is no indication that a true breach of the peace is occurring, or is going to occur. Police admit that they order people to move on from public spaces,³ although they have no legal authority to do this.⁴

Executive arms of government are increasingly widening the scope of police powers relating to the use and regulation of public spaces. These powers, known variously as 'move-on' powers, dispersal legislation, anti-social behaviour orders and reasonable directions,⁵ allow police to direct users of public space to move on. Laws have already been introduced in South Australia, New South Wales, Queensland and the Australian Capital Territory⁶, and internationally.⁷ Victoria, Tasmania, Western Australia and the Northern Territory have yet to implement such legislation.

This article will discuss the existing offence of loitering in Victoria,⁸ and analyse the effectiveness of legislation already enacted in other Australian jurisdictions in dealing with anti-social behaviour, actual reduction of crime, and the effect on community perceptions of crime and safety.

Existing Victorian offence of loitering

Section 7(1)(f) of the *Vagrancy Act 1966* (Vic) provided that any person who, being a reputed thief, loitered in a public place with intent to commit a felony or misdemeanour would be guilty of an offence. This Act was repealed by the *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic) which inserted Section 49B into the *Summary Offences Act 1966* (Vic).

Under ss 21A(2)(c) and 60B of the *Crimes Act 1958* (Vic), loitering is also an offence when a person is stalking another person, and when a person previously

found guilty of sexual offences loiters in or near a prescribed area, including schools, kindergartens, etc. Under ss 12 and 13 of the *Prostitution Control Act 1994* (Vic), loitering is prohibited for the purposes of prostitution and soliciting prostitution.

These loitering provisions require *mens rea* or an intention to commit a criminal act and, in the case of s 60B, require the offender to have committed a certain class of offence and to be in the vicinity of a prescribed place.

Potential changes to Victorian law

Both the Victorian Labor Government and its Liberal opposition have advocated the introduction of 'move-on' legislation.

Tim Holding, then Minister for Police and Emergency Services, convened a taskforce to advise the government on key issues in the management of entertainment precincts, and to propose measures to safeguard amenity and community safety. The Inner City Entertainment Precincts ('ICEP') Taskforce included state and local government, and statutory and regulatory authorities. A key recommendation made by ICEP was that the government investigate legislation to:

enable police to give a direction to a person in a public place if the police officer has reasonable grounds to believe that the person's behaviour or presence in the place is causing or likely to cause fear to another person or persons.⁹

On 3 May 2005, then Victorian Liberal Opposition leader Robert Doyle announced that he wanted to introduce 'a "move-on" law where police can direct people out of an area and can even arrest',¹⁰ and the Victorian Liberal Party formally adopted a policy titled 'Combating Anti-Social Behaviour', which advocates the introduction of 'move-on' legislation.¹¹

Both the Government and Opposition were quick to reassure the community that safeguards would be incorporated into the legislation to 'prevent indiscriminate use and ensure that vulnerable groups within the community are not adversely affected'.¹² As noted below, empirical research has indicated that several of these vulnerable groups within the community are adversely affected by the (often arbitrary) exercise of the 'move-on' powers by police officers.

More recently, Frankston City has proposed making a Local Law under Part 5 of the *Local Government Act 1989* (Vic) to allow an authorised officer to direct a person in the municipality to leave a public place, and not return for up to 24 hours. A direction could

REFERENCES

1. Max Nankervis, 'Our Urban Parks: Suitable Pieces of Real Estate?' (1998) 57 *Journal of Australian Studies* 162.
2. Victoria, *Inquiry into Sustainable Urban Design for New Communities in Outer Suburban Areas*, Parl Paper No 87 (2004), 132.
3. Christine Alder et al, *Perceptions of the Treatment of Juveniles in the Legal System* (1992) 32.
4. Tim Anderson, Steve Campbell and Sheree Turner, *Youth Street Rights: A Policy and Legislation Review* (1999), 89.
5. See, eg, Ben Saul, 'Olympic Move On Powers: Street Sweeping and the Erosion of Public Space' (2000) 11 (1) *Polemic* 34; Philip Lynch, 'Understanding and responding to begging' [2005] 29 *Melbourne University Law Review* 518; Inner City Entertainment Precincts Taskforce, *A good night for all: Options for improving safety and amenity in inner city entertainment precincts* (2005), 39; *Crime and Disorder Act 1998* (UK) s 1; *Summary Offences Act 1988* (NSW) s 28F. In this article, these terms are used interchangeably.
6. *Summary Offences Act 1953* (SA) s 18, *Summary Offences Act 1988* (NSW) s 28F, *Police Powers and Responsibilities Act 2000* (Qld) s 38, *Crime Prevention Powers Act 1998* (ACT) s 4.
7. See, eg, *Anti-social Behaviour Act 2003* (UK) s 30.
8. See, eg, *Summary Offences Act 1966* (Vic) s 49B.
9. Inner City Entertainment Precincts Taskforce, above n 5, 39.
10. Rodney Lohse, 'Calls for teenage curfew', *Today Tonight*, 3 May 2005, <seven.com.au/todaytonight/> (Copy on file with the author).
11. Liberal Party, Victorian Branch, *Combating Anti-Social Behaviour*, Policy statement (26 April 2006), 1.
12. *Ibid.*

be given if the person is interfering with another person's reasonable use and enjoyment of that place, is endangering health, life or property, or is destroying, damaging or interfering with property or animals, and the direction is reasonably necessary to uphold public safety, public order, or the lawful enjoyment by others of the public place.¹³

Australian provisions

As noted above, some Australian jurisdictions have already introduced various forms of 'move-on' legislation. Section 18 of the *Summary Offences Act 1953* (SA) provides that a South Australian police officer may request a person to cease loitering or disperse, if the police officer believes on reasonable grounds that:

- (a) an offence has been, or is about to be, committed by that person or by one or more of the persons in the group or by another in the vicinity; or
- (b) a breach of the peace has occurred, is occurring, or is about to occur, in the vicinity of that person or group; or
- (c) the movement of pedestrians or vehicular traffic is obstructed, or is about to be obstructed, by the presence of that person or group or of others in the vicinity; or
- (d) the safety of a person in the vicinity is in danger.

The SA legislation arguably has the widest application, as it provides that police may exercise the power where any breach has occurred, is occurring, or will occur.

Section 28F into the *Summary Offences Act 1988* (NSW), empowered New South Wales police to give a reasonable direction to a person in a public place if that person's behaviour or presence obstructs other people or traffic, constitutes harassment or intimidation, or causes or is likely to cause fear to another person (provided that the behaviour or presence would cause fear to a person of reasonable firmness).¹⁴ That provision has been repealed but similar provisions exist in Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

Additional 'move-on' powers were introduced in NSW for the Sydney Olympic Games in 2000 under reg 15 of the *Homebush Bay Operations Regulations 1999*, under the authority of the *Homebush Bay Operations Act 1999* (NSW), and provided for in reg 23 of the *Sydney Harbour Foreshore Authority Regulation 2006* made under the authority of s 46 the *Sydney Harbour Foreshore Authority Act 1998* (NSW). These powers allowed police officers and security guards to give a 'move-on' direction from prescribed locations on the grounds of 'annoyance' or 'inconvenience'.¹⁵ Similar provisions were introduced into the *World Youth Day Regulation 2008* (NSW), but were held in part to be ultra vires by the Federal Court (*Evans v New South Wales* (2008) 168 FCR 576).

Section 38 of the *Police Powers and Responsibilities Act 2000* (Qld) empowers Queensland police to 'give to a person or group of persons doing a relevant act any direction that is reasonable in the circumstances'.

Under section 39, a relevant act occurs if a police officer reasonably suspects the person's presence is or has been:

- (a) causing anxiety to a person entering, at, or leaving the place, reasonably arising in all the circumstances; or
- (b) interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place; or
- (c) disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place.

Unlike its NSW and SA counterparts, s 41 of the Queensland legislation allows the 'move-on' power to be executed only at a place notified under regulation by the Governor, although anecdotally this has not always been the case.¹⁶

The Australian Capital Territory does not allow police to move on individuals for intimidating or harassing behaviour. Section 4 of the *Crime Prevention Powers Act 1998* (ACT) allows police officers to direct persons to leave a public place if there are reasonable grounds for the police officer to believe that a person has engaged, or is likely to engage, in violent conduct. However, s 4(3) of the ACT legislation limits the type of direction that police may give.

International provisions

United Kingdom

In Britain, Part 4 of the *Anti-social Behaviour Act 2003* (UK) allows for the dispersal of groups and removal of persons under 16 to their place of residence. It enables senior police officers to designate an area where there is persistent anti-social behaviour and a problem with groups causing intimidation. The local authority — that is, municipal council — must agree to the designation, which must be published in a local newspaper or by notices in the local area and can then last for up to six months and can be renewed if necessary. The designated area must be clearly defined, usually by a description of the streets or roads bordering the area.

Within these designated areas police have the power to disperse groups where they have reasonable grounds for believing that a person's presence or behaviour has resulted, or is likely to result, in a member of the public being harassed, intimidated, alarmed or distressed. Individuals can be directed to leave the locality and may be excluded from the area for up to 24 hours.

In *R (W) v Commissioner of Police of the Metropolis* [2006] EWCA Civ 458, W (a person under the age of 16) applied for judicial review of the authorisation given to the police by the Metropolitan Police Commissioner to remove persons under the age of 16 from notified dispersal areas in London. At paragraph 28, the British High Court held that the word 'remove' in Section 30(6) carried with it a coercive power, as it 'naturally and compellingly means "take away using reasonable force if necessary"'. However, the Court went on to find (at paragraphs 32 to 36) that the provision did not have an illegitimate curfew effect as it did not grant an arbitrary power of removal.

13. Public submissions on the proposed Local Law 15 closed on 19 February 2009, and the Council is expected to consider the proposed local law soon.

14. NSW Ombudsman, *Policing public safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998* (1999), 223.

15. Saul, above n 5, 3.

16. Paul Spooner, 'Moving in the wrong direction: An analysis of police move-on powers in Queensland' (2001) 20 *Youth Studies Australia* 27, 30.

There is no empirical evidence to show that ‘move-on’ legislation does actually result in reductions in crime rates, in Australia or internationally.

The *Anti-social Behaviour Act* gives British constables the right to physically remove people from designated localities, particularly those citizens under the age of sixteen. However, it is still unclear whether force can be used in enforcing, in particular, section 30(4), which allows constables to order a group to disperse, leave the locality and not return.

Another tool used in the United Kingdom is the use of anti-social behaviour orders (‘ASBOs’) under the *Crime and Disorder Act 1998 (UK)*. ASBOs are civil orders that prohibit the offender from specific anti-social acts or entering defined areas, and are effective for a minimum of two years.¹⁷

United States

Citizens of the United States rely on a constitutionally-enshrined right — which protects individuals against deprivation of life, liberty or property without due process of law — to prevent the exercise of ‘move-on’ powers by the state (including police authorities). Attempts to regulate loitering in the US have been struck down on the ground that they violated the rights of citizens or constituted an unreasonable restraint on liberty (see eg *Sawyer v Sandstrom* (1980, CA5 Fla) 615 F2d 311; *Hawaii v Anduha* (1931, CA9 Hawaii) 48 F2d 171; *People v Solomon*, 33 Cal App 3d 429, 108 Cal Rptr 867).

The City of Chicago introduced the *Gang Congregation Ordinance 1992* to prohibit known or suspected gang members from loitering with other gang members or other persons in a public place with no apparent purpose. The US Supreme Court ruled the Ordinance unconstitutional, as the City Council’s failure to provide clear guidelines for the enforcement of the ordinance gave too much discretion to law enforcement authorities in determining what constituted a violation, possibly encouraging arbitrary and discriminatory enforcement (*City of Chicago v Morales* (1999) 527 US 41, 54 (Stevens JJ)). However, the Supreme Court suggested that the Ordinance would have been constitutional if there had been a *mens rea* component added to the mere loitering, as had been held in previous cases such as *People v Superior Court*, 758 P.2d 1046, 1049-50 (Cal 1988), validating a statute prohibiting loitering for purpose of engaging in lustful acts and *City of Tacoma v Luvenc*, 827 P2d 1374, 1383-1384 (Wash 1992), requiring intent to engage in illegal drug activity in addition to loitering.

Similar statutes attempting to criminalise loitering have been held to be unconstitutional in other cases (see

eg *NAACP Anne Arundel County v City of Annapolis* 133 F Supp 2d 795; *City of Chicago v Youkhana* (1995, 1st Dist) 277 Ill App 3d 101, 213 Ill Dec 777, 660 NE2d 34), although challenges to loitering legislation, on the basis that they are restrictive of the rights of free speech and assembly, have generally failed (see eg *People v Baer* (1965) 50 Misc 2d 357, 270 NYS2d 434; *People v Lewis*, 70 Misc 2d 41, 332 NYS2d 929; *Ex parte Stout* (1917) 82 Tex Crim 183, 198 SW 967).

Effectiveness of ‘move-on’ legislation

Perceptions of community safety

Fear of crime impacts on the community in significant ways, including withdrawal from participating in the community, altered lifestyle and implications for health and well-being, socio-economic consequences, and effects on small business, particularly tourism, when a community is perceived to be unsafe.¹⁸ The Australian Institute of Criminology (‘AIC’) has identified several factors that influence people’s fear of crime.¹⁹ Females generally tend to be more fearful of crime than do men, while older people fear crime in their homes and younger people fear crimes against their person. Generally, individuals with higher levels of education and income tend to be less fearful than poor people. Previous experience as a crime victim is often associated with fear of crime.

Frequent exposure to news coverage of crime may lead one to overestimate the probability of personal victimisation. Interestingly, the AIC notes that:

the effect of newspaper coverage is complex, with some forms of coverage increasing fear and other forms of coverage decreasing fear. The effect of official crime rates on fear is also mediated through the newspaper coverage of crime. In Britain, readers of tabloid newspapers which have more sensational crime coverage reported higher levels of fear than readers of broadsheet newspapers, whose crime coverage is less predominant and less dramatic.²⁰

National Crime Prevention, a unit within the Federal Attorney-General’s Department, noted in a 1999 report that young people’s offending is not particularly serious, but their crimes are highly visible, and that visibility is increased and sensationalised by the media.²¹ Atypical — usually violent — crimes are given more prominence than common crimes, and crime is presented as basically random in nature and thus a threat to everyone in the same way.²²

Media images of youth crime often represent young people as a threat to law and order, morality or

17. Home Office (UK), *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (2004), 9.

18. Standing Committee on Legal and Constitutional Affairs (LACA), Parliament of Australia, *Inquiry into crime in the community: victims, offenders and fear of crime* (2004) [2.70].

19. Peter Grabosky, *Fear of Crime and Fear Reduction Strategies*, Australian Institute of Criminology Trends & Issues Paper No 44 (1995), 2-3.

20. *Ibid.*

21. National Crime Prevention, *Hanging out: negotiating young people’s use of public space* (1999), 8.

22. See generally Peter Grabosky and Paul Wilson, *Journalism and justice: How crime is reported* (1989); Richard Ericson, Patricia Baranek and Janet Chan, *Representing order: Crime, law and justice in the news media* (1991).

community standards.²³ For example, Sercombe found that *The West Australian* contained five times as many articles relating to youth crime than any other category of youth story.²⁴ The New South Wales Bureau of Crime Statistics and Research believes that the commercial imperative within the media to maintain ratings or circulation, and the widespread public interest in crime, prompt almost ubiquitous media coverage of the subject.²⁵

Despite the fact that the fear of crime is often unfounded or irrational, particularly in light of the relative frequency of crimes, government recognises the importance of addressing these perceptions.²⁶

Reductions in Crime

Commentators have questioned the effectiveness of moving on undesirables in reducing crime noting that, in the context of begging, there is evidence suggesting that zero tolerance policing methods such as 'move-on' powers tend to either divert beggars to other geographical locations with a lesser police presence, or divert them into the commission of more serious criminal activity.²⁷ There is no empirical evidence to show that 'move-on' legislation does actually result in reductions in crime rates, in Australia or internationally.

However, some empirical research has been conducted in the United States into the effect of curfews, another tool used to regulate the use of public spaces. According to a major study of the effects of curfews on youth crime in 21 cities of 100,000 or more people:²⁸

- curfews cannot be shown to reduce youth crime or violent death over time or by locale, as cities without curfews showed the same patterns as cities that enforced curfews;
- curfews may actually increase crime and reduce youth safety by occupying police time removing law-abiding youths from public space, leaving emptier streets and public places which urban planning experts argue are conducive to crime;
- in the Monrovia neighbourhood of Los Angeles California, the crime rate did not decline after the introduction of curfews in 1994. More surprising, it declined only during the summer months and on school-year nights and weekends when the curfew was not enforced; and
- in Vernon, Connecticut, police reported no instances of criminal activity among the youth they cited for curfew, so the effect was to remove law-abiding youths from the streets.

This research demonstrates the questionable effectiveness of removing people from public spaces in reducing crime rates.

Crime Prevention Victoria ('CPV') suggests that anti-social behaviour can range from serious criminal offending such as assault, to non-criminal 'inconsiderate' behaviour such as playing music loudly in public.²⁹ There is no empirical evidence to suggest that anti-social behaviour is reduced through the introduction of 'move-on' legislation, although there is considerable anecdotal evidence.³⁰

However, the difficulty in providing police with powers to redress such behaviour is that the element of anti-social behaviour is largely subjective. CPV notes that there is no standard definition, although it can include inconsiderate behaviour.³¹ CPV uses the example of playing music loudly: it may be inconsiderate at 3am, but would it still be inconsiderate if played at 1pm? The level of subjectivity and ambiguity of 'anti-social' behaviour, despite its possible populist appeal, may fail to justify the introduction of discretionary 'move-on' powers as a means to prevent such 'anti-social' behaviour.

Discriminatory exercise of power

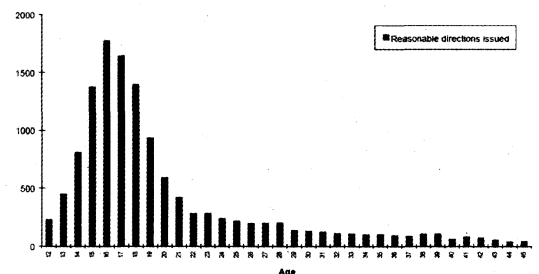
As Saul notes, '[p]articularly if you are a young person, indigenous, homeless, or a sex worker, police scrutiny and state surveillance of the public use of public streets has become acute'.³²

Limited empirical research has been undertaken to review the discriminatory exercise (or otherwise) of 'move-on' legislation. However, this research is analysed below.

Young people

As White notes, the struggle over territory between police and young people is by no means a new phenomenon.³³ A report submitted by the National Affairs Research Scheme of Australia showed 80 per cent of young people aged 15 to 18 had been stopped by the police and of these, 83 per cent had been stopped on the street.³⁴ In addition, police officers who participated in the research thought that young people were causing problems in malls (53 per cent) and shopping centres (60 per cent).³⁵

The NSW Ombudsman provided the following diagram to illustrate the incidence of 'move-on' powers amongst various age groups in the twelve months July 1998 to June 1999:



Source: NSW Ombudsman, Policing public safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (1999), 227, citing NSW Bureau of Crime Statistics and Research extract of COPS records of s 28F 'reasonable directions' incidents for all NSW 1.7.98 to 30.6.99.

This figure shows 16-year-olds are nine times more likely to be 'moved on' than 26-year-olds, and 19 times more likely to be 'moved on' than 36-year-olds.

In all recorded criminal incidents across NSW in the year to 30 June 1999, young people under 25 represented 54 per cent of the total incidents, but the same group accounted for 79 per cent of 'move-on' directions in the same period.³⁶ Persons under the age of 17 accounted for 22 per cent of crimes against the person in 1998-99,³⁷ but accounted for 54 per cent of

23. Judith Bessant and Richard Hill (eds), *Youth, crime and the media* (1997).

24. Howard Sercombe, *Media constructions of young people in public space* (1998), a submission to the Negotiating young people's use of public space Project. Cited in National Crime Prevention, above n 20, 9.

25. NSW Bureau of Crime Statistics and Research, *Crime Perception and Reality: public perceptions of the risk of criminal victimisation in Australia*, Discussion Paper No 28 (1996), 7.

26. Committee on LACA, above n 17, ch 2.

27. Lynch, above n 5, 535-6; and see Roger Hopkins Burke, 'Tolerance or Intolerance? The Policing of Begging in the Urban Context' in Hartley Dean (ed), *Begging Questions: Street-Level Economic Activity and Social Policy Failure* (1999), 230.

28. Mike Males and Dan Macallair, 'Get Tough': *Juvenile Control Measures - Are they Needed?* (1998) Issue paper for the Juvenile Justice Information Center (1998). Cited in Penny Travlou, *Teenagers and Public Space: a literature review* (2003), 16.

29. Crime Prevention Victoria, 'Anti-Social Behaviours', (2004) CPV Knowledge Bank <crimeprevention.vic.gov.au/> (Copy on file with the author).

30. See, eg, NSW Ombudsman, above n 14, ch 10.

31. Crime Prevention Victoria, above n 29.

32. See Saul, above n 5.

33. Rob White, 'Young people, community space and social control' (Paper presented at the National Conference on Juvenile Justice, Adelaide, 22-24 September 1992) 196; see generally Peter Grabosky, *Sydney in Ferment: Crime, dissent and official reaction 1788 to 1973* (1993); Jon Stratton, *The Young Ones: Working-class Culture, Consumption and the Category of Youth* (1992).

34. Travlou, above n 28, 13.

35. Alder et al, above n 3, 31.

36. Saul, above n 5, 36.

37. NSW Bureau of Crime Statistics and Research, 'Police records of persons of interest involved in all recorded criminal incidents against the person in non-residential locations, 1.7.98 to 30.6.99.' Cited in NSW Ombudsman, above n 14, 228.

The level of subjectivity and ambiguity of 'anti-social' behaviour, despite its possible populist appeal, may fail to justify the introduction of discretionary 'move-on' powers as a means to prevent such 'anti-social' behaviour.

'move-on' directions.³⁸ This reveals a telling disparity between the general rate of youth crime — itself arguably over-policed in any case³⁹ — and the rate of move-on directions.

Spooner suggests that this indicates that 'police are using the "move-on" powers as a general enforcement measure beyond the areas identified by politicians',⁴⁰ contradicting the view of the Minister for Police and Corrective Services Tom Barton, who said:

I am pleased to note that there is little, if any, recorded abuse of the power on the part of police officers. Moreover, the history of the use of the 'move-on' power has clearly indicated to the government that it is an effective preventative tool in minimising criminal disturbances, particularly assaults.⁴¹

Spooner found that abuse of powers could occur, and that 57 per cent of respondents were given a direction not covered by the legislation. In particular, he noted:

the possibility that young people known to police are being targeted and labelled as 'trouble-makers' and being excluded from public spaces on the basis of perceptions rather than actual behaviour at the time of being requested to move on.⁴²

The Youth Affairs Council of Western Australia suggests that 'move-on' powers can increase levels of conflict between police and young people by reinforcing stereotypes.⁴³ The NSW Ombudsman noted that policing powers should be used fairly so as to avoid undermining community confidence in the integrity of police, and that:

[t]he danger for police is that any injudicious use of police powers may erode community confidence in their police, and possibly undermine the Police Service's capacity to address crime and disorder in those communities.⁴⁴

The disparity between young people being moved on by police, and the rate of their involvement in crime and their representation in the population, is disturbing. It suggests police are not using the powers as an effective tool, and are exercising the power in a discriminatory fashion. Not only does this not reduce the incidence of crime, but it may lead to even more unsatisfactory outcomes such as conflict between police and young people.

Indigenous Australians

A detailed 1995 study in NSW found that Indigenous young people were over-represented at every level of the system except police cautions.⁴⁵ This certainly appears to be the case with move-on orders, as Chan and Cunneen⁴⁶ note that police use 'move-on' powers in

New South Wales against Aboriginal people at a massively disproportionate rate, as illustrated in the table below:

	Juvenile		Adult		Total	
	No	%	No	%	No	%
Aboriginal	1,556	24	1,400	21	2,956	23
Non-Aboriginal	1,906	29	3,398	51	5,304	41
Unknown	3,009	46	1,823	28	4,832	37
Total	6,471	100	6,621	100	13,092	100

Breakdown of 'move-on' orders in the twelve months July 1998 to June 1999

Source: NSW Ombudsman, Policing public safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (1999), 231, citing NSW Bureau of Crime Statistics and Research extract of COPS records of s 28F 'reasonable directions' incidents for all NSW 1.7.98 to 30.6.99.

Chan and Cunneen note that even if all the individuals in the 'unknown' category were non-Aboriginal, the over-representation of Aboriginal people would still be in the order of 14 times, based on their population within New South Wales.⁴⁷ The NSW Bureau of Crime Statistics and Research has discussed the high rate of using summary offence charges, particularly offensive language and offensive conduct charges, in relation to Aboriginal people in NSW,⁴⁸ and this was noted by the NSW Ombudsman.⁴⁹

Spooner found that 36.8 per cent of respondents moved on in Queensland were indigenous young people, despite the fact that indigenous young people make up only 4 per cent of the general Queensland youth population.⁵⁰

Other groups in society

Police records also showed 14.7 per cent (2120) of 14 455 persons given directions to move on were female and 84.7 per cent (12 237) were male.⁵¹ Concerns that the 'move-on' powers discriminate against young people, ethnic minorities, the homeless,⁵² Aborigines and sex workers are reflected in the NSW Ombudsman's report:

[t]here may be circumstances in which a person begging is harassing or intimidating other persons or otherwise exhibiting the 'relevant conduct' under the Act. However, there will also be instances where begging on its own is not sufficient to justify a police officer issuing a direction under the Act. Under the current legislation, police officers need to consider whether the 'relevant conduct' has been displayed in each situation.

38. NSW Ombudsman, above n 14, 227–8.

39. Roger Smith, *Youth Justice: Ideas, policy, practice* (2003).

40. Spooner, above n 16, 30.

41. Queensland, *Parliamentary Debates, Legislative Assembly*, 29 February 2000, 50 (Tom Barton, Minister for Police).

42. Spooner, above n 16, 30.

43. Youth Affairs Council of Western Australia, 'Curfews: The Public Fight for Young People to be in the City', (2003) 5(27) *Indigenous Law Bulletin* 8, 8.

44. NSW Ombudsman, above n 14, 240.

45. Garth Luke and Chris Cunneen, 'Aboriginal over-representation and discretionary decisions in the NSW juvenile justice system' (1995) 1 *Australian Indigenous Law Reporter* 95.

46. Carrie Chan and Chris Cunneen, *Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan* (2000) 438.

47. NSW Ombudsman, above n 14, 241. See also Monica Taylor and Tamara Walsh (eds), *Nowhere to go: The impact of police move-on powers on homeless people in Queensland* (2006) ch 6.

48. NSW Bureau of Crime Statistics and Research, *Aborigines and Public Order Legislation in New South Wales*, Discussion Paper No B34 (1997), 1.

49. NSW Ombudsman, above n 14, 235. The Ombudsman also noted increased contact with police as a result of reasonable directions orders may further exacerbate the tensions in police relations with Aboriginal communities, 232.

50. Spooner, above n 16, 30.

51. NSW Ombudsman, above n 14, 230; gender for 98 persons not recorded.

52. See also Taylor and Walsh, above n 47.

Similarly, the Ombudsman's report identified that when police move-on sex workers, they 'may be acting within the scope of the legislation if the presence of these sex workers constitutes harassment, intimidation or is likely to cause fear'.⁵³ However, the report did not conclude whether police were systematically working within the scope of the legislation and whether the presence of these individuals did actually constitute harassment, intimidation, or was likely to cause fear. The report referred to a case which had proceeded to court (as the person had refused to comply with the order), in which the magistrate found that sex workers in a particular street were intimidating residents, and held that any sex worker in the relevant area could be given a direction, irrespective of their conduct.⁵⁴ The Ombudsman reported that police believed this case validated their approach of using the legislation to move suspected street sex workers from particular areas irrespective of their behaviour, contrary to the spirit and the content of the legislation.

The Ombudsman did not examine minority groups other than young people and indigenous Australians, despite mounting anecdotal evidence that other groups are being disproportionately and adversely affected by the law.⁵⁵ However, the Ombudsman did recommend that,

[i]n light of the comparatively high numbers of young people and Aboriginal people affected by these powers, the [Police] Service must seek to address concerns expressed by those particular groups, as well as any other group likely to be targeted.⁵⁶

The Ombudsman recommended implementing a code of practice and providing officers with advice on the application of the laws, as they are largely misunderstood.⁵⁷ The report was issued in 1999 and the police service has still not implemented a formal code of practice.

Human rights issues

Other commentators have considered these powers in a human rights framework, which may provide further bases for dismissing or questioning the efficacy of 'move-on' powers.⁵⁸

In a Victorian context, the *Charter of Human Rights and Responsibilities* may be relevant where there is a limitation or infringement of a person's human rights, including the freedoms of movement (section 12), association (section 16) and expression (section 15), among others. Infringement of these rights, together with the disproportionate impact on minority groups discussed above, could require the Victorian parliament and courts to consider whether the introduction of 'move-on' powers in Victoria would amount to an unreasonable limitation of these rights (section 7). Possible Charter-based responses to move-on powers include Parliament's pre-enactment statement of compatibility (section 28) and, post-enactment, the courts' duty to interpret consistently with rights under the Charter (section 32) and statutory authorities' duty to have regard to the rights under the Charter (section 38).

Australia has also ratified and committed to implementing the human rights contained in numerous

United Nations treaties, such as the International Covenant on Civil and Political Rights which enshrines similar human rights to the Victorian Charter. Again, infringement of these rights, and particularly the disproportionate impact on minority groups, could allow communications to be made to the UN Human Rights Committee.

Conclusion

This article examines the 'move-on' powers given to police in South Australia, Queensland, New South Wales and the Australian Capital Territory, and has found that they have varying levels of application; for example, the Queensland power can only be exercised at proscribed locations, while the ACT laws can only be exercised where a police officer reasonably believes a violent incident will occur.

The legislation could perhaps be justified as a means to improve public perception of crime prevention or reduction. However, the fear of crime is often based on irrational beliefs and perpetuated by mainstream media, and there is no empirical evidence to suggest that the removal or exclusion of persons from public space actually reduces the incidence of crime. It is difficult to justify the introduction of 'move-on' powers to reduce anti-social behaviour, as such behaviour is difficult to define without ambiguity and unreasonable levels of subjectivity.

The move-on powers are exercised in a discriminatory fashion across Australian jurisdictions, and young people, indigenous Australians, and other minority groups are massively over-represented in the exercise of 'move-on' powers, relative to both their representation in the population and their participation in criminal activity.

Loitering provisions grant adequate powers to regulate the use of public spaces by people intending to commit a crime (assuming that the offence is policed appropriately). 'Move-on' powers simply grant police discretionary powers which do not reduce crime; they do, however, alienate minority groups, and prevent the engagement of many groups in community spaces.

JAMES FARRELL is a Melbourne lawyer. Thanks to Claire Macken (Deakin University), and to the anonymous referee for providing valuable comments and suggestions on this article.

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53. NSW Ombudsman, above n 14, 269.

54. Ibid 270.

55. Saul, above n 5, 34.

56. NSW Ombudsman, above n 13, 239.

57. Ibid 279.

58. See, eg, Cassandra Goldie, 'Living in Public Space: a human rights wasteland?' (2002) 27(6) *Alternative Law Journal* 277; Di Otto, 'Addressing Homelessness as a Violation of Human Rights in the Australian Context' (Paper presented at the 3rd National Homelessness Conference, Brisbane, 6-8 April 2003); Taylor and Walsh, above n 47.