Victoria’s Banning Provisions: ‘balancing’ discretionary police powers and individual rights

by

Clare Farmer
BA Hons. (Oxon), MA (Oxon), MSc

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I am the author of the thesis entitled

Victoria’s Banning Provisions: ‘balancing’ discretionary police powers and individual rights

submitted for the degree of Doctor of Philosophy

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“Is a 24 hour ban such a bad thing?”¹
Victoria’s banning provisions: ‘balancing’
discretionary police powers and individual rights

Over the past decade alcohol-related violence in and around licensed premises has been an area of notable legislative and operational policing development. Victoria’s banning notices sit within a range of provisions enacted in response to problems of disorderly behaviour in the night-time economy. The legal principles upon which banning notices are based and the way in which they are implemented challenge traditional expectations regarding the separation of powers and individual due process rights in the administration of justice. Banning notices are one example of a move towards police-imposed summary justice, which circumvents the criminal law and reconfigures the notion of balance in the criminal justice system.

There is a disconnect between the use of balance to both explain the need for provisions such as banning notices, and to legitimise their consequential undermining of the due process rights of individuals. This thesis challenges the appropriateness of using a need for balance to justify the discretionary police power to ban. A mixed methodological approach facilitates the examination of two core themes. The first analyses the underlying political assumptions and justifications that secured the passage of the banning notice provisions through the Victorian Parliament. The second theme explores the extent to which the implementation of banning notices, and their impact upon individual rights, have been subject to ongoing scrutiny.

¹ (Legislative Assembly 2007c, 4072 [Thomson, Labor]).
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Chapter One

Thesis Introduction

There are two kinds of problems that need to be dealt with in any model of the criminal process. One is what the rules shall be. The other is how the rules shall be implemented.

(Packer 1968, p.171)
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1 Introduction

Over the past decade alcohol-related violence and disorder in and around licensed premises has been an area of notable legislative, licensing and operational policing development. In jurisdictions across Australia, police officers have been afforded a range of powers to tackle problems associated with excessive alcohol consumption. New offences and infringement penalties have been introduced along with move-on provisions and police-imposed banning notices.

Victoria’s burgeoning night-time economy (NTE) reflected significant growth in the alcohol industry following the 1986 Nieuwenhuysen Report. Liquor licence reforms, taxation changes and deregulation facilitated a proliferation of licensed venues, the growth of urban entertainment precincts across the State, and the escalation of alcohol-related problems (Donnelly et al. 2006; Livingston et al. 2010; Matthews et al. 2011, 2012; Zajdow 2011). Victoria’s Alcohol Action Plan: 2008–13 (Department of Justice 2008a) presented a suite of initiatives targeting a reduction in the impact of alcohol-fuelled violence and anti-social behaviour. A key element of the plan was the introduction of police-imposed banning notices.

Banning has been used in Victoria as a component of court-imposed penalties for over a decade, and for longer by venue licensees and under trespass provisions. The advent of on-the-spot banning notices as an immediate response to alcohol-related violence has been developing only since 2007. The Liquor Control Reform Amendment Act 2007 (Vic) (‘LCRA Act 2007’) established 24 hour banning notices, and the Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Act 2010 (Vic) (‘JLA Act 2010’) extended their permissible length to 72

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1 See, for example, Donnelly et al. (2006), Chikritzhs et al. (2007), Nicholas (2008), Eckersley and Reeder (2008), Fleming (2008), Graham and Homel (2008), Livingston (2008), Mcllwain and Homel (2009), Babor et al. (2010), Smith et al. (2011), and Trifonoff et al. (2011).

2 Between 1995-2005 the number of licensed premises in Victoria rose from 2,000 to 24,000 (Alcohol Policy Coalition 2011, p.6).

3 For example, under s9(1)(d) of the Summary Offences Act 1966 (Vic).
hours. Banning notices apply in designated areas, and may be imposed by police officers for a range of specified offences or pre-emptively in anticipation of problematic behaviour. A decision to impose a banning notice is made subjectively by a police officer. Recipients are compelled to leave the designated area and not return for up to 72 hours. The banning notice applies immediately, must be accepted, requires no evidence to be recorded, and a decision to ban is not subject to independent appeal.

Victoria’s banning notice provisions test the conception of balance within the criminal justice system. The discretionary powers afforded to police officers, and the consequential effect of banning notices upon core individual rights and judicial safeguards, present significant challenges to the principle of the separation of powers and the expectation of due process in the administration of justice. The justifications for the necessity of banning legislation, and the extent of ongoing scrutiny of police powers to punish merits detailed examination. This thesis explores these two fundamental issues and considers the relevance of balance within evolving criminal justice processes.

1.1 Separation of Powers, Due Process & Victoria’s Charter

The rule of law embodies the expectation that everyone, citizens and government, are subject to the laws that are enacted by parliament (Walker 1988). It is predicated upon the principle of the separation of the powers of government into the executive,
legislature and judiciary, at both federal and state/territory level. All states retain the right to determine the specific content of their laws (The Commonwealth of Australia Constitution Act 1900, s118). In Victoria, the Constitution Act 1975 affirmed the Victorian Parliament’s right to determine the state's criminal laws.

A key function of a separate judiciary is to uphold the principle of legality to ensure, as far as possible, that executive and legislative decisions protect fundamental rights for all citizens (Weller 2004; Spigelman 2005; Meagher 2011). Australia has no statutory Bill of Rights and Victoria’s Constitution Act 1975 does not formalise any rights for individuals. However, core human rights principles and due process expectations reflect the common law tradition of England and Wales and are embedded within Australia’s legal system (Castles 1982; Keon-Cohen 1991; Lord Irving of Lairg 2002). Fundamental individual rights such as freedom of movement, natural justice and access to the courts have been framed as a “common law bill of rights” (Spigelman 2008, p.29). Due process extends the principle of natural justice to protect the rights of individuals in their treatment by the agencies of the criminal justice system, and should ensure procedural fairness in the administration of justice (Galligan 1996; Rares 2013). Specific due process rights include the presumption of innocence, the right to legal representation, and the right to a fair trial (Blake & Ashworth 1996; Wheeler 1997, 2004; Ashworth 2006a; Keyzer 2008; Bateman 2009; Findley 2009).

Individual rights have been increasingly formalised through international conventions to which Australia is a signatory, the Commonwealth Parliamentary

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7 As well as the 1900 Act Constituting the Commonwealth, the States of Australia each have their own constitution. Initially declared largely as Acts of the British Parliament, most have since passed Constitution Acts under their own auspices: NSW (1902), South Australia (1934), Tasmania (1934), Victoria (1975), Queensland (2001). The Constitution Act of WA, passed in 1889 and significantly amended in 1899, has not been re-enacted as a specific Act of the WA State Parliament. The two mainland territories, Northern Territory and ACT, operate according to Self Government Acts, the former passed in 1975, the latter in 1988.

Joint Committee on Human Rights (established by the Human Rights (Parliamentary Scrutiny) Act 2011), and in provisions such as the Australian Capital Territory’s Human Rights Act 2004, and Victoria’s Charter of Human Rights and Responsibilities 2006 (‘the Charter/Charter Act’). The Charter Act articulates the specific rights regarded as “essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom” (Charter Act 2006, preamble). Individual due process rights in relation to criminal proceedings are specified in the Charter, such as the presumption of innocence and the right to a fair hearing. Each new Bill introduced into parliament must be accompanied by a ministerial Statement of Compatibility that confirms adherence to the rights contained in the Charter (Charter Act 2006, s28). Charter rights are not inviolable and exemptions are permitted. Any measure that requires a waiver of Charter rights must be justified fully, and the need for the exemption must be supported in the Statement of Compatibility with empirical evidence (Charter Act 2006, s7(2)).

Effective oversight of the enactment and application of laws by an independent judiciary (The Commonwealth of Australia Constitution Act 1900, Ch. III) adds a further protective layer for the individual rights enshrined in the Charter Act. However, the corrective power of Victorian courts is limited unless a legislative Act can be declared unconstitutional. Significantly, the Charter itself is a legislative Act and its provisions are not enshrined within Victoria’s Constitution Act 1975. As the Victorian Parliament retains the constitutional law making remit, it has the ability to pass laws that are incompatible with the Charter’s requirement to preserve fundamental rights. Despite the passage of the Charter Act, the primacy of parliamentary law making power in Victoria provides the foundation for the state to erode core rights and due process safeguards (Rares 2013).

1.2 The Evolving Criminal Process

Traditional expectations of the criminal law hold that “no person should be liable to conviction and/or punishment unless the charge has been duly tried in a criminal
court...” (Ashworth & Zedner 2008, p.22). In recent decades perceived public anxieties about security, crime and anti-social behaviour have coincided with a range of legislative responses and changes to the criminal process. Depicted by Tonry as “populist posturing” (2010, p.387), governments in a number of English-speaking jurisdictions, such as the UK, USA and Australia, have used political expedience and media-driven hysteria to justify a steady dilution of individual rights. A number of recurring and specific changes have been documented across a body of literature, which is explored in Chapter Two of this thesis. Key themes include the increasing use of discretionary police decision-making and summary justice, the blurring of boundaries between civil and criminal methods of determining liability, the use of pre-emptive police powers to punish, and the criminalisation of an expanding range of anti-social behaviours.9 Justified by rhetoric that a higher purpose is being served by addressing a pressing socio-political issue, the impact upon the separation of powers and individual due process rights has been largely overlooked during the legislative process, or is subsumed by claims of a greater good, political expedience or parliamentary indifference. Valverde aptly concludes this sentiment by suggesting the effect of the game is that the crucial question of how governance is done ends up being decided without explicit discussion (2009, p.145).

Failure to adequately consider the consequences of legislative and operational responses to perceived issues of security or disorder are fundamental concerns for the protection of individual rights. Zedner (2005) cautioned that specific risks have been used to justify legislative provisions and police powers that undermine procedural safeguards. The significance of such changes to the criminal process is embodied in Crawford’s (2009) depiction of the ‘net-widening’ effect of policing by discretionary summary justice.10 The expanding remit of discretionary and pre-emptive police

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10 Net-widening in this context reflects an increase in the range of behaviours that may lead to a penalty, and the resulting growth in the number of people subject to a criminal justice intervention (Blomberg 1977; Cohen 1985; McMahon 1990). Crawford (2009) applies ‘net-widening’ to the use of Penalty Notices for Disorder (PNDs) in England and Wales, which police officers may impose for a range of disorderly behaviours (Criminal Justice & Police Act 2001, s1-11). Crawford contends that up to three quarters of recipients of PNDs between 2004-06 would previously not have been given a formal sanction (2009, p.821).
powers applies primarily to lower level disorderly and anti-social behaviours, but this should not limit political or public concern about the potential impact of these mechanisms upon individual rights. As Zedner noted “both murderer and petty thief enjoy the same due process rights” (2005, p.524).

It is within this broader context of the balance between issues of political expedience, public safety and individual rights that Victoria introduced its banning provisions. Banning notices target alcohol-related disorder in the NTE, and may be imposed for a specified offence, such as assault, or for more general anti-social acts and perceived nuisance, such as swearing. Banning notices address the types of low level behaviours that are increasingly subject to discretionary police punishment. Valverde (2009) questioned why such police powers, typically applied locally, are rarely challenged as potential violations of human rights. The balance between police powers and individual rights is a central focus of this thesis. Victoria’s banning provisions circumvent the separation of powers doctrine, and undermine individual due process protections that should be ensured under the Charter Act. However, the legislation has not been subject to judicial scrutiny and there is no provision within the LCRA Act 2007 for recipients to appeal their police-imposed ban in court; shortcomings which are explored across this thesis.

1.3 Theoretical Framework & Thesis Rationale

Balance is embedded in Western legal traditions and political structures, and has been debated by criminologists and legal theorists for a number of decades. It is an implicit dimension of the way in which laws are enacted, interpreted and enforced, through mechanisms such as the separation of powers and due process safeguards. However, manifestations of balance are not fixed or uniform. Within criminal justice processes the fluidity of how balance operates in practice is exemplified through the shifting emphasis on individual rights, community protection and notions of victimisation. This is reinforced by evolving theoretical constructs, such as Packer’s

11 The issue of a right of independent appeal was prominent during parliamentary debate of the LCRA Bill 2007. This is discussed in Chapters Five and Six.

The application of criminal justice models reflects a complex evolution of political, operational policing and judicial priorities. Despite an emerging interplay of human rights charters and rights-based models, these theoretical concepts have been undermined by significant legislative developments that favour enhanced police discretion, pre-emption, and lower thresholds of behaviour classified as criminal. Police discretionary powers to punish reduce the cost and increase the efficiency of administering justice, but typically at the expense of individual rights. Chapter Three examines key research and theoretical literature across a range of criminological contexts which has explored constructions of ‘balance’ in the provision of justice.

Balance suggests a sense of equilibrium, with a legislative and judicial commitment to parity between defendants’ due process protections and the needs of victims and the broader community. ‘Re-balancing’ conveys the competing expectations of individual rights and public safety, and the weight each is afforded in the administration of justice. Changes to the criminal process in recent decades have reflected a dilution of defendants’ due process rights, and a ‘re-balancing’ towards the primacy of risk mitigation and public protection. Embedded within this shift is a subordination of the rights of the accused to the needs of potential victims within the law-abiding majority. Ashworth and Zedner highlighted a key issue for this thesis.

12 Other models of the criminal process are acknowledged, such as Llewellyn’s (1962) parental and arm’s length models, and the hierarchical and co-ordinate models depicted by Damaska (1975), which align broadly with European and Anglo-American traditions. These are not explored in this thesis.

with their assertion that “suspects and unconvicted defendants ought surely to be treated as law-abiding citizens” (2008, p.43). Banning notices challenge conceptions of balance in the provision of justice in Victoria. This thesis considers whether the notion of balance is appropriate at all in the context of discretionary police-imposed punishment. As both a theoretical and applied concept, balance is explored by analysing the enactment, Charter compliance and ongoing scrutiny of Victoria’s banning notice provisions.

Banning notices embody many of the recent initiatives that ‘re-balance’ collective security away from the due process rights of defendants. The provisions involve a discretionary police decision to punish, and may be given pre-emptively and in anticipation of a subjectively assessed behaviour. Banning notices prohibit the lawful action of being in a public place, with an underlying justification of community protection to obviate the risk of victimisation. However, there is a clear dichotomy between the protections enshrined in Victoria’s Charter Act and a police-imposed pre-emptive summary power to ban. Despite the expectations afforded by the Charter Act there is no judicial scrutiny of whether the banning legislation complies with Charter rights, and a police decision to issue a banning notice is not subject to a court-based appeal. The Charter appears to have been circumvented by a ministerial Statement of Compatibility that authorises this addition to police powers at the expense of individual rights. Banning notices undermine the due process rights of recipients as they are issued on-the-spot by police officers, take effect immediately, contain a presumption of guilt, can be imposed pre-emptively before the commission of an offence, and require no evidence to be recorded. This thesis examines how the banning notice provisions were enacted, and the nature of ongoing scrutiny of the police power to ban. An analysis of the presumptions and justifications used to support the passage of the provisions through parliament informs consideration of how discretionary police powers to punish undermines the notion of ‘balance’ under Victorian criminal and liquor control laws.
1.4 Thesis Aims

The need for balance is reflected in a range of responses across the scale of seriousness of criminal law, from the terror threat post-9/11, to the control of alcohol-related violence in urban centres. The resulting increase in the reach and pre-emptive nature of criminalisation, typified in changes to operational police powers, are the antithesis of balance. An inherent ambiguity exists as the direction in which the balance is tipped encompasses a complex array of inter-related pre-emptive security issues. These range from widespread restrictions on liberty and civil rights driven by the ‘greater good’ of national security, to short term pre-emptive prohibitions, such as banning notices, to tackle localised perceptions of fear and disorder. There has been some analysis of the use of Victoria’s banning notices and the exclusionary principles they embody (Palmer & Warren 2014). However, there has been no detailed examination of the consequences of these provisions for individual rights and their impact upon the relevance of balance in developing and administering the criminal law in the light of contemporary human rights requirements. Three specific research questions are explored in this thesis to address this empirical and conceptual gap. Firstly, did Victoria’s Charter Act compliance procedures ensure an open and comprehensive assessment of the consequences of the banning notice provisions for individual rights and due process protections? Secondly, how balanced and rigorous were the parliamentary debates of the banning notice provisions? Thirdly, has ongoing public scrutiny of the use of banning notices enabled meaningful analysis of their imposition and effect?

14 National security and legislative responses to the terrorist threat post-9/11, as well as measures enacted to address concerns relating to organised crime and outlaw motorcycle gangs (OMCGs) in Australia, feature prominently across the ‘re-balancing’ literature. Some of the key literature is used in Chapter Three where theoretical arguments are pertinent and have a broader relevance to this thesis. However, the differences between issues of national security, organised crime, and local level responses to alcohol-related disorder and anti-social behaviour are acknowledged. Specific measures in relation to national security and OMCGs that challenge notions of balance, such as the introduction of Control Orders under the UK Prevention of Terrorism Act 2005, or enhanced police search powers in Queensland under the Criminal Law (Criminal Organisations Disruption) Amendment Act 2013, are not explored in detail.

15 A significant body of literature has examined exclusion and the policing of space across a variety of criminal justice contexts. Examples include, MacDonald (1997), Young (1999), Garland (2001), Travis (2002), Hermer & Mosher (2002), Gaetz (2004), Belina (2007), Beckett & Herbert (2010), Aas (2011), Ewald (2011). However, the broader exclusionary tradition is not a focus of this thesis.
The research questions sit within two complementary and inter-related themes. Firstly, Chapter Three explores the notion of balance as a theoretical and methodological construct that informs the development, implementation and operation of the criminal law. Legislative and operational ‘re-balancing’ validates the shift in recent decades towards pre-emptive discretionary police powers, that are described in Chapter Two. There is a disconnect between the use of balance to explain both the need for provisions such as banning notices, and to legitimise the consequential dilution of the due process rights of individuals. By examining the application of Victoria’s Charter compliance processes and parliamentary debates that led to the introduction of police-imposed banning notices, the first two results chapters (Five and Six) highlight the underlying political assumptions used to justify the erosion of the separation of powers doctrine. The examination of parliamentary scrutiny of the LCRA Bill 2007 and JLA Bill 2010 is considered against a number of perspectives, such as Waiton’s (2008) contention of the nonchalant drift of policies through parliament, and Crawford’s (2013) concern that reactive policy development is driven by a desire that governments are seen to do something in response to high profile issues regardless of the possible consequences for individuals. If banning notices dilute due process protections for recipients, and their passage through the Victorian Parliament circumvented Charter compliance requirements, then rather than ensuring balance the result may be the obverse of balance.

The second theme acknowledges concern regarding a lack of understanding of the effect of police-imposed summary justice (Crawford 2009), and disquiet about the erosion of due process rights (Zedner 2005; Ashworth 2006a; Ashworth & Zedner 2008). Chapter Seven examines the ongoing public scrutiny of the discretionary police power to ban. Victoria’s banning notice provisions were enacted to ‘re-balance’ the administration of justice in the NTE by prioritising the collective needs of community protection and legitimising the dilution of individual due process rights. Published data from Victoria Police, media analysis, and interviews with Victorian Magistrates are used to explore the extent to which police officers have been held accountable for their discretionary powers to punish. Deficiencies in the provision
and examination of formal banning notice data, and media indifference to the impact of banning upon individual rights, combine with judicial concern about the risks and expansion of discretionary police powers. The analysis questions the appropriateness of balance to justify Victoria’s banning notice provisions, given the ineffectiveness of their scrutiny.

### 1.5 Research Design

This thesis draws on previous studies which have used a mixed method approach to consider regulatory issues in the light of broader theoretical concepts, such as balance and punitiveness (Hall et al. 1978; Crawford & Lister 2007; Beckett & Herbert 2008, 2009, 2010a, 2010b; Hadfield, Lister & Traynor 2009). Of particular relevance is the work of Hall et al. (1978), who adopted a mixed method design utilising official crime data, detailed document and media analysis. Their consideration of constructions of race, crime and youth highlighted how a moral panic about the ‘issue’ of mugging in the early 1970s was created and augmented to justify urgent and far-reaching legislative and operational policing responses.

The design for this thesis also synthesises existing research that has utilised documentary and data records, stakeholder interviews and focus groups to examine the nature of alcohol-related harms, and the practices of fine enforcement (Saunders et al. 2013; DCPC16 2001a, 2001b, 2006, 2010). This thesis uses multiple research techniques, including a contextual analysis of documentary sources, such as parliamentary records, Hansard, Charter guidelines and reviews, secondary analysis of published data, examination of online media sources, and interviews with a sample of Victorian Magistrates and representatives from the Department of Justice. The research comprises two key phases. The first phase analyses Charter documentation, Hansard records, and a range of additional secondary sources, and applies the findings of interviews conducted at Victoria’s Department of Justice and Victoria Police (n=5). The objective of this phase is to examine the passage of the

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16 Victorian Parliament Drugs and Crime Prevention Committee.
banning notice legislation through the formal parliamentary processes. The second phase combines published Victoria Police data and media analyses with exploratory interviews with Magistrates (n=12) to analyse the ongoing scrutiny of the application of banning notices after their introduction. The pre- and post-enactment examination of Victoria’s banning provisions informs a broader consideration of whether balance is appropriate to justify discretionary police powers to punish.

1.6 Thesis Structure

The rationale for this thesis is documented over two chapters. Chapter Two provides an overview of Victoria’s banning notice provisions and literature relating to specific challenges to the separation of powers and due process rights. The expanding scope of discretionary police powers, the blurring of criminal and civil boundaries, the increasing role of pre-emptive controls, and the consequences for the administration of justice are discussed. The growth of discretionary summary justice and pre-emptive controls sit within evolving theoretical models of the criminal justice system that are examined in Chapter Three. This Chapter addresses the interplay between human rights, the drive to ensure security, risk mitigation and community protection, and the contentious notion of ‘balance’. Key influences for and consequences of the ‘re-balancing’ agenda are outlined, along with consideration of the centrality of human rights in the development of legislation. Chapter Three confirms the thesis rationale for examining the theoretical and methodological construct of balance in the light of Victoria’s banning provisions.

The research approach and design are explained in Chapter Four. Acknowledging a range of influential studies (including Hall et al. 1978; Crawford & Lister 2007; Beckett & Herbert 2008, 2009, 2010a, 2010b; Hadfield, Lister & Traynor 2009), a mixed method approach combines secondary document, media and data analysis with interview research across two phases. The methodological approach, research design and key data sources are described, along with consideration of key benefits and limitations of the research approach.
The research analysis and results are documented across three chapters. Chapter Five considers the way in which the requirements of Victoria’s Charter were applied to the banning legislation. There are competing perspectives regarding the ability of charters to uphold individual rights and of parliamentary methods to adequately assess the human rights impact of legislation (such as Feldman 2004; Neumayer 2005; Williams 2006; Gans 2009; Evans & Evans 2006, 2011; Cole 2013). The application of Victoria’s Charter to the banning notice Bills is assessed in detail to determine the extent of Charter compliance. Chapter Six scrutinises the subsequent parliamentary debates in 2007 and 2010 to highlight the justifications used to support the introduction of police-imposed banning notices. Chapter Seven looks beyond the enactment of the banning legislation to consider the ongoing public scrutiny of the discretionary police power to ban. Published banning notice data and the media coverage of the banning provisions are both examined in detail. Data from interviews with Victorian Magistrates exploring the use and implications of police-imposed discretionary justice from a judicial perspective is also presented.

The key research findings are drawn together in Chapter Eight. The thesis themes and research questions are discussed, along with the broader consequences for the separation of powers and criminal law-making of discretionary powers afforded to police officers, such as Victorian banning notice provisions. The findings are considered in relation to the literature discussed in Chapters Two and Three, in terms of their theoretical implications in the context of the ‘re-balancing’ agenda in contemporary justice administration.

Victoria’s banning provisions, and the on-the-spot police power to punish, were introduced to address issues of alcohol-related disorder in the NTE. They reflect a broader trend, evident across many Western jurisdictions, that seeks to ‘re-balance’ criminal justice processes under the auspices of national security and public safety. However, banning notices undermine core due process protections and subsume the rights of individuals to a perceived need for community protection. The passage of Victoria's banning legislation demonstrates flaws in the process of Charter
compliance and the rigour of parliamentary scrutiny. That the effect of banning notices upon the individual rights of recipients were either not recognised or were disregarded during the process of enactment has significant implications for the administration of justice and conceptions of balance. These consequences are exacerbated by a failure to monitor the way in which banning notices, and the discretionary police powers that they embody, are used. Rather than re-balancing criminal justice processes, Victoria's banning notices remove long standing due process protections and individual rights, for a need that is unsubstantiated and with an effect that is unproven.
Chapter Two

Literature Review

Victoria’s Banning Provisions: Challenges to the Separation of Powers & Due Process
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2 Introduction

The criminal process encompasses two core principles of the Australian constitutional system - the rule of law and the separation of powers. Each principle embodies the notion of balance. The rule of law embodies the expectation that everyone, citizens and government, are subject to the laws that are enacted by parliament (Walker 1988). It is predicated upon the separation of the powers of government into three distinct entities: the executive, the legislature and the judiciary. The right to determine specific criminal laws in Australia is largely devolved to the states and territories (Commonwealth of Australia Constitution Act 1900, s118).

The rights of those affected by the criminal process are fundamental to the expression of balance in the criminal justice system. While determinations made by the High Court of Australia have served to read certain human rights guarantees into the Constitution (French 2009), Australia has no formal Bill of Rights and none are specified in Victoria’s Constitution Act 1975, or its precursors. Core individual rights and civil liberties are derived from post Magna Carta legal instruments and longstanding common law tradition emanating from England and Wales. For example, the 1688 Bill of Rights, “an act for declaring the rights and liberties of the subject”, articulated basic civil rights and was embodied in statute law in Victoria’s Imperial Acts Application Act 1980 (Keon-Cohen 1991). Principles that have influenced Australia’s legal system include no arbitrary detention, no cruel or

1 The first constitution of Victoria was contained within the Australian Constitutions Act 1850. This was superseded by the Constitution 1855. Numerous amendments were consolidated under the Constitution Amendment Act 1890; Constitution Act 1903; Constitution Reform Act 1937; and Constitution Act Amendment Act 1958. Since 1975 significant amendments to the Constitution include the Constitution (Duration of Parliament) Act 1984; Australia Act 1986; Constitution Amendment Act 1994; and Constitution (Parliamentary Reform) Act 2003 (Taylor & Economou 2006).

2 The Magna Carta makes clear the expectation of ‘due process’ in the administration of justice, albeit for freemen: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land” (full text translation: British Library n.d.). In Momcilovic v The Queen & Ors (2011) HCA 34, French CJ observed that most rights derive from the common law.
unusual punishment, equality before the law and a fair trial (Castles 1982; Lord Irving of Lairg 2002; Meagher 2011). The right to a fair trial comprises both procedural and substantive principles (Bateman 2009). Procedural principles are embedded in a number of due process rights, including the presumption of innocence, the time and opportunity to present a defence, the right to legal representation, the right of the accused to examine any evidence, and the right of the accused not to be compelled to confess guilt or otherwise implicate themselves (Blake & Ashworth 1996; Wheeler 1997, 2004; Keyzer 2008; Bateman 2009).

Due process is applied to the intrinsic rights of individuals in relation to their treatment by agencies of the criminal justice system, such as Victoria Police. In the absence of a federal Bill of Rights these due process rights have been enshrined through longstanding use and expectation (Castles 1982; French 2009). The principle of legality upholds such common law provisions by ensuring that executive actions and parliamentary decisions are subject to judicial review and statutory interpretation (Weller 2004; Spigelman 2005; Meagher 2011). More recently international conventions to which Australia is a signatory, and local provisions such as the Australian Capital Territory’s Human Rights Act 2004 and Victoria’s Charter of Human Rights and Responsibilities 2006 (‘the Charter/Charter Act’), have sought to provide a more transparent legislative basis for individual rights. Expectations of due process and of human rights more generally, whether enshrined in statute, treaty or common law, are not necessarily enforced or applied consistently. The notion of ‘law in books, law in action’ (Pound 1910; Halperin 2011) embodies the challenges inherent in upholding individual rights, which are subject to change over time and interpretation according to context.

3 See Chapter 1, footnote 8.

4 Meagher provides a detailed analysis of the what he terms “methodological opacity” (2011, p.464) in the judicial application of the principle of legality.

5 Despite the common law tradition inherited from England and Wales, Australian jurisdictions have experienced ongoing struggles to ensure key due process rights (Neal 1991).

6 For example, in NSW the Evidence Amendment (Evidence of Silence) Act 2013 qualified the right to silence and permitted an adverse inference to be drawn.
In Victoria, the *Charter Act* provides a commitment that the civil, political, cultural and due process rights afforded to all citizens of the state will be upheld, and that these rights will be protected in legislative decision-making. Individual rights include the fundamental due process protections in relation to criminal proceedings, such as the presumption of innocence, a fair hearing, and the right to appeal a conviction and sentence. However, the *Charter Act* acknowledges that individual rights may be subject to reasonable limitations. A Ministerial Statement of Compatibility must accompany each new Bill to confirm adherence to the Charter (*Charter Act 2006*, s28). Any measures in a Bill that do not comply with one or more Charter rights must be justified and the need must be empirically evidenced in the Statement of Compatibility (*Charter Act 2006*, s7(2)). Section 31 of the *Charter Act* goes further with the inclusion of an override mechanism. Parliament may expressly declare, in “exceptional circumstances” (s31(4)), that an Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter (s31(1)).

Victoria’s Supreme Court is authorised to review legislation and to make a declaration of inconsistent interpretation if it determines that a statutory provision does not uphold a human right protected by the Charter (*Charter Act 2006*, s36). However, while a declaration of inconsistent interpretation triggers an opportunity for parliament to reconsider the legislation, it does not invalidate the disputed provision (Department of Justice 2008b, p.41).

In Victoria, the *Constitution Act 1975* (s16) articulates the requirement that “Parliament shall have power to make laws in and for Victoria in all cases whatsoever”. With constitutionally enshrined sovereignty, the Victorian Parliament holds the power to determine and enact the state's criminal laws. The Charter is a legislative Act, and its provisions are not protected by Victoria’s *Constitution Act 1975*. The individual rights of Victorians are formalised in the Charter, but the Victorian Parliament retains the ability to pass laws that are incompatible with the

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7 An override declaration lasts for up to five years and can be extended.
Charter’s basic rights. The potential exists, therefore, for a state initiated erosion of core individual rights and due process safeguards. What Valverde (2009) depicts as the apparent willingness of the state to side-step due process in certain situations, emphasises the significance of the way in which individual rights are upheld, and balance is ensured, in both the legislative and criminal processes.

2.i Due Process & Balance

The underlying criminal justice process in Victoria, as with other common law jurisdictions such as the UK and USA, extends the principle of the separation of executive, legislative and judicial powers. Clear parameters frame its functioning, ideally ensuring consistency, transparency, accountability, and effective preservation of individual rights and due process protections. To illustrate the separation within the criminal process, Ashworth and Zedner depict a “paradigmatic sequence of prosecution-trial-conviction-sentence” (2008, p.23), expanding Fox and Freiberg's progression of “guilt, conviction, sentence and execution” (1989, p.298). The criminal process is central to the state response to crime and to the enforcement of individual rights (Ashworth & Redmayne 2010). The rights of citizens in relation to criminal law should be maintained, as far as possible, through the independence and separation of the judiciary and its capacity to review the actions of parliament (Sage 2002; Lacey 2003; Wheeler 2004; Hunter-Schulz 2005; Bateman 2009). However, the breadth of the parliamentary law-making remit limits the corrective power of the Victorian courts, in particular with respect to the erosion of fundamental individual rights.

In 2008, Australia’s Attorney-General highlighted the nexus between the rule of law and human rights.

In Australia the rule of law and human rights are regarded as synonymous or at least mutually supportive. They are supported by: our democratic system of responsible government; the separation of powers between the Parliament, Executive Government and the Judiciary; a professional judiciary whose independence is constitutionally protected.
and who all hold accountable for upholding the law… (McClelland 2008).

Reflecting this synonymity, Waldron (2003) conceived the protection of civil liberties as central to the prevention of abuses of state power. He cited clear concern about the potential for government-initiated injustice.

… an apprehension that power given to the state is seldom ever used only for the purposes for which it is given, but is always and endemically liable to abuse (2003, p.205).

The failure to constitutionally cement core rights allows Victoria’s Parliament to undermine longstanding due process principles, that can be challenged only by a non-enforceable judicial declaration of inconsistency under the Charter (Charter Act 2006, s36). Whether for empirically evidenced necessity, political expedience, or simply to be seen to be doing something in response to a perceived social need, the primacy of parliamentary law-making power in Victoria engenders a profound imbalance.\textsuperscript{8} Despite the underlying separation of powers and the provisions within the Charter Act, the way in which individual rights are ensured in Victoria facilitates the passage of legislation that erodes due process procedural protections.

Victoria’s banning notice provisions exemplify the way in which established individual due process rights and protections have been subordinated to a declared political and social need. The legislation has been subject to limited examination to date. In this thesis the passage of the banning provisions through parliament is the basis for examining specific changes to the criminal process, and consequential theoretical and applied challenges for the legislative assurance of individual rights in Victoria.

The next part of this chapter provides an overview of Victoria’s banning notice provisions, highlighting their stated purpose and key features. Banning notices are

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\textsuperscript{8} Constitutional protections do not in themselves guarantee the absolute enforcement of individual rights. Despite its Constitutional Bill of Rights, due process protections in the USA have been subject to ongoing legislative, interpretive and enforcement challenges. However, notwithstanding the potential for political appointments, the US Supreme Court is empowered to uphold Constitutional protections and to compel legislative change (Ratner 1968). The Constitutional basis of individual rights provides an additional layer of protection that is absent in Victoria.
then considered in the context of literature depicting significant changes to criminal justice processes over recent decades. Challenges to the separation of powers and due process protections include the move towards discretionary police-imposed justice, the blurring of boundaries between criminal and civil methods of determining liability, the increasing use of pre-emptive, prohibitive restrictions, and a shift in the behaviours that lead to police-imposed summary justice. Each development has recast how balance is conceived and expressed in the criminal justice system, in Victoria and comparable English speaking jurisdictions.

2.1 Overview of Victoria’s Banning Notice Provisions

The *Liquor Control Reform Amendment Act 2007* (‘LCRA Act 2007’) was the first Victorian legislation to permit the police-imposed prohibition of individuals from defined areas, initially for 24 hours. Building upon the measures contained within the *Liquor Control Reform Act 1998* relating to the sale and supply of alcohol in Victoria, the *LCRA Act 2007* also significantly extended the regulatory framework to strengthen penalties for liquor licensing offences. Victoria’s banning notice provisions were one component of a multi-dimensional response to concerns about issues of alcohol-related disorder in Victoria’s night-time economy (NTE). A combination of legislative and operational policing measures were consolidated under Victoria’s Alcohol Action Plan (Department of Justice 2008a).9

Subsequent legislation expanded police powers in the NTE (see Appendix A). The *Summary Offences & Control of Weapons Acts Amendment Act 2009* increased the range of behaviours subject to control and penalties,10 introduced police enforceable

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9 Notable measures include the creation of the Safe Streets task force (an operational policing initiative to increase the visible police presence in central Melbourne on Friday and Saturday nights) as well as the provisions documented in section 2.1.i of this chapter.

10 Penalties include ‘penalty units’. These are outlined in Victoria’s *Monetary Units Act 2004*, and are used throughout Victoria’s legislation to describe fine amounts (an offence may constitute a number of penalty units). To prevent legislation needing to be updated each time a fine is increased, the value of penalty units is fixed for each financial year by the Treasurer (*Monetary Units Act 2004*, s5(3)). One penalty unit has increased from $110.12 in 2007-2008, to $147.61 for the 2014-2015 financial year (Victorian Legislation and Parliamentary Documents 2014)
move-on powers, and created the offence of ‘disorderly conduct.’ The principles of banning have since spread to contexts outside of the NTE. The *Summary Offences & Sentencing Amendment Act 2014* extended discretionary police move-on powers to cover protests, blockades and demonstrations where a “reasonable apprehension of violence” is perceived or where an obstruction is likely to occur (s3(e-h)).

To implement the banning provisions, the *LCRA Act 2007* empowered the then Director of Liquor Licensing to declare a 'designated area' if “alcohol-related violence or disorder has occurred in a public place that is in the immediate vicinity of licensed premises within the area” (s147(1a)), and if it was believed that the imposition of banning notices may be effective in controlling, reducing or preventing further “alcohol related violence or disorder in the area” (s147(1b)). The “immediate vicinity” is defined as a “place that is within 100 metres of the licensed premises’’ (s147(3)).

Victoria's first two designated areas, declared in December 2007, were the Melbourne Central Business District (CBD) and Prahran/South Yarra, incorporating the Chapel Street entertainment precinct of inner Melbourne (VCGLR 2015). Additional entertainment precincts in Metropolitan Melbourne and all major regional centres across Victoria now have designated areas.

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11 Similar to a banning notice, move-on orders can be issued pre-emptively if a police officer suspects that a person may cause damage, injury or “is otherwise a risk to public safety” (s3(1)). They specify non-return for up to 24 hours (s3(3)), and carry financial penalties of up to five penalty units ($738) for their breach.

12 What is meant by ‘disorderly conduct’ was not defined in the legislation.

13 The Attorney-General stated that the Act would “give Victoria Police the power to end unlawful union pickets and protestor blockades that threaten to shut down businesses” (Clark 2013).

14 In February 2012, the Director of Liquor Licensing was superseded by the Victorian Commission for Gambling and Liquor Regulation (VCGLR).

15 The VCGLR website maintains an inventory of each designated area. The precise location for each is described and depicted visually on individual declarations (VCGLR 2015).
2.1.i Banning Notices: Key Features

The *LCRA Act 2007* afforded Victoria Police on-the-spot discretionary powers to ban individuals, including those behaving or likely to behave in an anti-social manner, from the designated area for a period not exceeding 24 hours (s148B(1,2)). This was increased to a maximum of 72 hours under the *Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Act 2010* (‘*JLA Act 2010*’). A police officer can impose a banning notice if he/she

(a) believes on reasonable grounds that the giving of the notice may be effective in preventing the person from—
   (i) continuing to commit the specified offence; or
   (ii) committing a further specified offence; and

(b) considers that the continuation of the commission of the specified offence or the commission of a further specified offence may involve or give rise to a risk of alcohol-related violence or disorder in the designated area (*LCRA Act 2007*, s148B(3)).

A banning notice may be imposed if a police officer reasonably believes that it may be effective in preventing the recipient from committing a specified offence or committing a further offence. Specified offences are documented in the *LCRA Act 2007* (s7, schedule 2), and include offences against the person, sexual offences, destroying or damaging property, and assault.\(^{16}\) However, no actual offence need necessarily have been committed. A police officer may issue a banning notice in anticipation of these listed offences, and any disorderly or anti-social behaviours as perceived by the officer. The legislation targets alcohol-related violence and disorder, but the behaviours for which banning notices may be imposed are reliant on subjective perceptions and the interpretation of vague and undefined terms such as ‘disorderly’ and ‘anti-social’. The *LCRA Act 2007* affords police officers the discretionary power to both define a behaviour as disorderly and to determine the punishment, by imposing a banning notice.

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\(^{16}\) Additional specified offences include trespass, offences relating to drunkenness, offensive and obscene behaviour, possession of prohibited weapons and failure to leave licensed premises.
Imposition of a banning notice requires that a police officer suspects “on reasonable grounds” (*LCRA Act 2007*, s148B(3)(a)) that an offence has been committed or is likely to be committed “wholly or partly in the designated area” (s148B(1)). There is no requirement for the officer to offer proof, to demonstrate intent to commit an offence, or to record any witness information. The banning notice sanction is imposed immediately. The recipient is given a paper copy of the banning notice (see Appendix B) and instructed to leave the designated area. There is no recourse to legal representation and no capacity to appeal the imposition of a banning notice. Recipients are effectively compelled to accept the ban. The legislation requires anyone to whom a banning notice is given to provide his or her name and address to the requesting police officer. A banning notice recipient must not refuse to provide their details “without a reasonable excuse” (s148D(3)), and must not provide false or misleading information. If a banning notice recipient refuses to provide their details a financial penalty may be imposed, but what is meant by a 'reasonable excuse' is not made clear in the legislation. Police officers may also use “reasonable force” to ensure the banned person leaves the designated area upon receipt of a banning notice (s148H).

Unlike other infringement provisions that permit the imposition of on-the-spot penalties, such as speeding fines,¹⁷ there is no opportunity to seek an independent review of a police decision to issue a banning notice. Despite the acknowledged imperfections within Victoria’s infringement system,¹⁸ there are clear options available for recipients wishing to challenge the imposition of infringement penalties. The penalty, typically a fine, does not have to be paid until the review process is complete. Legal representation may be sought and evidence may be requested when a recipient instigates an appeal, and due process is therefore ensured prior to the financial punishment taking effect. Although only invoked if an appeal against the infringement penalty is lodged, these core individual rights are still

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¹⁷ For example, the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006 (Vic)*, r8, and the *Road Safety (General) Regulations 2009 (Vic)*, r75.

¹⁸ Saunders et al. (2013) noted, for example, the disproportionate effect of fixed penalty fines upon less wealthy recipients.
enabled. The only option stipulated in the *LCRA Act 2007* for a recipient of a banning notice to appeal its effect upon their freedom of movement or its perceived validity, is by written notice to a police officer above the rank of sergeant, who may “vary or revoke a banning notice” (s148E). The feasibility of being able to submit a written application and receive a response within the period for which the banning notice is enacted is questionable, as the ban takes effect immediately. No appeal against the imposition of an individual banning notice is permitted beyond the agency of Victoria Police.

In Queensland, the *Safe Night Out Legislation Amendment Act 2014* introduced police-imposed banning notices of up to ten days (s602C-D). The legislation expressly permits recipients to seek an independent review of the imposition of a ban via the Queensland Civil and Administrative Tribunal (QCAT) (s602P). Victoria’s Civil and Administrative Tribunal (VCAT) does not have the remit to review police-imposed banning notice decisions.19 It is recognised that provisions exist for more complex administrative reviews of legislative, executive and other agency decisions.20 However, there is no facility to appeal a police decision to impose an individual banning notice.

Although a banning notice is not a criminal sanction, its imposition is recorded on Victoria Police’s Law Enforcement Assistance Programme (LEAP) database.21 Breach proceedings may be initiated if a recipient contravenes their banning notice by entering or attempting to enter the designated area (*LCRA Act 2007*, s148F). Banning notice breaches are strict liability offences. They operate under reverse onus principles, whereby the accused must prove the breach was a consequence of a mistake or was beyond their control (s148F(3a,b)). Breach penalties are initially

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19 VCAT confirmed that “VCAT does not have jurisdiction to review this type of decision” [police-imposed banning notices] (personal email, 20 April 2015).


21 Introduced in 1993, the LEAP database records Victoria’s crime related data and information. It is used for operational policing and statistical analysis. Police officers and analysts record individual offences, penalties, missing persons etc. An individual’s record may remain on LEAP indefinitely (Victoria Police 2012).
financial, set at 20 penalty units (currently $2952\textsuperscript{22}). In the event of persistent non-compliance or non payment of the fine, summary court proceedings may be initiated, with the potential for criminal consequences, including imprisonment.

The way in which banning notices have been legislatively framed has significant consequences for their imposition, and for the conception of balance. Banning notices are a quasi-criminal sanction, and embody a number of due process concerns. The most significant features are their permissible pre-emptive and immediate imposition, the lack of opportunity to seek legal representation, and no provision for judicial appeal of police decisions despite potentially significant breach consequences.

2.1.ii Exclusion Orders, Liquor Accord Bans & Barring Orders

Banning notices are not the only prohibitive mechanisms targeting issues of disorderly behaviour in the NTE. The *LCRA Act 2007* also introduced exclusion orders, which can be imposed by Magistrates for up to 12 months following court conviction for a “specified offence that was committed wholly or partly in the designated area” (s148I(1)). Unlike banning notices, exclusion orders are issued post prosecution and recipients are permitted full due process protections. Data relating to the use of exclusion orders is referenced in a comparative capacity in Chapter Seven of this thesis.

Liquor Accords, previously permitted under local government agreements, were given legislative authority under the *LCRA Act 2007*. Participating venue licensees and police officers may ban members of the public from their own and other venues across an accord (s146A-D). The period of the ban is determined as part of the accord. While embodying the issue of private trespassory rights to evict and to

\textsuperscript{22} See footnote 10.
exclude, no breach provisions apply to liquor accord bans. As licensed premises are not public spaces, the banning notice issues relating to due process and procedural protections do not apply in the same way to liquor accord bans.

Victoria’s *Justice Legislation Amendment Act 2011* created barring orders (s4), which empower venue licensees, police officers or another “responsible person” (s106D) to bar someone from licensed premises if “the person is drunk, violent or quarrelsome”, or creating a “substantial or immediate risk” (s106D). Barring orders are a statutory extension of the private right to trespass. They may be imposed for up to six months (s106G) and records must be kept by the licensee for three years (s106K). Breach of a barring order may lead to a fine or court proceedings (s106J). The VCGLR confirmed that no records are kept centrally and no data is available relating to the use of barring orders (personal email, 27 June 2014). This limits possible analysis other than in the event of court documented breach proceedings. As licensed premises are not public spaces once again the banning notice issues relating to due process and procedural protections do not apply in the same way.

The evolution of related legislation is pertinent to discussion of the broader consequences of the passage of the *LCRA Act 2007* and *JLA Act 2010*. However these alternative provisions (exclusion orders, Liquor Accord bans and barring orders) embody imposition procedures and/or scope that are substantively different to banning notices, and which do not undermine individual rights in the same way. Banning notices typify the expansion of police-imposed discretionary summary justice in Victoria, and across comparable jurisdictions. The banning provisions

23 Foreshadowing many subsequent developments, Gray & Gray describe such exclusion from quasi-public spaces as “insidious”, and which “has already begun to take hold of us and paralyse our critical legal faculties” (1999, p.46).

24 Liquor accord bans are also discretionary, potentially punitive, and based upon the subjective opinion of venue licensees. However, as venues are private spaces licensees may determine who is permitted to enter (notwithstanding expectations in relation to anti-discrimination legislation). In Queensland, the Supreme Court judgement in the case of *Owens v Normanton Liquor Accord & Ors* [2012] QSC 118 confirmed that the *Liquor Act 1992* (QLD) confers on licensees the discretion to refuse entry to patrons. In 2011, a similar judicial challenge against a decision by Victoria’s Swan Hill Liquor Accord to impose a 12 month ban, led to the ban being retracted before legal proceedings commenced (this is discussed further in Chapter Seven).
dilute the separation of powers in the provision of justice, erode due process protections for individuals and have influenced the trajectory that police-imposed discretionary powers have followed. The remainder of this chapter relates Victoria’s banning notice provisions to literature that has depicted and analysed significant recent changes to relevant criminal justice processes.

2.2 Challenges to the Separation of Powers & Due Process

2.2.1 Summary Justice and Discretionary Decision-Making

Discretion is exercised whenever a public officer is empowered to “make a choice among possible courses of action or inaction” (Davis 1980, p.4). Discretionary decisions are made across the criminal process, from pre-trial plea bargaining, witness selection and admission of evidence, to jury direction and sentencing (Findlay, Odgers & Yeo 2010, p.114). Police decisions, such as when to use force, or whether to warn, caution or arrest a suspect, are shaped by a range of legal, situational, interpretive, logistical, personal and pragmatic factors (Travis 1983). Policing is, therefore, inherently and necessarily discretionary (Davis 1969, 1980; Klockars 1985; Finnane 1990; Skolnick 1994; Mastrofski 2004; Bronnitt & Stenning 2011). The use of discretion can be an effective and positive aspect of policing (Dixon 1997). Police officers are empowered, for example, to apply their judgement of selective enforcement (Klockars 1985) to move someone on rather than arrest them, therefore saving time and expense in the provision of justice. However, police discretion is not always demonstrably fair, impartial or visible. Notable research into US, UK and Australian policing has explored the damaging consequences for procedural justice and police legitimacy of the way in which discretionary police

25 Since the 1960s the definition and significance of police discretion and selective enforcement has been the focus of ongoing research. A range of influential sources are acknowledged but not explored in this chapter.
powers, such as to move-on and stop/search, have been used disproportionately against certain racial groups.\textsuperscript{26}

Since the 1970s, diversion and decarceration initiatives have led to a growing number of people being subject to an increasing range of controls, creating both a net-widening and net-strengthening in the provision of justice (Blomberg 1977; Cohen 1985; Polk 1987; Sarre 1999). Cohen contends that attempts to reduce the scope and reach of formal criminal processes has “left us with wider, stronger and different nets” (1985, p.38), whereby increasing numbers of people receive more intensive intervention, determined by an expanding range of agencies. Legislative developments in many jurisdictions have challenged the separation of powers within criminal justice processes. As members of the executive branch of government police officers are increasingly called upon to determine guilt and administer justice summarily. Summary justice in this context refers specifically to the use of police-initiated pre-court punishments, such as banning notices, which risk diluting or circumventing established due process protections.

The evolution of legislative provisions, from infringement penalties to banning notices, enables summary justice to be determined and imposed on-the-spot by police officers. This has significantly extended the reach of their discretionary powers, with consequences for individual rights that are explored in this thesis. The increasing use of infringement penalties and move-on provisions are particularly evident in regulatory responses to public order issues in England and Wales, the USA, and Australia.


\textsuperscript{26} For example, Weitzer and Tuch (2002), Weatherspoon (2004), Tyler and Wakslak (2004) Goodey (2006), Hallsworth (2006), Harris (2006), Walsh and Taylor (2007), Sivasubramaniam and Goodman-Delahunty (2008), Young (2010), Yesufu (2013), and Mazerolle et al. (2013). Published data relating to Indigenous recipients of Victoria’s banning notices is analysed in Chapter Seven. However, as this thesis does not address the issue of discriminatory policing per se, this extensive body of research is not examined in detail.
Reduction Act 2006 introduced and extended Police Notices for Disorder (PNDs), dispersal orders and police exclusionary powers. PNDs carry financial penalties and are issued on-the-spot by police officers for a range of alcohol-related and disorderly behaviours. Dispersal orders enable police officers to exclude recipients from designated areas for actual or perceived anti-social behaviours. Hadfield, Lister and Traynor (2009) and Young (2010) contend that summary justice in this sense facilitates a fundamental change in the role of police officers from law enforcers and investigators to both judge and jury as well. Such police-imposed summary justice presents a tangible challenge to the principle of the separation of powers, as police officers determine the culpability of the alleged offender and administer the punishment on-the-spot.

The ‘net-widening' effect of policing by summary justice is highlighted by Crawford (2009). He notes that between 2004 and 2006 the number of PNDs issued in England and Wales more than tripled to over 200,000 (2009, p.821). Ashworth and Zedner (2008) and Crawford (2009) contend that up to three quarters of PND recipients in England and Wales would previously have been given a caution or warning and would, therefore, not have received a formal sanction or punishment. The changing priorities enabled by summary justice, increases the number of people drawn into the formal mechanisms of the justice system, who then receive a tangible penalty – determined and administered outside of traditional legal processes. The possibility of ‘add-on’ offences further extends the net-widening concerns. For example, any profanities expressed after receipt of an infringement notice could result in another being issued (Saunders et al. 2013).

Research by Beckett and Herbert (2008, 2009, 2010a, 2010b) examines the use of police-imposed discretionary powers in Seattle, USA. Trespass rules allow police officers to issue on-the-spot exclusion orders from public spaces, which can last for up to a year. There is no requirement to provide any evidence of wrongdoing, and restrictions apply to extensive geographical areas (Beckett & Herbert 2008, 2010a). Breaching a ban can result in arrest with potentially serious consequences, including...
custody. Beckett and Herbert (2010a) highlight the way in which such programs continue to grow, have a disproportionate effect upon the homeless, and progressively increase the likelihood of infringement and punishment.

Early Australian research identified a similar move towards summary justice. Fox and Freiberg (1989) discussed the growth of discretion afforded to the police in Victoria through the use of on-the-spot fines and infringement notices. They noted the ability of the police to negotiate an early resolution to situations without the need for prosecution in a summary court. In Victoria, the number of actions and behaviours subject to police regulation and control continues to grow. Infringement notices issued by Victoria Police increased by over 25% between 2006-7 and 2010-11 to 2.9 million (Attorney-General, Victoria 2011, p.10). The majority of infringement notices were for traffic or driving infractions, with only 15,000 related to public order offences. Of particular significance for this thesis, infringement notices carry the option of formal review or a hearing before a court before the penalty is implemented (Saunders et al. 2013). During 2010-11, 8% of notices were reviewed, over half of which were subsequently withdrawn, mostly due to special or exceptional circumstances. But nearly 15% of those withdrawn, more than 17,000 individual notices, cited their imposition as being “contrary to the law” largely due to errors made by the issuing officer (Attorney-General, Victoria 2011, p.19). This demonstrates the clear potential for error in the application of on-the-spot penalties by police officers.

In a detailed assessment of the NSW Young Offenders Act 1997, Bargen (2005) offers a more positive perspective regarding discretionary police powers. Prior to the

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27 For example, following a decade of little change, the number of trespass cases filed in the Seattle Municipal Court rose by 40% between 1999–2005. In 2005, trespass cases comprised the third largest category of cases (10% of the total caseload). Significantly, of the 1,947 criminal trespass cases filed, 60% of them had criminal trespass as the only charge (Beckett & Herbert 2010a, p.91).

28 Infringement notices were first introduced in Victoria via the Magistrates (Summary Proceedings) Act 1975.

29 NSW Young Offenders Act 1997 introduced a hierarchy of diversionary measures as alternatives to court proceedings; informal police warnings, formal police cautions and youth justice conferencing options.
fewer than 20% of relevant cases used police-imposed cautions, with over 80% being dealt with by the Children’s Court. By the third year of the Act, the proportion of cases resolved with the application of a caution increased to 36% (2005, p.16). Within this shift the number of interventions remained steady, suggesting no net-widening effect of the extended discretionary police powers. Bargen does concede a number of issues with the consistent and transparent application of this form of police discretion, such as deficiencies in police training, resources and the quality of legal advice (2005, p.148). However, the overall effect upon the provision of justice was positive.

There are common and recurring themes across a body of literature regarding discretionary police powers. The growth of police-imposed summary justice reflects underlying pressures to reduce costs and ease judicial burdens. The stated principles upon which Victoria’s infringement policies are based include efficiency and expediency (Attorney-General, Victoria 2012, p.9). Of significance to Fox and Freiberg is the way in which similar changes have progressed over several decades in Victoria “without debate or analysis… [and] principles relevant to the exercise of that [police] discretion are all but non-existent” (1989, p.299). Crawford’s (2008, 2009) analysis of developments in England and Wales suggests little improvement in the appetite for understanding the basis for, and effect of, equivalent police powers to punish. Consequences of discretionary police-imposed summary justice, such as Victoria’s banning provisions, include the loss of traditional procedural safeguards, the dilution of the separation of powers and the erosion of police accountability.

2.2.ii Police Discretion and Accountability

Discretion plays a key role in the imposition of summary justice by police officers. While not necessarily negative, discretionary police decisions risk being applied inconsistently or improperly, due in part to a lack of visibility and accountability. Davis cautioned that “the exercise of discretion may mean either beneficence or tyranny, justice or injustice, reasonableness or arbitrariness” (1980, p.3). Klockars
(1985) noted that while police decisions to arrest will typically be subject to review, decisions not to arrest are much less transparent. Court decision-making processes operate under clearly documented guidelines, such as those drawn up by Victoria’s Sentencing Advisory Council and the Sentencing Act 1991. Determinations of guilt and sentencing pronouncements are, with only limited exceptions, made publicly ensuring a level of accountability. The judicial rules of evidence and procedure further enhance the safeguards embedded in criminal justice processes (Sage 2002).  

By contrast, police administered summary justice is not subject to the same processes of regulation or accountability. Guidelines and procedural controls do exist, in terms of how police discretion should be exercised. However, supervisory mechanisms and the way in which decisions are actually made are more opaque. Fox (1995) specifically cautions against the undesirability of police-imposed penalties that are not subject to judicial scrutiny. Mechanisms, such as banning notices, dilute the protections that should be provided through the separation of powers and do not enable effective scrutiny of the police use of discretion. Victoria’s banning notices require no evidence to be recorded and their imposition is not subject to independent appeal.

Concerns about police-imposed summary justice have been identified in other jurisdictions. Between 2003 and 2011, the number of out-of-court disposals effected by the police in England and Wales increased by 241%, while the number of in-court convictions remained stable (Lord Chief Justice 2011, p.14). By 2011, 40% of all crimes solved by the police in England and Wales were dealt with outside of the court process (HM Inspectorate of Constabulary 2011, p.9). The Lord Chief Justice of England and Wales highlighted judicial disquiet about the growth of discretionary summary justice.

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30 It is recognised that summary justice effected through the courts is also subject to discretion, and the possibility of error and injustice. However, court processes are typically visible, defendants are permitted to have legal representation, and decisions are subject to appeal and review.

31 For example, the LCRA Act 2007 states that banning notices can be imposed by ‘relevant police members’ (s148N). Specific training is required, and it is not a power intended to be used by all or any police officer. However, the extent of adherence to this requirement is unknown.
We must be very careful about the creation of two separate systems of providing summary justice: the one in the hands of the magistrates, and the other in the hands of the police, who effectively act as prosecutor, and jury and judge. Just as judges are not police officers, so police officers are not judges (Lord Chief Justice 2011, p.15).

A study by HM's Inspectorate of Constabulary (2011, p.5) compared 190 cases of police administered cautions and PNDs across England and Wales with 50 guilty plea cases dealt with in a Magistrates Court. The research noted a lack of consistency in the application of out-of-court disposals, with 64 (34%) failing to comply with the guidelines for their imposition, compared with only one (2%) of the court-based cases reviewed (2011, p.22). In 2012, the Chair of the Magistrates’ Association of England and Wales issued a warning for the separation of powers doctrine.

… some offences are being dealt with outside of the judicial process. In some cases there is already a suspicion that this has created a lack of transparency and openness in the system and effectively means that those who are there to enforce the law are effectively put in the position of judges and sentencers (Fassenfelt 2012, p.42).

The consequential risk of police-imposed discretionary justice is that much “is being dealt with inappropriately because it has not come before an independent tribunal” (Fassenfelt 2012, p.42). Victoria’s banning notices typify the changes in police powers that underpin such judicial concerns. Chapter Seven of this thesis documents interview research with a sample of Victorian Magistrates, and offers a judicial perspective of the banning provisions.

It is recognised that court decisions may be made in error, and that discretionary police decision-making is not inevitably problematic. However, Beckett and Herbert's (2010a) research in Seattle, USA illustrates the absolute discretion that police administered summary justice is able to permit, along with the potential consequences for individual rights. The coercive powers available to the Seattle police are exercised on-the-spot with limited oversight or opportunity for judicial review (Beckett & Herbert 2010a). For example, trespass admonishments, which may cover extended geographical areas, can be imposed by a police officer without evidence and with no independent authority. The effect is to create a fundamental
imbalance of rights, whereby the due process protections of the accused are subordinated to expansive discretionary police powers, which embody a “problematic lack of constraints” (2010a, p.148).

Across Australia, research also highlights issues for the accountability of police-imposed discretionary summary justice. Spooner (2001) notes abuses in Queensland, with move-on decisions made by police officers based on their subjective perceptions rather than actual behaviours. Walsh and Taylor (2006, 2007) synthesise trends in police move-on practices in Queensland. They identify a disproportionate effect upon vulnerable groups, such as the homeless, and evidence of harassment by police officers. A Queensland Crime and Misconduct Commission (CMC) report confirms the importance of discretion in the effective policing of public order (CMC 2010). The report also cautions that misuse of police discretion poses a serious risk to public confidence and police legitimacy. The disproportionate impact upon disadvantaged groups (such as the homeless, young and Indigenous) of discretionary police powers to move-on, is identified as a specific issue. In New South Wales (NSW), recommendations by the NSW Ombudsman (1999) to introduce a clear code of practice to improve accountability in the application of police move-on powers were not implemented.

In Victoria, Farrell (2009) considers the then proposals for move-on provisions and notes the scarcity of empirical research in other Australian jurisdictions regarding their effectiveness in reducing crime. In 2012, the Office of Police Integrity (OPI) conducted a detailed review of discretionary police powers to stop and search. Their report expresses concern about the lack of appropriate transparency and accountability for police decision-making. The absence of oversight and review, and failure to meet the legislated reporting requirements due to inadequate data collection are highlighted as significant issues (OPI 2012, p.7). A recent detailed examination of the Victorian infringement notice system also notes concerns with respect to police conformity with guidelines for their issue (Saunders et al. 2013, p.31).

32 The name was changed to the Crime and Corruption Commission (CCC) in 2014.
Fundamental to political and criminal theory is Zedner's assertion that “one long lauded means of protecting democratic freedom is reliance upon the separation of powers” (2005, p.525). In the context of police discretionary summary justice, separation should be effected by mechanisms such as judicial oversight of legislative provisions and independent review of police decision-making. The changing remit of police powers poses a threat to these principles. The strengthening of the discretionary authority of the police, at the expense of due process and separation of powers, highlights a significant challenge to the criminal process that is exemplified by Victoria’s police-imposed banning notices. The post-enactment scrutiny of the police use of banning notices is therefore examined in Chapter Seven.

2.2.iii The Blurring of Criminal/Civil Boundaries

The boundaries of criminal, civil and regulatory law have become increasingly blurred by legislative developments that have expanded the use of police-imposed penalties, under the auspices of both punishment and control. Pre-dating many of the specific Victorian provisions, Fox and Freiberg (1989) drew attention to long-standing changes in sentencing practices in Victoria. In the 1980s they documented the move towards summary justice, and the rise of what they term non-conviction diversionary practices, or contracts, the precursors of contemporary prohibitive orders. Fox and Freiberg (1989) noted the shift of power that sits alongside the blurring of civil and criminal boundaries, and expressed concern about the undermining of formal due process rights to the promise of leniency. For example, a judicial hearing would require guilt to be proven beyond reasonable doubt. The new diversionary practices, by contrast, were offered with the incentive of non-conviction if recipients consented and accepted their guilt. Fox and Freiberg (1989) contend that such consent was flawed, conceptually confusing and was fundamentally coercive. Individuals were asked to waive their right to a judicial hearing and accept the police determination of their guilt, in return for a more lenient outcome.
Crawford extends this early discussion of non-conviction dispositions to the increasing use of ‘contracts’ to control and govern individual behaviour. He questions the “future-focused logic of crime prevention” (2003, p.486) that uses prohibition to prevent wrong-doing and promote community security. Referencing Young’s (1999) ‘exclusive society’, Crawford (2003, 2008) critiques the criminalisation of social policy and the introduction of largely prohibitive measures, such as Anti-Social Behaviour Orders (ASBOs) in the UK. ASBOs epitomise the blurring of criminal and civil boundaries, and the dilution of the separation of powers. As well as being a post-conviction disposal, an ASBO could be applied for by police, social landlords and other local authority bodies (Crime and Disorder Act 1998 (UK) s1; Police Reform Act 2002 (UK) s61), and imposed without conviction.

A key criticism of ASBOs is their reliance upon discretionary powers and the combining of the lower burden of proof of civil orders, with the potential for criminal breach proceedings (Burney 2002, 2006, 2009). The restrictive nature and the extent to which ASBOs transgress fundamental legal principles is highlighted by Ashworth (2004a). ASBOs typically included prohibitive elements, such as not entering a defined geographical area, or not associating with named individuals. These actions in themselves are not criminal, but if undertaken when an ASBO is in place may lead to criminal prosecution. Ashworth (2004a) notes that limits embedded within the rule of law do not apply to prohibitions like ASBOs, as they are a future-focused community protective measure rather than a punishment for an actual offence. However, like banning notices, their effect can be considerable and disproportionate to the behaviour that triggered the order.

33 ASBOs were introduced under the UK’s Crime and Disorder Act 1998. Intended to be used to resolve neighbourhood disputes, the legislation was designed to tackle behaviour that “caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household” (UK Crime & Disorder Act 1998, part 1), and envisaged to apply primarily to adults. However, ASBOs quickly became synonymous with young people (Burney 2002), although their success continues to be debated (Garrett 2007; Squires 2008; Crawford 2008, 2009; Burney 2009; Donoghue 2010; Hodgkinson & Tilley 2011).

34 ASBOs were eventually superseded by new Criminal Behaviour Orders (CBOs) under the Anti-Social Behaviour, Crime and Policing Act 2014. CBOs continue to operate under prohibitive principles, with criminal sanctions available for breaches.
Von Hirsch and Simester (2006) echo the concerns of Crawford (2003), Ashworth (2004a) and Burney (2006) in their analysis of what they term “two-step prohibitions (TSPs)” (Von Hirsch & Simester 2006, p.174), which combine prohibitive civil orders with criminal breach proceedings. Von Hirsch and Simester position TSPs, such as ASBOs, as a form of criminalisation that punishes, yet carries a fundamental loss of procedural safeguards. Ashworth (2006a) considers civil and hybrid orders in the context of their specific threat to the presumption of innocence. Like Victoria’s banning notices, the civil nature of ASBOs enables their imposition to side-step fundamental due process protections that would be afforded in criminal proceedings. Their breach reverses the presumption of innocence and conflates criminality with otherwise non-criminal acts (Martin 2011). Similarly, in the USA a Stay Out of Drugs Area (SODA) order, which covers more than half of the city of Seattle, is offered to defendants to avoid a drug prosecution (Beckett & Herbert 2008, 2010a). SODAs are civil dispositions that do not require a conviction, but which retain criminal breach provisions. Key due process rights that would be assured by summary prosecution are subsumed to the promise of leniency and the avoidance of conviction.

Similar prohibitive orders and related concerns across Australian jurisdictions pre-date the introduction of ASBOs. The creation of a range of family violence protection and stalking intervention orders embodied the same issues of the hybridisation of civil and criminal proceedings. Such measures restricted the free movement of recipients with penalties invoked for their breach (McMahon & Willis 2003; Australian Law Reform Commission (ALRC) 2010). In Victoria, the Crimes (Family Violence) Act 1987 empowered police to issue discretionary orders with a variety of generally prohibitive conditions, for example exclusion from specified addresses, breach of which could lead to criminal prosecution.36 Examining Prohibitive Behaviour Orders (PBOs) introduced in Western Australia in 2010, 35 Superseded by the Family Violence Protection Act 2008.

36 Under Victoria’s Crimes (Family Violence) Act 1987 (s23) police were able to impose an Intervention Order, and initiate an arrest for alleged breaches without a warrant.
Crofts and Witzleb (2011) contend these orders are predicated on the empirically unproven assumption that certain behaviours that in themselves are lawful, will increase the likelihood of previously convicted offenders committing further acts of anti-social behaviour. Like ASBOs, PBOs therefore prohibit lawful behaviours, such as being present in a particular place. Breach of any of the requirements constitutes a criminal offence – thereby effectively criminalising non-criminal behaviours (Crofts & Witzleb 2011). As Belina observes in relation to similar spatial orders in Bremen, Germany, this becomes the “…criminalisation of the merely being there” (2007, p. 327).

Discretionary summary justice fundamentally challenges the separation of powers, and circumvents entrenched aspects of criminal law and procedure (Young, Byles & Dobson 2000; Ashworth 2004a). Significantly, rather than amending specific policing laws, such as Victoria’s Crimes Act 1958, new police powers and control mechanisms are being introduced via existing administrative provisions. In the case of banning notices, Victoria's Liquor Control Reform Act 1998 has been amended to enable their imposition. Reinforcing the blurring of criminal and civil processes, the police power to punish is intentionally transformed outside of the boundaries of the criminal law. A consequence for banning notices in particular is to render their individual imposition immune from judicial scrutiny. Fox and Freiberg’s (1989) concern about the coercive imposition of diversionary mechanisms under the guise of leniency is taken a step further, as banning notices require no consent from the recipient to be imposed.

2.2.iv Pre-emptive Justice and Pre-Crime

Prohibitive orders, such as ASBOs, PBOs and banning notices, typify the principles of pre-crime and preventative justice. Pre-crime relates to the notion of preventing wrongdoing, controlling risk and pro-actively managing behaviours, by enabling a person’s intentions to be presumed rather than waiting for actions to occur. Such pre-emptive justice, envisaged in Feeley and Simon's 'New Penology' (1992), finds

In important respects we are on the cusp of a shift from a post- to a pre-crime society, a society in which the possibility of forestalling risks competes with and even takes precedence over responding to wrongs done (2007c, p. 262).

The transformation of criminal justice processes and priorities, from individual responsibility and punishment to the management of probability and risk, is addressed by Feeley and Simon (1992). They outline the ‘old penology’ need to prove individual intent and the existence of protective barriers, or due process, to afford necessary protection for the accused. Feeley and Simon suggest that the ‘new penology’ manifests a more managerial and regulatory approach, with a focus upon “surveillance, confinement and control” (1992, p. 452). Groups and sub-populations are targeted for control with a justifying discourse emphasising the need to promote public safety. This control approach validates the use of administrative measures to deal with crime, and finds subsequent expression in many examples, including the UK’s ASBO legislation and the growing body of police-imposed penalties, such as the banning provisions of Victoria’s LCRA Act 2007.

Hallsworth and Lea (2011) extend the work of Rodger (2008a, 2008b) with respect to pre-crime. They explore a number of examples from the UK to illustrate how the traditional reactive, post-hoc criminal process is being “mutated” (2011, p. 146) by pre-emptive criminalisation. Depicted as “tooling up’ Leviathan”, Hallsworth and Lea explore some of the primary developments that are used to justify what they regard as the increasing “coercive powers of the criminal justice agencies” (2011, p. 146), particularly in the realm of pre-crime. Rather than continuing the traditional functions of arrest and evidence gathering for subsequent court prosecution, policing organisations now seek
pre-emptive responses that previously would have been unthinkable other than at times of major civil disturbance and the suspension of normal legality (2011, p.151).

Hallsworth and Lea (2011) suggest that strategies developed in response to serious crime are subsequently applied to lower level crime control under the banner of common sense. In Victoria pre-punishment mechanisms had previously been directed towards serious risks to public safety from, for example, sex offenders or the post-9/11 terror threat. Discretionary police banning powers lowered the threshold to include prospective public disorder in the NTE. The implication of Hallsworth and Lea’s analysis is that corners are being cut in the administration of justice through the circumvention of due process. The framework of individual rights and protections remain but their application is quietly diluted. The pre-crime approach is thereby increasingly enshrined, at the behest of legislative assistance, in ‘normal legality’.

Crawford (2009, 2011, 2013) notes that coercive powers may initially be introduced as exceptional measures, that are time limited or spatially restricted (such as banning notices). However, they become routinised through use and the exceptional transitions into the normal (2009, p.826). One example is the dispersal order. Introduced in the Anti-social Behaviour Act 2003 (UK) (ss30–36) as a specific measure to be used only in pre-designated areas for a specific purpose, a 48-hour dispersal order may now be imposed anywhere with blanket restrictions, preclusions and preventative prohibitions (Crawford & Lister 2007). The extent to which the individual rights of banning notice recipients have been subject to a similar “hollowing out” (Hallsworth & Lea 2011, p.153) is explored in Chapters Five and Six.

The temporal shift inherent in the move from a post-crime, reactive focus towards pre-emptive management fundamentally challenges the traditional model of dealing with criminal behaviours, and the separation of powers (Rodger 2008a, 2008b).

37 Victoria’s Serious Sex Offenders Monitoring Act 2005 authorised extended supervision for serious sex offenders after release from prison, in the interests of community protection.

38 The Anti-Terrorism Act 2005 (Cth) introduced Control Orders and Preventative Detention Orders.
Intent can be assumed merely from being present in a location, leading to preventative prohibitions. In a comprehensive consideration of pre-crime, Zedner argues that conflating intent and punishment is morally as well as legally questionable, as “to close this window pre-emptively fails to respect the moral autonomy of the individual to choose to do the right thing” (2007c, p.274). It is acknowledged that the pre-crime approach may fit with theories of crime prevention by removing or reducing the available opportunities for crime to occur (Felson & Clarke 1998). However, once the notion of pre-emptive control is established, the risk exists of it being applied more broadly to actions and behaviours only remotely related to crime. This is exemplified by the range of permissible provisions embodied within measures such as ASBOs, SODA orders, and PBOs. Victoria’s banning notices take this a step further, as a ban may be imposed entirely pre-emptively, according to the subjective assessment of a police officer.

Underpinning much of the implementation and practice of pre-emptive justice is the expectation that a person or community has the right not to be put at risk of harm by the intended or actual actions of another person or group (Finkelstein 2003; Oberdiek 2009). Measures that prohibit certain behaviours and lead to consequences in anticipation of their occurrence reflect a basic right to be safe. Banning notices are an example of such a pre-emptive prohibition, which may be imposed in the interests of public safety. By contrast, Husak examines and supports the proposition of a “substantial risk requirement” (2008, p.161) when it comes to the imposition of pre-emptive controls, and consideration of their breach. He suggests the context of the risk matters and should determine the nature of the response, particularly in relation to breaches of prohibitive orders. Husak cites the example of a US defendant who was convicted of breaching an order not to be within 1000 feet of a school zone. The breach involved cycling near a public park that the defendant did not know was school property which had been leased to the community. Despite the clear intention of the original prohibition, the technical nature of the breach was sufficient for conviction. Husak criticises the failure to consider the context in which the breach occurred. Duff (2011) extends this thinking and asserts that it is only the most serious
types of risk that should be controlled and criminalised. Under Duff's model, the
defendant would not have breached his order, as there was no intent or serious risk
involved.

Victoria’s banning notices may be imposed pre-emptively, with a consequential
conflation of intent and punishment. Intent is assumed in initial implementation, as a
police officer may issue a ban following their subjective assessment of the recipients
potential behaviour.\(^{39}\) However, the due process expectation of the presumption of
innocence is undermined if the mere presence in a location can be deemed evidence
of intent without the need for proof. Significantly for Ashworth and Zedner (2011),
such presumptions do not allow for the possibility that the accused may have
changed their mind about an intended action. The precedents being set by the
implementation of legislation such as banning notices mean, in the view of Ashworth
and Zedner, that “the requirement of intent is being diluted....” (2011, p.288-89). In a
later study, Ashworth and Zedner (2012) are fundamentally critical of civil
preventative orders and the way in which procedural safeguards are denied.
However, they caution against extending the scope of criminalisation simply to
ensure that due process in enabled.

Rather than allowing the procedural tail to wag the substantive dog, it is
preferable to determine the proper limits of criminalisation on the
grounds of principle alone, leaving due process to attach to conduct that
is rightfully criminalised rather than criminalising conduct in order to
ensure that appropriate protections are provided (2012, p.571).

Building upon Zedner’s (2007c) notions of temporal and conceptual pre-crime,
Crawford presents a thorough critique of the principle of “governing the
future” (2009, p.819). Early interventions, risk assessments and preventive measures
offer fundamental challenges to traditional principles of criminal justice, including
the presumption of innocence and protections afforded by judicial review. Ashworth
(2004a, 2004b, 2006a), Tadros and Tierney (2004), Roberts (2014) and Ulvang
(2014) extend a body of research addressing threats to traditional conceptions of the
presumption of innocence, and the consequences for the criminal law, due process

\(^{39}\) Intent is also assumed in consideration of any breaches, for which strict liability rules apply.
and individual rights. Significantly, Ashworth (2004a) and Crawford (2009) contend that the language of control, protection, prevention and enforcement allows established legal protections to be pushed aside, while in many cases failing to address or measure the effectiveness of interventions. This is exemplified by O’Malley’s depiction of the monetisation of justice (2009, 2010, 2011), whereby money, risk and justice converge. Administrative instruments, typified by infringement fines for traffic offences, enable simulated summary justice to operate generally outside of traditional judicial mechanisms. Both the risk and consequence are calculable and as long as the fine is paid, regardless of culpability or intent, then the risk is mitigated and justice served.

It is a process of justice for consumers, in which both risk and justice are monetised, and justified by a mathematised jurisprudence of risk (O’Malley 2009, p.555).

O’Malley (2009) observes the progression of this monetised approach into non-traffic related forms of offending, such as disorderly behaviours. This enables police discretion to be enhanced and justice to be administered through on-the-spot executive action. Guilt is presumed, unless an appeal is lodged by the recipient. Justice can occur almost invisibly, with speed and efficiency. The policing Leviathan depicted by Hallsworth and Lea (2011) is therefore reinforced and normalised.

2.2.v Undesirable Behaviours, Prevention and Punishment

Alongside the growth of discretionary, pre-emptive summary justice, across jurisdictions in the US, UK and Australia the body of criminal law is increasing. Between 1997-2006, a new criminal offence was created nearly every day in the UK (Pantazis 2008). In Victoria, the official crime statistics illustrate the growth in the number of individual offence codes, with more than 4000 statutory and common law offences noted in 2010-11, rising to over 5000 in 2011-12 (Victoria Police 2011, 2012). The expanding reach of criminalisation is explored here in relation to the type of behaviours that are drawn into the criminal process, their potentially subjective assessment, and the consequences for the individual rights of the accused.
The emphasis upon preventing undesirable behaviours, manifested in the literature on pre-emptive justice, is predicated on the assumption that the state can and should regulate such behaviours. Extending Garland’s (2001) responsibilisation thesis, behaviours are regarded as the personal choices of individuals rather than as a result of fundamental social or economic failings. The effect is to move the responsibility from the public to the personal sphere (Crawford 2009). Crawford emphasises the contractual and conditional nature of the legislative responses to anti-social behaviour. While prohibitive and restrictive orders such as ASBOs place the responsibility for conformity or compliance upon the individual, recipients exercise that choice from a position of weakness. In the case of banning notices recipients may be intoxicated and unable to comprehend the nature of the restriction. Crawford (2009) urges careful scrutiny of regulatory reforms and their consequences.

There is a lack of objectivity in key constructs of criminality, and fluidity around what may be regarded as criminal behaviours. The actions that may lead to the imposition of various orders, admonishments and punishments are often vaguely defined and may not necessarily pass an appropriate threshold of criminality. Terms such as anti-social, quarrelsome and troublemaker are used in relation to Victoria’s banning provisions, but what they mean in an objective or measurable sense is unclear. In a critique of the significance of key words and phrases in social policy, Garrett (2007) observes the subjective interpretation of behaviours which lead to discretionary controls, such as banning notices. In a more conceptual analysis of police decision-making Van Wijck (2011) contends that police have no objective measure by which to judge the likely risk of particular individuals, actions or behaviours. To Van Wijck, the expectation that police can anticipate problems is rooted in subjective and unstructured assessments. In the context of the rise of police-imposed summary justice and the lack of visibility and accountability regarding how and why such decisions are made, there is an absence of clarity regarding the definition and interpretation of behaviours that are subject to increasing police discretion. Victoria’s banning provisions empower police officers to set their own precedents for behavioural thresholds and determinations of guilt, without their
decisions being subject to judicial review. This is explored in Chapter Six of this thesis in relation to the parliamentary debates of the banning notice provisions.

Addressing what he regards as a void in the study of the judgements that underpin the process of criminalisation, Millie (2011) contends that the application of value judgements explains why some people and behaviours are criminalised more than others in particular circumstances. Millie observes that “each behaviour occurs in a place/time context and that there are behavioural expectations specific to that context” (2011, p.291). Despite applying aspects of his model to an examination of aesthetic judgements in relation to graffiti, begging and the control of billboards in Toronto, Mille’s argument is framed more philosophically than empirically. His notion of value judgements is, however, relevant to the subjective assessment of behaviours which may lead to the imposition of a banning notice. In a discussion of UK anti-social behaviour legislation and the notion of offensiveness, Roberts (2006) concedes, with acknowledged reticence, that wrongfulness is a pre-requisite to criminalisation. Roberts’ diffidence arises, in part, from the subjectivity of ‘anti-social’ as a concept and a behaviour. For example, the anti-social nature of behaviours, such as playing loud music, are not objectively assessed. The ‘wrongfulness’ of playing loud music is determined by the context in which it is played, rather than the act itself.

Central to the criminalisation of behaviours are the works of Feinberg (1984, 1985) and his depiction of the “harm principle” and the “offence principle”. Feinberg proposes a complex set of considerations to underpin the legitimate development and application of crime control legislation. His principles and “mediating maxims” (1984, p.214), find additional expression in Hillyard et al. (2004), and Von Hirsch and Simester (2006). Behaviours become criminalised when they cause sufficient harm and/or offence to victims. While the notion of harm may be easier to define and to measure than wrongfulness, what constitutes offence is more subjective and liable to change depending upon the context and the conceptions of the victim.

40 This is explored in Chapters Six and Seven of this thesis.
Offensive behaviours that are criminalised include many that are categorised as ‘anti-social’, such as bad language, sleeping in public places or playing loud music. Whether such behaviours are regarded as offensive is determined almost entirely by context, in particular whether anyone is affected by the behaviour. Playing loud music is an anti-social act only when it is problematic for someone else.

Within a detailed reflection of the changes to criminalisation, Ashworth and Zedner (2008) discuss the convergence of what they term the regulatory state, the preventive state and the authoritarian state. The regulatory state typically accepts the “normality of crime” and seeks to manage it through a “routinization of crime control” (2008, p. 39), typified by police-imposed summary justice. The preventive state reflects a desire to manage future behaviour, through the use of pre-emptive prohibitive sanctions in anticipation of unacceptable behaviour. The authoritarian state actively deploys the weight of criminal law in the interests of the community at large, and to “induce conformity with predetermined social norms” (2008, p.44). In response to these key developments, Ashworth and Zedner (2008, 2011, 2012) emphasise that procedural safeguards should underpin the functioning of any criminal process. With respect to discretionary decision-making by the police, any penalties imposed summarily must be fully accountable. The accused should retain the right to judicial oversight of both the legitimacy of the sanction and of their liability for it. As a police-imposed penalty that permits perceived future behaviours to be controlled in the interests of the broader community, Victoria’s banning notices embody Ashworth and Zedner’s (2008) convergent ‘states’.

A key issue for Ashworth (2006b) is the basis upon which legislative and regulatory developments, such as banning notices, are predicated. He highlights the influence of political expedience upon government responses to high profile issues about which 'something must be done'. The specific effect of the response is potentially “symbolic” (2006b, p.65) and not necessarily appropriate or effective. In such circumstances, what Ewald (2011) refers to as 'collateral consequences' resulting from the government intervention become more evident, and their effects potentially
more invasive and extensive. The response is considered to be proper and just, yet without meaningful examination of the means or the ends (Ewald 2011, p.107).

The risk of well-meaning but ill conceived legislative provisions was noted in an earlier paper by Steiker (1998). Her analysis of the limits of the preventive state relates specifically to the USA. However, key issues raised in relation to changes to criminal procedure and to considerations of punishment versus prevention, translate to other jurisdictions. Of particular relevance to this thesis is Steiker’s contention that the consequences of policies which are framed as preventive, non-punitive, and not deemed to constitute a criminal punishment, are too often trivialised.

Courts and commentators often tend to conclude, too quickly, that if some policy or practice is not “really” punishment, then there is nothing wrong with it (1998, p.777).

That a policy or operational measure is not regarded as a punishment means that potentially significant consequences, such as the dilution of individual rights, are overlooked or ignored.

Victoria’s banning provisions are one example of a range of sanctions and penalties, such as spatial exclusion orders and other prohibitive controls, which are not necessarily formally declared as punishments, but which have significant consequences for recipients. Banning notices were introduced to address alcohol-related disorder in the NTE. The extent to which both the appropriateness and the collateral consequences of the provisions were examined during the enactment of the legislation are explored in Chapters Five and Six.

### 2.3 Chapter Conclusion

A range of legislative, regulatory and operational provisions have both prompted and coincided with significant changes to criminal processes in recent decades. Recurring themes expressed across a body of literature include the increasing use of discretionary police decision-making and summary justice, the blurring of criminal and civil boundaries, the use of pre-emptive police powers to punish, and the
subjective assessment of an expanding range of minor and vaguely defined offensive behaviours. The specific changes, exemplified by Victoria’s banning notice provisions, reflect evolving theoretical models of the criminal justice system, and fundamental changes to conceptions of balance in the provision of justice. Chapter Three considers the theoretical perspectives embodying the interplay of human rights, the drive to ensure community protection, examines the contentious notion of ‘re-balancing,’ and outlines the thesis rationale.
Chapter Three

Theoretical Framework & Thesis Rationale

Modelling the Criminal Process: ‘Re-balancing’ and the Centrality of Human Rights in Legislation
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3 Introduction

The changes to criminal justice processes in recent decades, documented in Chapter Two, are evident within evolving theoretical perspectives of the criminal justice system. This chapter considers key criminal process models in the light of the increasing use of discretionary, pre-emptive police powers to interpret behaviours and administer justice on-the-spot. Many of the new legislative provisions and operational policing controls reflect the contentious notion of re-balancing. Key themes and literature relating to balance and re-balancing are explored, to examine the consequences of ‘re-balancing’ for the separation of powers and individual rights, and the application of human rights charters to the legislative process. The final section draws together the key literature and theoretical perspectives from Chapters Two and Three to outline the thesis rationale.

3.1 ‘Modelling’ the Criminal Process

The increasing use of discretionary summary justice and pre-emptive controls are a reflection of, and a response to, changing political and operational pressures within a generally expanding body of criminal law. Clear procedures frame the functioning of criminal justice processes, ideally ensuring consistency, transparency, accountability, and effective separation of powers to uphold individual rights. A typically consistent sequence of discrete events (depicted by Fox and Freiberg (1989) and Ashworth and Zedner (2008), and documented in Chapter Two), supports the investigation and resolution of alleged offending behaviours. However, legislative, regulatory and operational developments have expanded discretionary police powers and conflated previously distinct elements of the criminal process. Mechanisms such as infringement penalties and banning notices empower police officers to act as investigator, judge and jury. Criminal justice models have evolved in response to changing expectations and pressures. Examples discussed in this section include crime control, police power and due process, human rights and victim-centric
perspectives, and the prioritisation of community safety and national security under the banner of ‘re-balancing’.  

3.1.i Crime Control and Police Power Models

While not claiming to present a normative theory for the criminal process, Packer (1964, 1968) depicted two broad and competing rationales within which the criminal sanction operates: crime control and due process. The crime control model seeks to expedite the criminal process as efficiently as possible. Crime control operates with “routine, stereotyped procedures” (Packer 1968, p.159), carries an underlying presumption of guilt, and acts as “a positive guarantor of social freedom” (p.158). Packer accepts that resources across the criminal process are limited, and depicts the crime control model as one that should not be slowed by safeguards or technical procedures. As a result, extra-judicial processes underpin the crime control conception of criminal justice. The sequential nature of the crime control model positions each stage as a screening exercise to ensure successful passage to the desired conclusion – which is conviction.

An extension of crime control is Dubber's articulation of the police power model of the criminal process (Dubber 2002, 2005, 2006, 2011). Police power finds particular expression at the lower level of offending through summary, discretionary mechanisms such as infringement notices, on-the-spot fines and prohibitive orders, which are used to control and regulate an increasing range of behaviours (Ashworth & Zedner 2008; Crawford 2009). Police discretionary powers to interpret behaviours and invoke a penalty, without the encumbrance of due process safeguards and procedures, are typified by dispersal orders in England and Wales, SODA orders in Seattle, USA, and Victoria’s banning notices. Packer's (1964, 1968) crime control model focuses upon controlling the actions of the alleged offender without necessarily upholding the rights of individual victims. The police power model of

1 See Chapter One, footnote 12.

2 These mechanisms were explored in Chapter Two.
regulation and control is fundamentally collective. Political expedience and social need are used to justify the prioritisation of risk management in the best interests of the community (Dubber 2005, 2011; Sarat, Douglas & Umphrey 2011).

The police power model comprises vague definitions of criminality and an expanding scope of the criminalisation of behaviours, activities and spaces (Dubber 2005; Dubber & Valverde 2006; Pantazis 2008; Crawford 2009). For Crawford (2009), the effect of new police powers and regulatory tools requires detailed analysis, which he contends is missing from much of the recent criminological research. Through an examination of the anti-social behaviour agenda in the UK, Crawford suggests that the evolution of behavioural expectations has led to “a proliferation of novel mechanisms of regulatory control” (2009, p.811). Examples include prohibitive disposals, such as ASBOs and dispersal orders. He observes that

Regulatory ideas are being used to circumvent and erode established criminal justice principles, notably those of due process [and] proportionality… novel technologies of control have resulted in more intensive and earlier interventions (Crawford 2009, p.810).

Police powers and regulatory controls are being extended but without a formally sanctioned evaluation process. Both the need for and the effectiveness of such discretionary mechanisms are presumed, but have not been objectively measured.

3.1.ii Due Process to Rights Driven Theories

In contrast to the crime control and police power perspectives, Packer's (1964, 1968) due process model is significantly more judicially oriented. It details an expectation that any conviction requires the prosecution to overcome a set of obstacles in the pursuit of justice (Packer 1968, p.163). Fundamental to the due process model are safeguards, or rights, for the alleged offender. Criminal process theorists are unambiguous about the role of due process in the administration of justice.³ Due

process safeguards and procedures support the key objectives of fair, proportionate and appropriate judicial decisions, and effective review of police actions.

The separation of powers is central to the operation of the criminal process and the assurance of appropriate protections for defendants (Zedner 2005). Ashworth and Zedner contend that traditional expectations of the criminal law hold that no person should be liable to conviction and/or punishment unless the charge has been duly tried in a criminal court… (2008, p.22).

Keyzer (2008) agrees that punishment for a breach of the law should only be ordered by a court, and that this is a fundamental principle of the separation of judicial power. Bateman (2009) acknowledges the key role of procedural due process protections in the provision of justice. He notes the risk posed by mechanisms such as reverse onus and limitations on the right to silence, which have steadily subverted safeguards for defendants.

Ashworth (2006b) questions why governments may wish to avoid affording defendants their full due process protections. He posits the drive for streamlined and efficient procedures for the handling of more minor offences, and considers that governments may believe that due process protections are an obstacle to the control of issues such as anti-social behaviour. Legislators may potentially perceive that individual rights “stand in the way of vigorous responses to certain forms of conduct” (Ashworth 2006b, p.3). This perspective appears to be reflected in the pragmatic preference for the crime control approach when governments need to be seen to be addressing high priority issues, exemplified by increasing discretionary police-imposed powers.

Critiquing the prevailing criminal process in the UK, Ashworth and Redmayne’s (2010) analysis translates to Australian jurisdictions. They regard the respect for individual rights as a core requirement of the criminal process. Rather than simply creating obstacles, due process should apply clear rules and procedures to ensure transparent and consistent decision-making (2010, p.48). Ashworth and Redmayne assert that dispositive decisions that are effected outside of the formal trial process
still require the principle of “the right of an innocent person not to be punished” (2010, p.55). Pre-trial sentencing outcomes, such as infringement notices, cautions and prohibitive orders, should retain and be framed by core due process principles. Of particular significance is the right of access to the full judicial process for alleged offenders who maintain their innocence, via legal representation and resolution through the courts. Ashworth and Redmayne (2010) highlight the challenge inherent in ensuring that individual rights are respected through the criminal law. Their analysis remains largely aspirational. They acknowledge the conflicts and pressures under which criminal justice systems operate, and offer no solution to ensure the effective implementation of a rights-based theory.

Dripps (2011) extends Ashworth and Redmayne (2010) by examining the increasing embodiment of criminal procedure in human rights charters. Despite their formalisation, individual due process rights and expectations remain fluid and open to interpretation. For example, the requirements of Victoria’s Charter Act can be overridden by a parliamentary Act. Dripps also explores the “challenge of reductionism” (2011, p.413), the way in which the criminal process is modified by the steady blurring of procedure and substance. He urges consideration of the due process implications of increasing the use of discretionary summary justice and changing the nature of what is regarded as criminal behaviour. Dripps contends that the relationship between substance and procedure in the criminal justice system remains “problematic”, but that “hard problems.... do not disappear because they are ignored” (2011, p.432). Implied in Dripps’ observation is a need to examine carefully the effect of changing criminal justice processes.

Within a detailed, multi-jurisdictional analysis of the formalisation of human rights within criminal procedures, Roberts and Hunter consider the extent to which human rights legislation has facilitated “institutional realignments in the distribution of powers and responsibility for developing and implementing procedural norms” (2012, p.3). Despite Australia being aligned to the requirements of the

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4 Explained in Chapters One and Two.
International Covenant on Civil and Political Rights (ICCPR), and the passage of specific human rights Charters in Victoria and the Australian Capital Territory, the assurance of individual rights still requires legislative enactment (Gans et al. 2011). In Victoria, the rights that are formalised in the Charter Act may be qualified, limited and reduced by simple Acts of Parliament, such as the LCRA Act 2007. The institutional realignments to which Roberts and Hunter (2012) refer do not necessarily operate to ensure that human rights are upheld.

One notable omission from much of the early theoretical thinking regarding models of criminal justice are the rights of victims, which includes both individual targets of crime and the broader public who may be at risk. Roach (1999) positions victims of crime prominently within his models of criminal justice. He embraces the needs of victims throughout the criminal process, and juxtaposes them within both a crime control and due process context. Roach’s models acknowledge the complexity of ensuring the due process protections of defendants, but he reinforces the police power approach as the primacy of the rights of victims inevitably subsumes the rights of offenders. Prohibitive and pre-emptive orders imposed to prevent victimisation of individuals and to protect the broader community, such as banning notices, are tangible manifestations of a victim focused criminal process.

3.1.iii Balance and Re-Balancing?

A renewed focus on national and international human rights declarations and conventions over the last three decades has attempted to formalise due process protections for those accused of crimes. Much of the literature and theoretical thinking around individual rights, victimisation and criminal justice processes

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Manifestations of balance are problematic. The increasing reach and pre-emptive nature of criminalisation, reflected in the changes to operational police powers described in Chapter Two, are the antithesis of balance. An inherent ambiguity exists as the direction in which the balance is tipped encompasses a complex range of interrelated drivers with multi-layered results. An insistence on the need for balance is evident across the scale of criminal law, from state level responses to the terror threat post-9/11, to UK New Labour’s ‘tough on crime’\footnote{Tony Blair first used the phrase “tough on crime and tough on the causes of crime” during his first speech to the Labour Party as its new leader (Blair 1994).} reforms in the 1990s, to Victoria’s localised attempts to control alcohol-related violence in urban entertainment precincts. The consequences of re-balancing range from widespread restrictions on liberty and civil rights driven by the ‘greater good’ of national security, to short term pre-emptive prohibitions, such as ASBOs and banning notices, to tackle local issues of disorder.

Across recent legislative changes and operational policing initiatives, balance is framed in terms of liberty, security and community rights, and typically predicated upon a desire by governments to be seen to do something about specific issues. The rhetoric used to justify measures to ‘re-balance’ embodies notions of them and us, and presumes that the balancing responses are made in the best interests of ‘us’, the community. Significantly, the victimisation construct drives the ‘re-balancing’, with
consequences for the due process rights of defendants rarely addressed openly. The precise way in which victims are defined skews the way in which balance is effected. Legislative developments have increasingly positioned the broader community as the primary, if prospective, victim. The expansion of discretionary, pre-emptive provisions has been justified, therefore, in the interests of public protection.

Ashworth (1996, 2004a, 2004b) has expressed repeated concern about the use of the balance metaphor in relation to criminal processes. As early as 1996 he called for the term balance to be banned. Ashworth contends that the rights of individual victims, defendants and the community should be clear, and any incompatibility must be examined openly and carefully. Similarly, Bronitt regards balance as a “crude metaphor” (2003, p.80) in his insistence on the primacy of individual rights. Ashworth and Redmayne demonstrate continued disquiet and urge

greater transparency about the weighting of rights, and closer attention to claims about the need to diminish rights and the outcomes of doing so… (2010, p.61).

Rather than ensuring parity of rights for all parties involved in the criminal process, balance is used increasingly by legislators to justify the removal of individual due process protections, in the interests of political expediency and the perception of proactive governance. Ashworth and Redmayne (2010) question the purpose of the formalisation of human rights, if they can be overlooked or ignored by governments through the enactment of legislation and the acceptance of charter ‘waivers’. While acknowledging the issues inherent in the application of balance, Williams (2006, 2007a, 2007b) specifically recognises the convenience of the balance metaphor as a means to facilitate dialogue.

The consequences of measures to ‘re-balance’ are tangible. Legislative and administrative changes to the criminal process and to police powers have steadily reduced the rights of those accused of crime, diluted the separation of powers, and lowered the threshold for criminal behaviours. Measures enacted in response to a range of drivers are predicated upon a need to ensure the security and safety of the community, at a national and a local level. However, fundamental issues are evident.
Firstly, the ‘need’ to re-balance has been substantiated via political expediency rather than empirically evidenced necessity. Secondly, despite the formalisation of individual rights, for example in Victoria’s Charter, the proposed ‘means’ of re-balancing have been subject to limited scrutiny. Finally, the desired and actual ‘ends’ of measures to re-balance may not be the same.

3.1.iii(a) Political Expediency or Empirically Driven Necessity?

Political priorities are increasingly driven by a need to be seen do something about high profile issues (Ashworth 2006b; Crawford 2013). In a study of the politics of anti-social behaviour, Waiton (2008) applies a control approach, whereby legislative responses to a perceived need are determined by a desire to control disorder, rather than to identify and address the causes. In this context, Waiton agrees that the broader consequences for due process protections are less important to a government than the belief that doing something is what matters. Waiton suggests that “old freedoms are lost with almost casual political statements and bills that nonchalantly drift through Parliament” (2008, p.xx). Earlier research by Blake and Ashworth (1996), examining English Crown Court cases dealing with alleged violations of the presumption of innocence, expressed similar concerns about the “casualness” (1996, p.312) with which parliament limits individual rights and extends the criminal law.

Government policy limiting individual rights should be supported by empirical evidence of both the need and effectiveness. The expectation of evidence-based policy development was made clear in a Victorian Government Drugs and Crime Prevention Committee report (DCPC 2006), and reiterated within the Charter Act 2006. In a detailed consideration of responses to 9/11, Waldron (2003) asserts that the ‘means’ and the ‘ends’ of legislative and operational provisions must not be confused. He contends that hardening the response to crime by prioritising the security of the majority over the rights of the minority, who are perceived as a risk, does not necessarily make the majority safer. Waldron questions whether adding to one side (the most) justifies taking away from the other (the few). Waldron is
unequivocal in his assertion that “*We must also be sure that the diminution of liberty will in fact have the desired consequence.*” (emphasis in original, 2003, p.208). The parallels with alcohol-related disorder in the NTE are clear. While operating at a different scale of risk, the need to increase police discretionary powers is justified by the ‘end’ of increased community safety. What happens if the means do not lead to the desired ends, or whether the expected ends have any relation to the means deployed, are missing from the rhetoric used to justify the need. This echoes Ashworth (2004a) and Crawford’s (2009) concern that community protection and crime prevention are used to justify the dilution of individual due process protections, without empirical analysis of the effectiveness of police-imposed summary and prohibitive interventions. Ashworth and Zedner (2008) suggest that if a government limits procedural protections for certain behaviours, then any consequences should sit outside of the criminal process.

Writing extensively in relation to the issues of security and liberty, Zedner's (2003, 2005, 2007a, 2007b) critique of Control Orders in the UK\(^8\) is pertinent to Victoria’s banning provisions. Zedner (2007a) expresses concern about government assertions of technical compliance with human rights requirements, where legislation is declared as compatible but never sufficiently challenged by parliament or the public. An overriding political belief in the need for collective security leads to practical erosion of individual rights, despite claims of human rights compliance (Zedner 2007b). Neocleous argues that the state will inevitably use the “anti-politics of ‘security-trumps’” (2007, p.146) to legitimise increasing restrictions on liberty, against which it is difficult to argue without being accused of endangering national security. The myth of balance enables a move towards more authoritarian measures that erode individual rights.

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\(^8\) Introduced under the UK *Prevention of Terrorism Act 2005*, Control Orders restrict the freedoms of anyone suspected of involvement in terrorist related activities. No prosecution or conviction is necessary for the imposition of an order. The *Terrorism Prevention and Investigation Measures Act 2011* replaced Control Orders with Terrorism Prevention and Investigation Measures; carrying similar restrictions upon the liberty of those suspected (but not necessarily proven) to pose a security threat (Zedner 2014, p.106).

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Michaelsen (2005, 2006, 2010) similarly challenges the notion of balancing civil liberties against the needs of national security. He prefers “the proportionality test” (2006, p.20), whereby any reduction of civil liberties and human rights should be assessed against three criteria: necessity, suitability and appropriateness (p.20). This translates to a clear requirement for an objective understanding of the need, the means and the ends of any legislative or operational measure. Michaelsen (2010) contends that, in the context of anti-terrorism laws, Australia’s failure to apply the proportionality test has significantly undermined core individual rights. He rejects the balance metaphor as conceptually flawed, simplistic and a significant barrier to objective examination of policy decisions. Michaelsen (2006, p.21) agrees with Waldron (2003) and Zedner (2003, 2005, 2007a, 2007b) that any trade off between rights and security must be closely examined to establish whether security is actually enhanced, or if the benefits are more symbolic or political. Zedner concludes that “of every new preventive measure it should be asked does this initiative make us more secure?” (2007a, p.203).

Necessity, perceived or actual, is a key component that determines legislative responses, and directly affects the way in which balance is skewed. In an examination of New Labour’s tough on crime approach in the UK, Tonry (2003, 2010) maintains that the legislative response was unsubstantiated, unproven and lacked any rigorously researched rationale. Tonry acknowledges Caplow and Simon (1999), Garland (2001) and Crawford (2009), who in different ways argue that weakening government control over crime leads to symbolic responses that are not necessarily appropriate or effective. Tonry contends that the reasons why legislation that he considers to be lacking any empirical basis can ever be enacted is due to the perceived need for governments to sound or act “tough” (2003, p.22). This is typified by New Labour’s targeted action against the anti-social behaviour of the undesirable minority which “disturbed the law abiding” majority (Tonry 2010, p.404). The dilution of procedural protections was subordinated to a desire “to try to show it was doing something about something that upsets people” (2010, p.404). Little opposition from political opponents, the media or the public is likely when being
tough combines with having sufficient numbers to be able to push such legislation through the parliamentary process. This view echoes Zedner’s (2007a, 2007b) concern about fundamental failures to examine the impact of changes to criminal justice processes and police powers upon individual rights, typified by Victoria’s banning provisions. The futility of the notion of balance and re-balancing is reinforced when it is driven by political expedience at the expense of effective scrutiny.

In an alternative critique of the balancing perspective Bronitt (2008) questions how risks on each side can be measured. Rather than being in conflict, he contends that individual rights and collective security can co-exist, with one not necessarily reducing the other. Bronitt cites evidence from the fields of procedural justice and police legitimacy\(^9\) to demonstrate that procedural fairness and proportionality can engender compliance (2008, p.71). However, under the auspices of the war on terror in the US, Australia and the UK, “human rights tend to be traded away as a threshold issue” that extends “to ordinary crimes, which target suspect classes or groups rather than individuals” (p.82). What Bronitt frames as a significant shift from preventative to precautionary models of justice, places the retention of human rights as a political choice rather than a legal necessity.

One of the most ‘balanced’ analyses of the re-balancing agenda is the pragmatic perspective adopted by Golder and Williams (2007). They argue that human rights do not necessarily trump the interests of national security and/or community safety, even though balancing is not simple and human rights are not inviolable. They contend that legislative decision-makers require a clearer set of guidelines, and highlight the need for proportionality as advocated by Michaelson (2006). Golder and Williams (2007) augment the reasoning of Waldron (2003) and Zedner (2003, 2005, 2007a, 2007b) and agree that any legislative response that erodes individual rights must be empirically evidenced, to ensure that the ends justify the means. They acknowledge the challenges, but maintain that the effect of legislative and operational responses

\(^9\) Epitomised by the work of Tyler (1990, 2006).
must be openly stated and objectively justified. Victoria’s Charter Act formalises this expectation, and legislative measures that impact Charter rights must be empirically evidenced. The extent to which the banning notice provisions complied with Charter requirements, and the nature of parliamentary scrutiny of their need and effect are examined in Chapters Five and Six of this thesis.

3.1.iii(b) Expanding Conceptions of Victimisation

Embedded in the discourse of security and community protection is an expanding conception of victimisation. Roach (1999) extended existing models of the criminal process to bring individual victims of crime to the fore. Recent changes in the criminal process have served to broaden the depiction of victimisation. The move towards the pre-emptive control of risk and harm encapsulates the prospective victimisation of the wider community. In this approach, legislative provisions and increasing police powers are justified under the rhetoric of public security and safety. For example, a swathe of reforms in the UK from the mid 1990s embodied the ‘tough on crime’ mantra. They typify fundamental changes to the balance of the criminal process via police-imposed, pre-emptive and prohibitive provisions, such as ASBOs and dispersal orders. The single priority expressed in the White Paper ‘Justice for All’ epitomises the direction being taken.

… to re-balance the criminal justice system in favour of the victims and the community so as to reduce crime and bring more offenders to justice (Home Office (UK) 2003, p.5).

Pollard claimed that the focus upon civil liberties within the adversarial trial system in England and Wales ensured that the defendant had “become first among equals” (1996, p.154), while communities live in fear. His conception of balance is one within which offenders need fewer rights. Pre-empting Roach’s (1999) model of punitive victims’ rights, Pollard (1996) asserted that the criminal process must realign to recognise both the rights of victims and the right of the community to be

10 Specific legislative measures such as the Crime and Disorder Act 1998, Police Reform Act 2002, Criminal Justice and Court Services Act 2002, Criminal Justice Act 2003 and the Anti-Social Behaviour Act 2003, have been subject to extensive analysis.
safe (1996, p.160). In a detailed critique of this argument, Ashworth (1996) contends that rights must not be regarded as obstacles in the criminal process. A core reason to uphold individual rights is the need to protect all people from state power and to ensure state accountability. Giving due attention to the rights of all parties should not result in underlying issues, such as national security or community safety, being neglected. Ashworth (1996) asserts that full public accountability is essential to uphold rights, via mechanisms to challenge discretionary decisions and to review the effect upon criminal processes. He subsequently rebukes the balancing rationale within New Labour’s criminal justice reforms, many of which were introduced with unproven claims of reducing crime and ensuring public protection (Ashworth 2004b). As well as disquiet about the measures themselves, Ashworth asks whether the ‘problem’ was so serious that individual rights should be subsumed to the greater need for public protection, and how the effectiveness of responses were actually measured. He acknowledges the value of increasing public protection, but contends that “it should not be pursued without respect for other fundamental values” (2004b, p.530). Individual due process rights and community safety are not mutually exclusive.

Waldron examines whether a perceived change in the nature of the harms that threaten our communities is sufficient to justify a re-ordering of civil liberties and re-prioritising of rights (2003, p.192). He suggests that defending limitations on the rights of individuals in the broader interests of the community, brings into question the place of the affected individuals within that community. Waldron’s concern is of direct relevance to the consequences of police-imposed summary justice. The resulting shift in the balance of rights and protections is embedded within a notion of ‘them and us’. Burnside’s observation that “majoritarian rule does not justify the mistreatment of unpopular minorities” (2006, p.1), while referring to the aftermath of 9/11, can be applied to the trouble-making “unpopular minorities” in the NTE. Burnside reinforces his point by observing

… it is easy to support the idea of human rights for ourselves, our family and friends, our neighbours and so on. It is less easy to stand up for the rights of the unpopular, the marginal, those we fear or hate (2006, p.2-3).
Both the political discourse and legislative responses, such as banning notices, embody what Van Dijk describes as “two complementary strategies, namely the positive representation of the own group, and the negative representation of the others” (1993, p.263). Van Dijk notes in particular the “inferiorization, problematization and marginalization” (1993, p.267) of the undesirable minority. The use of “fear systems and other emotion programs or … kin protection” are highlighted by Hart et al. (2005, p.191) as manipulative strategies in political discourse. Chilton observes an underlying “schema of self versus other” (2004, p. 117), where we all have rights but some deserve more rights than others. Rather than ensuring an equilibrium between the rights of offenders, victims and the community, discretionary powers have shifted the balance within criminal justice processes and diluted the separation of powers. The rights of individuals, perceived by police officers to behave in an undesirable manner, are steadily eroded.

3.1.iii(c) Consequences of Re-Balancing

In response to the expansion of discretionary pre-emptive justice, through mechanisms such as banning notices, Zedner (2007c) articulates the need to ensure that the means are consistent with the ends. Any challenge to liberties and due process rights must be “proportionate to the risks faced” (2007c, p.266). Implicit in this perspective is the expectation that justice should be exercised appropriately and should look and feel suitable to the ends sought. When summary police powers erode due process protections, based upon a promise of community protection or crime reduction, both the underlying need and the effectiveness of the police response must be measurable and provable. Ashworth (2004b) echoes Tonry (2003) and Waldron (2003), and extends his earlier work to question whether re-balancing actually reduces crime or tangible risks to the public. O’Malley (2009, 2010, 2011) contends that increasing police summary justice prioritises procedural streamlining rather than demonstrably controlling risk or improving public safety. These perspectives reflect the broader expectations of evidence-based policing (Sherman 1998; MacCoun 2005;
Bradford, Murphy & Jackson 2014), which seeks to measure and evaluate police policy, decision-making and practice.¹¹

Much of the justification for the growth in the criminalisation of behaviours, and discretionary pre-emptive police powers is couched in protective terminology. It is aimed at re-balancing the experiences of the broader community away from the disorderly and nuisance-making minority (Home Office (UK) 2003, 2012; Beckett & Herbert 2010b). In themselves these are objectives that are difficult to counter. However, Crawford suggests that the re-balancing approach “means shifting the emphasis away from a rights-based discourse” (2009, p.815) with the potential for enduring and far-reaching consequences. Driven by a need to be ‘seen to do something’, a mismatch exists between the balancing agenda and human rights, between the tough on crime mantra, and the actual focus of pre-emptive policy and practice. The dilution of rights is regarded by legislators as justifiable and necessary, and any broader consequences for individual rights is not generally considered. Yet as Ashworth (2004b) makes clear the New Labour government relied upon weak arguments to justify their UK legislative reforms because the re-balancing focus was misplaced and offered none of the implied benefits, to victims or the public at large. Fundamental rights and procedural protections are undermined and diluted for a need and value that is unproven. Zedner (2014) contends that it has taken over a decade for the right of individuals to be protected from the power of the state to re-emerge from the hysteria of the need for public security. She is unequivocal in her demand that any limit placed on due process or other procedural protections must be proportionate and fully substantiated.

A clear dichotomy is evident in relation to the artifice of the balancing exercise, which is exemplified by Victoria’s banning notice provisions. Governments use the need for security or public safety to justify measures that directly limit individual rights. However, the extent of the perceived risk to the community is not empirically

¹¹ This thesis does not explore evidence-based policing per se. However, the ongoing scrutiny of the use of the banning provisions is examined in Chapter Seven. It includes analysis of published Victoria Police data regarding the police use of banning notices.
tested. A combination of rhetoric-driven public fear, a consequential need to be seen ‘to do something’, and a pragmatic drive to streamline the judicial process allows effective scrutiny of legislative provisions to be side-stepped. This creates a clear risk when due process rights are subsumed to increasing police powers that are not subject to meaningful review, but which may not address the ‘need’ that has been asserted.

When individuals cannot request judicial appeal of discretionary police powers to punish, such as banning notices, the risk to justice increases. Pue draws attention to the fact that “only the tiniest sliver of state action is ever subjected to judicial review” (2008, p.48). He highlights the limited reach of judicial oversight and statutory interpretation, as only a minority of cases and legislative provisions are reviewed by the courts. An undeveloped corollary is that an absence of independent scrutiny places even greater responsibility upon those enacting changes to criminal processes, to ensure that a verifiable need exists and that the response is empirically evidenced, scrutinised and evaluated. In the context of Victoria’s banning notices the significant potential consequences for individual rights highlights the need for mechanisms enabling judicial appeal. Triggers for the review of the banning provisions could include errors made by police officers in the imposition of a ban, its potentially disproportionate effect upon an individual, or more fundamental failures in the parliamentary scrutiny of the legislation, such as not identifying Charter-driven human rights issues.

Inherent flaws in the concept and application of ‘balance’ are evident from the perspectives discussed in this section. Political decision-making, often in response to external events rather than well conceived policy, has led to the dilution and erosion of significant individual rights. Balance is increasingly perceived within policy decisions as a need to protect the broader community and thereby secure their liberty. However, failure to adopt a test of proportionality risks the implementation of measures regardless of their empirically evidenced need or their effectiveness in securing the desired outcome. Paradoxically, while re-asserting the rights of victims,
both individual and collective, the protections for alleged offenders have been significantly reduced. In this sense, re-balancing has arguably extended the scope of victimisation to include the recipients of discretionary police-imposed summary justice, whereby pre-emptive and prohibitive provisions may be enacted on-the-spot in anticipation of a subjectively assessed potential behaviour, but which may not be subject to review. Banning notice recipients, for example, could potentially be victims of state sanctioned control measures.

Packer's (1964, 1968) models are regarded by some as limited and assumption-driven, even constraining creative thinking in the realm of criminal justice (Feeley 1979; Ericson & Baranek 1982; Roach 1999). The due process and crime control models were the focus of significant analysis for several decades after their publication (Feeley 1973, 1979; Goldstein 1974; Smith 1997; Duff 1998; Roach 1999). While the intensity of debate may have diminished, the models continue to elicit ongoing discussion, and arguably endure. Crime is still expected to be controlled efficiently and effectively. Ashworth and Redmayne (2010) suggest viewing Packer's due process and crime control models together rather than as polar opposites. Findley (2009) agrees, and positions the models as clarifiers of value preferences that acknowledge the competing forces within the criminal justice system. He provides a convincing analysis of the compatibility of due process rights with a crime control focus to suggest the dichotomy between the two models is “never as stark as sometimes assumed” (2009, p.15). They are both key objectives of the criminal justice system. Crime control is the core purpose, but due process ensures proportionality and appropriate safeguards. This co-existence reinforces the significance of how rights are configured and ensured.

3.2 The Centrality of Human Rights in Legislation

As well as being enshrined in the models and practices of the criminal process, individual rights are formalised within charters and conventions. Williams (2006,
2007b) positions Victoria’s *Charter Act* as a framework to enable balance that demonstrates

how an Australian state can enact better protection for human rights without undermining parliamentary sovereignty, transferring power to the courts or causing a surge of litigation (2007b, p.69)

The *Charter Act* comprises detailed procedures to ensure legislative and operational conformance with the purpose of its provisions. However, the Charter protections are not absolute. Mechanisms exist to enable parliament to circumvent the proscribed human rights. Measures that limit individual rights, such as banning notices, can be legitimised. The result is a potential subversion of both the spirit and letter of the Charter via the subjective value judgement of politicians and police officers. The *Charter Act*, that should ensure government accountability for the rights of citizens, can be ignored by the government. This potential structural weakness and the challenges created for the synonymy of the rule of law and human rights are explored in this thesis, with specific reference to the legislative development of banning notices in Victoria. Ashworth and Zedner (2008), Crawford (2009) and Dripps (2011) are vocal in their expression of concern about changes to criminal justice policy and practice, and the potential consequences for human rights, civil liberties and procedural protections. The application of individual rights within a legislative context has elicited a complex and contentious body of research. Across Canada, the UK, New Zealand, USA and Australia, contributors have examined the role of parliaments in the scrutiny of legislation and how mechanisms, such as charters, reaffirm the centrality of human rights.

The move towards a more rights-based approach to legislative development personifies the notion of ‘law in books, law in action’ (Pound 1910; Halperin 2011).

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12 These range from reasonable limitations, which must be empirically justified (*Charter Act 2006*, s7(2)), to the provision for an override declaration in “exceptional circumstances” (s31(4)).

Despite the proliferation of mechanisms to ensure human rights, Landman notes “there is a continuing disparity between official proclamation and actual implementation of human rights protection” (2004, p.907). Gearty (2009) highlights the way in which human rights law in the UK has been flexed to accommodate security-focused changes which undermine the separation of powers and traditional procedural safeguards. Pue (2008) argues that human rights charters and conventions do little to ensure or assure rights due to the ambiguity of language, subjective and discretionary interpretation of rights, and permitted limitation of rights in certain contexts. In enacting new legislation, “charter compliance is offered as proof positive of legislative wisdom” (2008, p.58), but this obscures effective analysis of the actual impact of legislation. More specifically, Valverde (2009) observes that charters and conventions appear to carry little weight in relation to low-level disorder and police exercised controls. This reflects the different 'scales' at which such controls and rights operate, and bolsters the need for consideration of why localised discretionary police powers are rarely challenged by notions of human rights. Similarly, in their analyses of specific aspects of Victoria’s Charter Act, Tate (2007), Debeljak (2011) and Lau (2012) draw attention to issues within the framing of the Charter, and its subsequent application, that undermine the intended protection of human rights within Victoria. While they are supportive of the Charter in principle, the broad and varying ways it can be interpreted limits its effectiveness in protecting individual rights.

The role of parliaments and parliamentary committees in the scrutiny of the human rights implications of legislation is crucial. Early human rights charters, in Canada and South Africa, retained post-hoc judicial rather than pre-enactment parliamentary scrutiny of legislation (Hiebert 1998, 2005, 2006, 2012). New Zealand and the UK introduced charters without the need for formal pre-enactment scrutiny by parliamentary committee, but with proposed limits on human rights to be made clear in the presentation of Bills to Parliament (Waldron 2005). The Australian Capital

14 Gearty uses the examples of pre-charge detention and executive determination of banned political associations (2009, p.89).
Territory and Victoria were the first jurisdictions to mandate the human rights review of Bills by formal parliamentary committees and parliamentary debates. How effectively parliaments and legislative scrutiny committees apply the requirements of human rights charters to legislation has been openly debated. The principle of pre-enactment parliamentary scrutiny receives general approval (Hiebert 1998, 2005; Feldman 2002, 2004; Williams 2006, 2007a, 2007b), but its application is more divisive.

Hiebert (1998) compares the Canadian post-hoc judicial review of legislation with the Australian model of parliamentary scrutiny. While supporting the principle of pre-enactment scrutiny, she contends that judicial review remains a necessary component to ensure the balance upon which the separation of powers is predicated. Her argument was refined following consideration of experiences in the UK and New Zealand (Hiebert 2005, 2006). Judicial review of legislation is effected much earlier in the legislative process, as policy proposals are assessed from a judicial perspective before enactment. Despite her support for parliamentary scrutiny, Hiebert (2012) expresses concern about its quality, effectiveness and visibility when, for essentially political reasons, parliaments enact legislation that is incompatible with human rights. She motions for more formalised legislative scrutiny via mechanisms such as Statements of Compatibility, arguing that this would put pressure on governments to explain the justifications for Bills (2012, p.102). However, Hiebert concedes that in Victoria, despite the clear Charter processes, including Statements of Compatibility, human rights scrutiny of legislation is limited. Visibility of the rationale underpinning Statements of Compatibility is generally absent. Bills are not subject to judicial review (Hiebert 2012 p.103), and are reliant upon parliamentary oversight. Hiebert agrees with Pue (2008), and supports the need to make parliamentary scrutiny of the human rights impact of legislation more effective. Once enacted the Victorian Parliament retains discretion to conform to, amend, or repeal an Act. Judicial power to overturn a Parliamentary Act applies only if the Act is determined to be unconstitutional. Significantly, Victoria’s Charter Act is itself an

Within a generally positive assessment of parliamentary scrutiny of legislation in the UK, Feldman (2002) expresses concern about the sheer volume of analysis required. He contends that too little time is available for parliament to appropriately scrutinise Bills. Williams (2006, 2007a, 2007b) examined Victoria’s Charter at the time of its enactment, and expresses hope about the role of parliamentary scrutiny. He highlights the dialogue model promoted by the Charter, and the multiple levels of “interaction for law, policy and politics as they relate to human rights” (2006, p.902). Williams contends that Victoria’s Charter makes government more transparent and accountable in their assurance of human rights (2007b, p.72). He acknowledges that the Charter is not perfect (2007a, p.9), but maintains his hope that the legal confirmation of human rights, exercised by government rather than the courts, will enhance a culture of human rights protection (2007a, p.10).

among the key limitations were the demands of the party and the necessity to compromise for political reasons unrelated to rights (2011, p. 341).

Adding to the concern about the parliamentary rights model, Santow (2010) asserts that parliamentary committees operate without instructions for the assessment of human rights, and that political interests compete to create a situation where “scant attention is given by Members of Parliament to the human rights impact of even draconian laws” (Santow 2010, p.3). In a more legally focused paper, Rares (2013) also highlights the disproportionate power of the executive, and the failure to apply the core requirement that legislative decisions must be justified and transparent. Like Feldman (2002), he expresses concern about the problems of interpretation caused by the sheer volume of legislation.

An impassioned challenge to Santow (2010) and Evans and Evans (2011) is made by Argument (2011). He robustly counters what he terms the “scant attention proposition” (2011, p.1) in his assertion of the key role that parliamentary committees play in protecting human rights. Argument (2011) asks whether the scrutinisation process matters if the decisions made by parliament are correct. Furthermore he considers whether the substantive issue for Evans and Evans (2011) has less to do with a lack of consideration of human rights than a failure by parliaments to express any reasoning for their approval of legislation “in the language of human rights” (Argument 2011, p.9). Of particular relevance to Victoria, Argument questions the revolutionary impact of human rights charters. He states that human rights have always been considered by legislative committees, and that much of this work is unseen and unacknowledged (2011, p.15). For example, Victoria’s Scrutiny of Acts and Regulations Committee (SARC) was established in 1992, long before the Charter was enacted in 2006. SARC replaced the Subordinate Legislation Committee, which had been created in 1956. As a result, Argument contends that there is nothing in Victoria’s Charter that could not or would not have been dealt with under previous legislative processes. The difference is that much of the work of legislative committees was unseen and largely unknown. Argument concludes that
far from scant attention being paid to human rights by legislative committees, “at present, scant attention is paid to that good work” (2011, p.42).

Section 30 of the Victoria’s *Charter Act* requires SARC to report to the Victorian Parliament, via an Alert Digest, in relation to any incompatibility with human rights. A response, if provided, is published in a subsequent Alert Digest. While supporting the principle of committee scrutiny, Gans (2009) is critical of the performance and capacity of SARC to ensure a human rights focus. He notes that only four amendments were put forward during the first two and a half years of the *Charter Act*, and that SARC reports are rarely referenced during parliamentary debate. Gans cites the narrow remit of SARC as limiting its potential for effective scrutiny of legislation (2009, p.4). Another concern is the lack of visibility of the dialogue emanating from SARC reviews, which Gans notes is at odds with the model envisaged for the Charter (2009, p.6). Government responses, if received at all, are not necessarily made public and SARC lacks the authority to enforce its recommendations. Rodgers (2012) compares Victoria’s approach with the New Zealand model of executive scrutiny of bills. Despite the concerns documented by Gans (2009), Rodgers holds the Victorian model up as one to which New Zealand should aspire. However, as with human rights charters in general, while the Victorian model of parliamentary scrutiny may appear comprehensive, its effectiveness is determined entirely by the manner of its implementation. In an Australian focused examination of parliamentary and judicial rights-based scrutiny of legislation, Horrigan (2012) concludes that “clear standards and guidance are needed to justify limits on individual and human rights” (2012, p.232). Implied within Horrigan’s analysis is a continued lack of clarity in the interpretation and implementation of Victoria’s *Charter Act*.15

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15 The complexity of *Charter Act* interpretation was underlined by the “precedential mess” (Horrigan 2012, p.232) emanating from the diversity of views arising from *R v Momcilovic* (2010) 25 VR 436 and *Momcilovic v The Queen & Ors* (2011) HCA 34. The case addressed the Charter compatibility of a reverse onus provision in Victoria’s *Drugs, Poisons and Controlled Substances Act 1981* (Debeljak 2011; Horrigan 2012). However, as the rulings relate primarily to judicial consideration of Charter rights, the case is not discussed in detail here.
3.3 Thesis Rationale

An influential body of research has examined recent changes to the functioning of the criminal justice system. In the context of a “human rights revolution” (Roberts & Hunter 2012, p.3) sits the paradoxical rise of summary justice, with the dilution of individual rights that are inherent in discretionary decision-making by police officers. On-the-spot police powers to punish are applied in the interests of collective security (Zedner 2007b), yet without visibility or the safety net of judicial oversight or independent review, and with significant implications for individual rights (Ashworth & Redmayne 2010). The consequential challenge posed to key aspects of due process is conceptually clear but, as Crawford (2009) concedes, lacks an empirical basis. Research has been conducted in a number of comparative contexts, but none has been directed specifically at the effect of Victoria’s banning notice legislation upon individual rights and conceptions of balance in the administration of justice in the NTE.

Victoria’s banning notice provisions highlight the impact and normative significance of the move to summary justice, and the importance of the way in which discretionary powers are afforded to police officers. Banning notices embody what Ashworth and Zedner (2008) depict as a fundamental challenge to the traditional liberal model of criminal justice, whereby clear procedural safeguards for the accused sit within a process that provides open and appropriate justice. Within a growing body of criminal law, and reflecting a combination of drivers and perceived issues with established models of criminal justice, legislation targeting undesirable behaviours increasingly circumvents the criminal law and side-steps the individual rights of defendants.

In the antithetical context of the re-balancing agenda and the formalisation of human rights in the scrutiny of legislative provisions, the resolution of such divergent

16 Examples are examined Chapter Two in relation to ASBOs, Control Orders, PBOs etc. In a sample of admonishments and parks exclusion orders for February, April, August, November 2005, Beckett and Herbert (2010a) report that police officers offered no rationale or reason in 59.8% of the records.
drivers is explored in this thesis. Even under Victoria’s *Charter Act*, human rights are not assured and the Victorian Parliament may pass legislation in contravention of key rights. Gans (2009) raises valid concerns about the remit and application of the parliamentary scrutiny of Bills under the Charter. Evans and Evans (2011) are blunt in their expression of doubt regarding the capacity of parliamentarians to scrutinise legislation effectively. That legislation can circumvent provisions which should protect individual rights, such as Victoria’s *Charter Act*, in the interests of loosely framed public protection is directly relevant to this thesis. Passed in the first year of the Charter’s operation, the passage of the LCRA Bill 2007 through Victoria’s Parliament is examined. Given the due process and human rights issues embedded within the banning provisions, the enactment of the legislation raises concerns about the implementation of the Charter compliance requirements, and the process of parliamentary scrutiny as a whole. The justifying rationale and the way in which parliamentary processes were applied enabled the banning provisions to be introduced through the *LCRA Act 2007*, and extended under the *JLA Act 2010*, despite significant consequences for individual rights that should be protected by the Charter. The banning notice provisions circumvented the *Charter Act* to legitimise discretionary police powers that then circumvent individual rights. To explore these concerns, this thesis examines the way in which the banning provisions were enacted in Victoria.

Significant legal and criminological research\(^\text{17}\) has identified key themes that illuminate the rationale and theoretical thinking for this thesis. In detailed analyses and modelling of criminal justice processes, the dilution of the separation of powers and consequential erosion of individual rights have been recognised. However the focus of much of the existing research sits primarily within the criminal law in terms of how recent legislative and operational policing changes undermine due process rights and procedural protections. Victoria’s Charter supplements the traditional

criminal law framework with a human rights driven mechanism. This thesis integrates the rights-based and criminological perspectives.

Two inter-related research themes are explored in this thesis. The first considers the enactment of Victoria’s banning provisions in the context of the ‘re-balancing’ agenda. A disconnect between the use of balance to explain the need for provisions such as banning notices, and to justify their consequential erosion of the due process rights of individuals is explored. The assumptions that underpinned the parliamentary rhetoric used to support the banning notice measures, and how their compliance with Charter requirements was secured, are analysed in detail. The extent of parliamentary analysis both of the ‘problem’, and of the presumed efficacy of the ‘solution’ is examined, providing a specific test of Waiton’s (2008) contention of the nonchalant drift of policies through parliament, regardless of their impact upon individual rights. The research considers the extent to which Victoria’s banning provisions were driven by what Crawford (2013) depicts as a reactive desire by Governments to be seen to do something in response to perceived concerns, regardless of empirical evidence to support the ‘need’ and the potential consequences for individual rights. Rather than ensuring an effective balance for all members of the community, banning notices circumvent the core due process rights of alleged offenders. The rights of a police-determined undesirable minority are subsumed to the politically proclaimed need to protect the wider community. The result appears to be the obverse of balance.

The second theme acknowledges concern about a lack of understanding of the use of discretionary police powers to punish (Crawford 2009), and the consequential erosion of due process rights (Zedner 2005; Ashworth 2006a; Ashworth & Zedner 2008). Crawford (2009) contends that the broader consequences of the police empowered regulatory state are essentially unknown, due largely to an absence of empirical analysis. Victoria’s police-imposed banning notices were enacted to ‘re-balance’ the provision of justice in the NTE, to prioritise the collective needs of community protection and legitimise the dilution of individual due process rights. However, when driven by political expedience rather than public scrutiny the
potential futility of the notion of re-balancing is significant. Given the effect of banning notices upon individual rights, the post-enactment scrutiny of the police power to ban is examined. Published banning notice data and analysis of media coverage of the provisions are used to explore the extent to which the use of banning has been scrutinised, and to assess the potential for public awareness of the consequences of re-balancing in the NTE. Given the lack of judicial oversight of the banning provisions, interviews with Victorian Magistrates sought a judicial perspective of the erosion of individual rights and consideration of the extent to which Victoria Police are held accountable for their discretionary powers to punish. The broader implications for the balance of individual rights and public protection are considered, to determine whether the conception of ‘balance’ is appropriate at all to the administration of justice.
Chapter Four

Research Methodology & Design
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4 Introduction

Victoria’s banning notice provisions afford police officers discretionary powers to punish that undermine due process protections and individual rights. A key purpose of Victoria’s Charter of Human Rights and Responsibilities 2006 (‘the Charter/Charter Act 2006’) is to ensure that fundamental human rights are protected. The application of the Charter, and how the operationalisation of legislation sits within it, is ambiguous and has been the subject of limited analysis. The research for this thesis addresses two complementary and inter-related themes. The first explores the enactment of Victoria’s banning provisions in the context of the ‘re-balancing’ agenda. The process of Charter Act compliance is assessed, and the parliamentary scrutiny of the two banning notice Bills is examined. This informs consideration of how the need for banning was justified, and the extent to which the banning provisions were driven by what Crawford (2013) depicts as a desire to be seen to do something, regardless of both the ‘need’ and the effect upon individual rights and procedural protections.

The second theme addresses the contention that the legitimacy and broader consequences of the discretionary police-imposed summary justice is essentially unknown, due largely to an absence of scrutiny (Crawford 2009). Given their impact upon individual rights and traditional procedural safeguards, the post-enactment scrutiny of Victoria’s banning provisions is examined, from a public, print media and judicial perspective. The key findings of the research are then drawn together to consider the appropriateness of ‘balance’ in the context of discretionary and pre-emptive police powers to punish.

This chapter first outlines the research methodology and acknowledges the contextual research that informed the methodological approach. The two phase research design and specific methods are then explained. Key benefits and limitations of the research approach are documented in the final section of the chapter.
4.1 Methodology and Contextual Research

This thesis applies multiple research techniques, comprising contextual analysis of documentary sources, secondary analysis of published data, media analysis, and interview research. The operationalisation of research objectives using a variety of approaches enhances the examination and understanding of the research topic (Cresswell 2003; Wheeldon & Ahlberg 2012; Johnson & Christensen 2012). Findings can be contextualised, compared and confirmed from each of the techniques used (Cresswell 2003). Within the multi-dimensional research design, this thesis utilises qualitative, quantitative and critical interpretive approaches and is primarily descriptive and exploratory in purpose. Descriptive research builds a detailed picture and clarifies understanding through the use of thorough procedures and documentation (Strauss & Corbin 1998; Ruane 2005; Hennink, Hutter & Bailey 2011; Johnson & Christensen 2012). The analysis of published data, media records, Hansard and the synthesis of documentary sources enable the processes of Charter compliance and parliamentary scrutiny of the banning provisions to be understood. Exploratory research seeks to gain insight and to increase understanding of a particular issue (Ruane 2005; Hennink, Hutter & Bailey 2011; Johnson & Christensen 2012). Interview research is used to explore the application of early Charter processes and to obtain a judicial perspective of key issues arising from this research.

The research design draws on previous studies which have used a mixed method approach to consider regulatory issues in the light of broader theoretical concepts (Hall et al. 1978; Crawford & Lister 2007; Beckett & Herbert 2008, 2009, 2010a, 2010b; Hadfield, Lister & Traynor 2009; Young 2010). Of particular relevance to this thesis is the influential work of Hall et al. (1978). Their consideration of the themes of race, crime and youth in the context of ‘mugging’ adopted a mixed method design utilising crime records and data, detailed document and media analysis. Significant overlaps with this thesis are evident in the research focus, methods used and in elements of the findings. Hall et al. examined how prevailing perceptions of the
‘issue’ of mugging in the early 1970s were created, augmented and positioned to justify urgent and far-reaching legislative and operational policing responses. In common with this thesis, Hall et al. were not concerned about causes of mugging or the effectiveness of solutions. Their focus was how mugging was depicted by the media and politicians, the moral panic and sense of crisis that was generated and the authoritarian response that resulted. This thesis draws on the success of the mixed method approach, and combines descriptive and exploratory methods to examine the rationale underpinning the banning provisions and to consider the consequences for the conception of balance. It does not seek to explain behavioural problems in Victoria’s NTE or to evaluate the effectiveness of the various responses, including banning notices.

Other notable studies which support the methodological approach include Crawford and Lister’s (2007) exploration of the issues that Dispersal Orders were designed to address in England and Wales. They combined interviews, observation and survey methods in their design. Research undertaken by Beckett and Herbert (2008, 2009, 2010a, 2010b), to examine the use of police-imposed spatial and exclusionary controls in Seattle, followed a similar mixed method approach, with a combination of observational research, interviews, and analysis of official data and documents. Hadfield, Lister and Traynor (2009) used interviews, focus groups and documentary sources in their two year study of policing and regulatory responses in the NTE in England and Wales. Young (2010) analysed parliamentary debates and Penalty Notice for Disorder (PND) data in England and Wales, to highlight deficiencies in their rationale and imposition.

In Victoria, Saunders et al. (2013) applied qualitative data derived from interview research with fine recipients, court room observations and secondary analysis of fine statistics to examine the effect of the infringement notice system upon disadvantaged groups. Addressing concerns related to this research, such as police discretion, net-widening and the subjective interpretation of behaviours, the regulatory approach underpinning the imposition of fines and factors that lead to their non-payment were
analysed. Research initiated by the Victorian Parliament also supports the methodological approach taken in this thesis. Studies produced under the auspices of the Drugs and Crime Prevention Committee (DCPC) examined the reporting of crime, alcohol-related harms, and assaults in public places in Victoria (DCPC 2001a, 2006, 2010). These reports combined and compared analysis of published police crime data, and print media coverage, and applied relevant constructions of crime, risk and fear. For example, the 2006 DCPC report synthesised existing research, documentary and data records, conducted interviews, focus groups and observational studies to produce a comprehensive analysis of the nature of alcohol-related harms in Victoria. It highlighted the absolute need for legislative and operational responses to be evidence-based.

Across a range of influential studies, a mixed method approach combining secondary document, media and data analysis with interviews has led to valid findings that extend understanding of the issues being examined. The methodological approach for this thesis is proven, context appropriate, and common to relevant socio-legal research.

### 4.2 Research Approach

This thesis addresses three specific research questions. Firstly, did Victoria’s Charter Act compliance procedures ensure an open and comprehensive assessment of the consequences of the banning notice provisions for individual rights and due process protections? Secondly, how balanced and rigorous were the parliamentary debates of the banning notice provisions? Thirdly, has ongoing public scrutiny of the use of banning notices enabled meaningful analysis of their imposition and consequences? The linkages between the research themes, questions, phases and results chapters are summarised in table 4.1.
Table 4.1: Linkages between the research themes, questions and design

<table>
<thead>
<tr>
<th>Research Theme</th>
<th>Research Questions</th>
<th>Research Phase</th>
<th>Results Chapter</th>
</tr>
</thead>
</table>
| The enactment of Victoria’s banning notice provisions and the ‘re-balancing’ agenda | 1. Did Victoria’s Charter Act compliance procedures ensure an open and comprehensive assessment of the consequences of the banning notice provisions for individual rights and due process protections?  
2. How balanced and rigorous was the parliamentary scrutiny of Victoria’s banning notice provisions? | One            | Five           |
| Post-enactment scrutiny of the discretionary police power to ban                  | 3. Has ongoing public scrutiny of the use of Victoria’s banning provisions enabled meaningful analysis of their imposition and consequences? | Two            | Seven           |

The first two questions reflect the first thesis theme by exploring the pre-enactment parliamentary scrutiny of the banning provisions. They are addressed in phase one of the research, which combines secondary analysis of key documents and published data with interview research at the Department of Justice and Victoria Police (n=5). Chapter Five documents the findings of the Charter compliance analysis and Chapter Six focuses upon the parliamentary debates. The third research question considers the second thesis theme of the post-enactment scrutiny of the banning provisions, and is explored in the second research phase. Secondary analysis of documents, published data, newspaper analysis (n=185), and exploratory interviews with Victorian Magistrates (n=12) examine the ongoing public scrutiny of police-imposed banning notices. The findings are documented in Chapter Seven.

The components of each research phase are outlined in this section, along with an explanation of the analysis and relevant ethical considerations. Table 4.2 summarises the methods for each phase and the key inputs. Additional secondary document and data analysis informs the research for each phase, and is outlined in the final part of this section. The relative weight afforded to each component of the research is not pre-determined and none is given priority (Cresswell 2003; Johnson & Christensen 2012). No dependencies exist between the phases. It is emphasised that the
effectiveness of Victoria’s banning notices in addressing the stated need is not examined. Notions of causality, with concomitant dependent and independent variables, do not apply.

### Table 4.2: Key research phases, methods and inputs

<table>
<thead>
<tr>
<th>Research Phase</th>
<th>Method</th>
<th>Key Inputs</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Phase 1:</strong> Pre-enactment Scrutiny: Charter Compliance and Parliamentary Debates</td>
<td>Detailed Document Analysis</td>
<td>Description, synthesis and mapping of key documents (listed in table 4.3)</td>
</tr>
<tr>
<td></td>
<td>Research Interviews</td>
<td>Victorian Government Officer (n=3) Victoria Police Officer (n=2)</td>
</tr>
<tr>
<td><strong>Phase 2:</strong> Ongoing Public Scrutiny</td>
<td>Secondary Data Analysis</td>
<td>Victoria Police Banning Notice Data: 2007 - 2012 Court Imposed Exclusion Order Data: 2007 - 2012</td>
</tr>
<tr>
<td></td>
<td>Media Analysis</td>
<td>Newsbank: Victorian Newspapers 2007 - 2012 (n=185)</td>
</tr>
<tr>
<td></td>
<td>Exploratory Interviews</td>
<td>Victorian Magistrate (n=12)</td>
</tr>
</tbody>
</table>

### 4.2.i Research Phase 1 – Pre-enactment Parliamentary Scrutiny

The first research phase examines in detail the legislative enactment of the *Liquor Control Reform Amendment Act 2007* (‘LCRA Act 2007’) and the *Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Act 2010* (‘JLA Act 2010’). The application of Victoria’s *Charter Act* compliance processes is analysed, for both Bills, to consider whether the Charter ensured an open and comprehensive assessment of the consequences of the banning provisions for the individual rights of recipients. The parliamentary debates for each Bill are then examined. Given the due process procedural implications for recipients of a banning notice, the way in which the banning measures were justified during the parliamentary debates is central to the thesis theme of ‘balance’. The primary research methods for this phase are secondary document and data analysis, and exploratory interviews.
4.2.i(a) Document Analysis

Relevant legislation and written records relating to the Charter Act compliance requirements, implementation reviews and the parliamentary processes through which the LCRA Act 2007 and JLA Act 2010 passed have been analysed. Any material relating to the earliest stages of the legislative process and marked as ‘Cabinet in Confidence’ is classified and was not available for this research. However, when legislative proposals receive cabinet approval, subsequent documentation reflects the agreed government perspective. Each document was examined fully to identify key themes and issues. The Hansard records of debate for the LCRA Act 2007 and JLA Act 2010 have also been examined in detail.

The findings are presented across two results chapters. Chapter Five maps the Charter compliance requirements against the processes followed for the two banning notice Bills. Each human right protected by the Charter is assessed against the LCRA Bill 2007 and JLA Bill 2010 to identify the rights affected by the banning provisions. The application of the mandated Charter compliance processes to each Bill is then examined. Chapter Six extends the analysis of the parliamentary scrutiny of each banning notice Bill. The parliamentary debates are described in detail, and key justifications used in support of the legislation are documented, with verbatim quotations from Hansard included where relevant.

There are no ethical issues pertinent to this phase of the research. All documents are publicly available, with no permissions or approvals required and no concerns regarding confidentiality. There are no restrictions relating to storage or publication of the material or findings. The key sources accessed are summarised in table 4.3.

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1 The key stages of the parliamentary scrutiny of legislative proposals are outlined in Chapter Five.
Table 4.3: Key sources and documents used in research phase 1

<table>
<thead>
<tr>
<th>Source</th>
<th>Key Documents</th>
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</thead>
<tbody>
<tr>
<td>Parliament of Victoria</td>
<td>Hansard records for LCRA Bill 2007</td>
</tr>
<tr>
<td></td>
<td>Hansard records for JLA Bill 2010</td>
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<tr>
<td></td>
<td>LCRA Act/Bill 2007</td>
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<td></td>
<td>JLA Act/Bill 2010</td>
</tr>
<tr>
<td></td>
<td>Drugs and Crime Prevention Committee Reports</td>
</tr>
<tr>
<td></td>
<td>Procedural information</td>
</tr>
<tr>
<td></td>
<td>Annual reports</td>
</tr>
<tr>
<td></td>
<td>Additional publications and reports</td>
</tr>
<tr>
<td></td>
<td>SARC Alert Digest 15, 2007</td>
</tr>
<tr>
<td></td>
<td>SARC Alert Digest 5, 2010</td>
</tr>
<tr>
<td></td>
<td>SARC Alert Digest 14, 2010</td>
</tr>
<tr>
<td>Department of Justice, Human Rights Unit</td>
<td>Charter Guidelines for Policy Officers</td>
</tr>
<tr>
<td></td>
<td>General Charter information</td>
</tr>
<tr>
<td></td>
<td>General Charter information</td>
</tr>
<tr>
<td>(VEOHR)</td>
<td>Additional Charter reports and documentation</td>
</tr>
<tr>
<td>Austlii</td>
<td>LCRA Act 2007</td>
</tr>
<tr>
<td></td>
<td>JLA Act 2010</td>
</tr>
<tr>
<td></td>
<td>Charter Act 2006</td>
</tr>
<tr>
<td></td>
<td>Additional relevant legislation</td>
</tr>
<tr>
<td>Victorian Commission for Gambling and Liquor Regulation</td>
<td>Designated area information</td>
</tr>
<tr>
<td>(previously Liquor Licensing, and Responsible Alcohol</td>
<td>Forums and Accords information</td>
</tr>
<tr>
<td>Victoria)*</td>
<td>Late hour entry declarations</td>
</tr>
<tr>
<td>Victorian Ombudsman</td>
<td>Research reports</td>
</tr>
<tr>
<td>Victorian Government Taskforce on Alcohol and Public</td>
<td>Victoria’s Alcohol Action Plan, 2008 - 2013</td>
</tr>
<tr>
<td>Safety</td>
<td></td>
</tr>
<tr>
<td>Sentencing Advisory Council, Victoria</td>
<td>Research and reports</td>
</tr>
</tbody>
</table>

(* Until February 2012, liquor and gambling were regulated by separate bodies)

4.2.i(b) Research Interviews

The LCRA Bill 2007 was one of the first legislative provisions subject to the requirements of Victoria’s Charter Act. The way in which compliance was undertaken is a significant element of the research. Interviews were conducted in 2013 at the Human Rights Unit of Victoria’s Department of Justice, with policy
officers responsible for Charter processes. Their purpose was to explore the Charter compliance readiness of the Department at the time of the LCRA Bill 2007.

Gaining access to government officials posed a particular challenge. While happy to talk off the record, there was initial reticence to be interviewed more formally. Documentation confirming the process focus of the research facilitated approval to interview three policy officers with direct involvement in Charter compliance processes. Each interviewee had occupied a human rights focused position with the Department since before the passage of the Charter Act. That their views are retrospective and benefit from hindsight is acknowledged, but is not regarded as a limitation of the research. Each participant offered candid and detailed perspectives. Written permission was obtained for the audio recording of each interview and verbatim transcripts are used in the analysis of the interview output. To ensure confidentiality, the pseudonyms DoJ1, DoJ2, DoJ3 have been adopted.

Two interviews were also conducted with a senior member of the Victoria Police Safe Streets task force,² to gain an understanding of the way in which police officers are advised to use banning notices in the Melbourne CBD. Written permission was obtained to speak with the officer and to use the output in this research. The interviews were not audio recorded but detailed notes were taken and are stored in accordance with Deakin research requirements. The pseudonym VP1 is used to ensure confidentiality. A follow-up interview was initiated by the police officer, who had undertaken additional research to examine the length of time for which banning notices had been imposed in Melbourne’s CBD during 2013. The findings of this research are noted in Chapter Five although it is acknowledged that their veracity cannot be confirmed.

² Formed in October 2007, the task force maintains a high profile police presence within Melbourne’s entertainment precincts. Two and four person street patrols monitor high risk locations on Friday and Saturday nights. The task force also visits major regional centres across Victoria on an ad hoc basis.
4.2.ii Research Phase 2 – Post-enactment Public Scrutiny

The second research phase explores the way in which the banning provisions have been scrutinised since their enactment. Published banning notice data and analysis of ongoing media coverage are combined with exploratory interviews with Victorian Magistrates. The research focus draws on the Australian Human Rights Commission (AHRC) assertion that

> Australia’s strong traditions of liberal democracy, an independent judiciary and a robust media have been sufficient to protect the rights and freedoms of most people in Australia, most of the time (2009, p 2).

In addition, Victoria Police crime statistics and a range of supplementary documentary and data sources are used to inform the interpretation of results.

4.2.ii(a) Banning Notice Data Secondary Analysis

The *LCRA Act 2007* required the publication of data relating to each banning notice imposed. It stipulates that an Annual Report for each year ending 30 June must be provided to the Victorian Parliament by the Chief Commissioner of Police (*LCRA Act 2007*, s148R). Reports must contain

- the number of banning notices imposed each year
- the number of people to whom orders have been given
- the number of multiple orders imposed each year (where a person has received more than one order)
- the “suspected specified offences in respect of which banning notices were given” (*LCRA Act 2007*, s148R (1)a(iv)) each year
- the designated areas where such offences were committed
- the ages of banning notice recipients
- indigenous status of banning notice recipients
- number of banning notices issued in each designated area
- number and results of charges in relation to breaches of banning notices
- number of breaches for which no charges were laid
Data from the first five reporting periods, years ending 30 June 2008 to 30 June 2012, has been examined. Descriptive analyses explore key trends over time and location, including numbers, types and reasons for banning notices, the Indigenous status of recipients, and areas in which notices were imposed. Deficiencies and omissions in the data published are identified and discussed.

The way in which the data is reported is pre-determined by the legislative requirements and this constrains the type and complexity of analysis. Data is presented at category level rather than by individual banning notice, necessitating univariate rather than bivariate analysis. Patterns are examinable only within each of the data categories and no cross-tabulation or more complex analysis is possible. It is not known, for example, whether Indigenous recipients were more likely to receive a banning notice for a particular offence type or in a particular location. No sampling has been undertaken and there is no requirement to infer significance across a broader population. All available data is used in the analysis, and the results are documented in Chapter Seven.

There are no ethical issues in this phase of the research, as the data is publicly accessible. No individual recipients of banning notices are identifiable and no permissions are required to use or publish the data.

4.2.ii(b) Media Analysis

A Newsbank data search of Victorian newspapers was conducted to examine the media coverage of the banning notice provisions. Using a fixed set of sources and key word search criteria ensures comparability of results. Additional print media sources exist beyond those utilised by Newsbank, along with a wealth of online media sources. However, Newsbank enables trends in media coverage to be identified and relevant articles to be retrieved. The research scope reflects the approach adopted by Victoria’s Drugs and Crime Prevention Committee (DCPC) in

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3 Newsbank is an online repository of full-text newspaper articles. A range of search options can be used to interrogate the database, to identify and access relevant articles.
their detailed enquiries (2001a, 2010). While the DCPC studies focused specifically on two state-wide newspapers, *The Age* and the *Herald Sun*, this thesis incorporated all 55 Victorian newspapers accessible via Newsbank. The five state-wide and fifty local publications are listed in table 4.4.

Table 4.4: Newsbank newspapers accessed for media analysis

<table>
<thead>
<tr>
<th>State/Local</th>
<th>Newspaper Title</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State Newspapers</strong></td>
<td>(5 titles)</td>
</tr>
<tr>
<td></td>
<td>The Age</td>
</tr>
<tr>
<td></td>
<td>The Sunday Age</td>
</tr>
<tr>
<td></td>
<td>Herald Sun</td>
</tr>
<tr>
<td></td>
<td>Sunday Herald Sun</td>
</tr>
<tr>
<td></td>
<td>The Weekly Times</td>
</tr>
<tr>
<td><strong>Local Newspapers</strong></td>
<td>(50 titles)</td>
</tr>
<tr>
<td></td>
<td>Victorian Community Publications - the Leader Group,</td>
</tr>
<tr>
<td></td>
<td>Australia (38 titles)</td>
</tr>
<tr>
<td></td>
<td>MX, Melbourne</td>
</tr>
<tr>
<td></td>
<td>Frankston Weekly</td>
</tr>
<tr>
<td></td>
<td>Peninsula Weekly (Mornington)</td>
</tr>
<tr>
<td></td>
<td>Hume Weekly</td>
</tr>
<tr>
<td></td>
<td>Casey Weekly (Cranbourne)</td>
</tr>
<tr>
<td></td>
<td>Monash Weekly</td>
</tr>
<tr>
<td></td>
<td>Wyndham Weekly</td>
</tr>
<tr>
<td></td>
<td>Greater Dandenong Weekly</td>
</tr>
<tr>
<td></td>
<td>Maroondah &amp; Yarra Ranges Weekly</td>
</tr>
<tr>
<td></td>
<td>Moonee Valley Weekly</td>
</tr>
<tr>
<td></td>
<td>Brimbank &amp; North West Weekly</td>
</tr>
<tr>
<td></td>
<td>Knox Weekly</td>
</tr>
</tbody>
</table>

The 55 Victorian newspapers were interrogated to explore the media coverage of the banning provisions following their enactment. As the banning provisions were introduced to parliament late in 2007, the research period applied was 2007 - 2012. The Newsbank search identified every article that referenced the banning provisions, in any context. Including the single search term ‘ban’ resulted in many thousands of articles for each year. A review of the results identified a range of terms used in relation to banning notices. Further searches were conducted for each relevant year using six banning notice specific key-word terms, the maximum number of simultaneous search terms permitted by Newsbank. The search terms used were:

- ‘banning’
- ‘banning notice’
- ‘banning order’
- ‘ban troublemaker’
‘24 hour ban’
‘72 hour ban’

Each article retrieved was read and accepted for analysis \(n=185\) only if it specifically referenced the banning notice provisions examined in this thesis. The precise content of each relevant article was further analysed to discern its primary purpose. Following a preliminary review of the articles, five categories were established against which to capture the core focus. Each category is defined in table 4.5, with the identifier used in the subsequent analysis also noted.

Table 4.5: Media content analysis categories and identifiers

<table>
<thead>
<tr>
<th>Core Focus</th>
<th>Description</th>
<th>Identifier</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imposition of the Legislation and/or a Specific Relevant Strategy</td>
<td>Primary focus upon the imposition (potential or actual) of the banning notice legislation. Including reporting the declaration of designated areas, and how the provisions relate specifically to strategic plans addressing issues in the NTE.</td>
<td>Imposition</td>
</tr>
<tr>
<td>Specific Events</td>
<td>Reporting details of particular dates, events, initiatives or police operations in relation to the NTE, and in which the banning provisions are referenced</td>
<td>Event</td>
</tr>
<tr>
<td>General Concern</td>
<td>Documenting general concern about behaviour in the NTE, including discussion of the banning provisions. Generally more editorial expressions of concern regarding the NTE and banning provisions</td>
<td>Concern</td>
</tr>
<tr>
<td>Data</td>
<td>Primarily reporting published data relating to the banning provisions</td>
<td>Data</td>
</tr>
<tr>
<td>Judicial Concern/Legal Challenge</td>
<td>Relating to judicial (rather than political or personal) discussion of banning issues, and specific court cases or legal challenges.</td>
<td>Legal</td>
</tr>
</tbody>
</table>

Where articles could fit into more than one category, the primary purpose of the article was determined. This decision was made subjectively by a single researcher. The potential for interpretive differences are acknowledged if multiple researchers are used, or if subsequent research aims to replicate or extend this study. No ethical considerations apply to this data as there are no restrictions on its use, publication or storage, and no permissions are required. The findings are detailed in Chapter Seven.
4.2.ii(c) Exploratory Interviews

Public scrutiny of the banning provisions via post-hoc independent review processes is not possible, as there has been no judicial examination of the legislation or court-based appeal of individual banning notices. To fill this notional gap interviews with Victorian Magistrates explored their views of the banning legislation, to gain an understanding of how this type of discretionary police-imposed justice is perceived from within the judiciary. Magistrates rather than County Court judges were chosen as the banning provisions, specifically breach proceedings, sit within their jurisdiction.

Interview participant selection was purposive. Written approval was first gained from Victoria’s Chief Magistrate. Each of the 11 Regional Area Co-ordinators and the State Co-ordinator were then contacted to seek nominations for possible participants. This approach was used for pragmatic reasons, but also to ensure a variety of regional and metropolitan participants. The State Co-ordinator and five of the Regional Co-ordinators forwarded the email addresses of Magistrates who, following a general enquiry, had expressed interest in participating. The sample is entirely self-selected and no claims are made regarding how representative it is. The Magistrates who expressed an interest were contacted directly. A number chose not to proceed beyond this point. Those willing to explain their decision cited lack of direct experience or knowledge of the banning provisions. One Magistrate determined that they could no longer spare the time to participate. A sample size of 12 was chosen to enable sufficient numbers from which to gain a selection of views and experiences. Of the 12 interview participants:

- Seven are currently based in regional Magistrates’ Courts and five in metropolitan Magistrates’ Courts
- Two are female, and ten are male
- The period of time spent as a Magistrate spanned a range of 22 years; with a mean of nine years

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4 This interesting finding is examined further in Chapter Seven.
The interviews took place across late 2013 and early 2014. They were semi-structured and acknowledged documented caution against fixed questioning (Berg 2001). The themes and key questions were clear and consistent but the direction of each interview was determined by the responses given, reflecting Ruane’s notion of a “purposeful conversation” (2005, p.149). A general guiding script was used to ensure a level of consistency, but no assumptions were built in and no hypotheses were tested. The focus was to establish from the Magistrates:

- their perceptions of police-imposed discretionary justice
- their views and experiences of the banning provisions (including the imposition of exclusion orders and dealing with breaches of police-imposed banning notices)
- their opinions regarding whether and why judicial appeal of banning notices should be permitted
- their thoughts on how such a review could be conducted, given the immediate nature of the imposition of banning notices.

The primary purpose of each interview was to gather personal perspectives of the themes examined. There are no claims made regarding the scientific rigour underpinning the interviews, or of the reliability or validity of the results. Specific experiences were shared, but they are anecdotal and illustrative only and not regarded as representative.

Each interview was audio-recorded and transcribed in full. The research output has been anonymised and pseudonyms applied, which do not identify the sex or judicial experience of the participant. The only identifier notes whether the participant was based in a regional or a metropolitan court at the time of the interview, to enable exploration of any differences that may exist. Each is numbered sequentially: MagReg01 to MagReg07, and MagMet01 to MagMet05 (where MagReg refers to a regional Magistrate and MagMet refers to a metropolitan Magistrate). The pseudonyms have been applied randomly and are known only by the primary

5 Court-imposed exclusion orders, introduced in the LCRA Act 2007, are explained in Chapter Two
researcher. More experienced Magistrates may have moved between areas, and from regional to metropolitan courts, or vice versa. Only their current location is recorded in the data.

Extracts from the interview transcripts are documented in Chapter Seven as verbatim quotations, with relevant contextual notes included in square brackets. Not all participants provided responses to each question. Some chose not to answer unless they could base their response upon specific knowledge. Others were happy to offer their opinion on all of the questions asked. Some participants discussed other issues, such as ‘hoon’ driving legislation and infringement penalties for drunken behaviours. Any perspectives offered in a different context have not been extrapolated to apply to the banning provisions.

In accordance with ethical requirements, written permission was obtained prior to each interview. Participants were advised that they could withdraw from the interview process at any time. No sensitive or contentious issues were anticipated or experienced. All recordings and transcripts are stored in compliance with Deakin University ethical standards. No participant is identifiable in the research output.

4.2.iii Additional Secondary Data Sources

Across both research phases contextual secondary document and data sources supplemented the primary analysis. In particular, examination of the parliamentary debates and the published banning notice data is informed with the use of the Victoria Police crime statistics. Victoria Police publishes its data and reports for each fiscal year ending 30 June. The crime statistics have been examined for the period 2000-2012, to enable relevant trends in offending behaviour to be applied to the analysis. Victoria Police crime statistics comprise multiple offence categories,

6 ‘Hoon’ is a colloquial term used in Australia and New Zealand to refer, in particular, to anti-social, dangerous and/or irresponsible driving behaviours.

7 Victoria Police data is used as its reporting period aligns with the banning notice data, and is similarly offence centric. Alternative data from the Australian Bureau of Statistics (ABS) is reported by calendar year, and is typically more victim focused.
each with many specific offence codes. Three categories are of particular relevance for this thesis: behaviour in public, assaults, and regulated public order.\textsuperscript{8}

As absolute figures may be affected by general population changes, relative offence rates per 100,000 population highlight trends in offending behaviours. It is recognised that the data for each offence category will include recorded offences that do not necessarily relate to the NTE or did not take place in the entertainment precincts. Where possible more specific analysis is used. For example, Victoria Police crime statistics include a breakdown by geographical region. Data for region 1, which includes the Melbourne entertainment precincts that became the first two designated areas (CBD and Chapel Street/Prahran) has been analysed to identify any issues of particular significance when compared with the overall State level figures. Victoria Police crime statistics also include 23 offence location types. Of most relevance for this thesis are the locations of street/footpath, and licensed premises.\textsuperscript{9} It is acknowledged that not all offences in these locations will be relevant to issues of alcohol-related disorder in the NTE. However, these location types are the most pertinent for this research, and the data informs analysis of specific offending issues in the NTE.

The Victoria Police crime statistics document recorded offences. For the period 2000-2010 the data was calculated and published in a consistent manner. Methodological and reporting changes were introduced after 2010 that affects comparability. Alterations to the region specifications also render comparison of specific and trend data more problematic after 2010. The additional secondary document and data sources have not been tested or subjected to further assessment. However, an error was identified in the location specific data for year ending June

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\textsuperscript{8} Other offence categories, such as homicide, rape, abduction, arson, burglary, theft etc. are not sufficiently specific to the NTE, and are not included in the analysis.

\textsuperscript{9} The location category ‘retail’ could also capture some offending behaviours occurring in entertainment precincts in the NTE, as it includes 24 hour convenience stores, fast food outlets and restaurants. However, ‘retail’ also includes locations that are not directly relevant, such as shopping complexes, car yards, supermarkets and department stores. As the data does enable a breakdown within the location type, ‘retail’ is not used in this analysis.
2002, as the individual totals across the location types do not reconcile with the overall total. This error was raised with Victoria Police’s Media and Corporate Communications Unit (Personal email, 20 June 2014), but no update to the data was provided. The incorrect data has been excluded from the analysis.

The additional document and data sources used throughout the thesis are summarised in table 4.6.

Table 4.6: Additional secondary sources used across both research phases

<table>
<thead>
<tr>
<th>Data Source</th>
<th>Key Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria Police Crime Statistics</td>
<td>Documents recorded offences per fiscal year; absolute and relative figures, by region and location type</td>
</tr>
<tr>
<td>Victorian Drugs and Crime Prevention Committee</td>
<td>Research reports</td>
</tr>
<tr>
<td>Australian Bureau of Statistics</td>
<td>Published data relating to Victoria’s population</td>
</tr>
<tr>
<td>Victorian Commission for Gambling and Liquor Regulation (VCGLR)</td>
<td>Data on Victoria’s liquor licence numbers and trends</td>
</tr>
<tr>
<td>Victoria Equal Opportunity &amp; Human Rights Commission (VEOHRC)</td>
<td>Additional Charter reports and documentation</td>
</tr>
<tr>
<td>Office of Victoria’s Attorney-General</td>
<td>Infringement notice reports and data</td>
</tr>
<tr>
<td>Chief Commissioner of Victoria Police, Annual Reports to Parliament</td>
<td>Reports data on court-imposed exclusion orders</td>
</tr>
<tr>
<td>Austlii</td>
<td>Relevant legislative provisions</td>
</tr>
<tr>
<td>Australian Human Rights Commission (AHRC)</td>
<td>Human rights information</td>
</tr>
</tbody>
</table>

There are no ethical issues with this additional secondary analysis. All of the sources are accessible online, and no permission is required for their use or publication.

4.3 Research Approach: Benefits and Limitations

Key research informing this thesis utilises secondary analysis, synthesis and critical interpretation of documents and published data. Examples include Waldron (2003), Zedner (2005, 2007a, 2007b) and Crawford (2008, 2009). Existing material is
generally publicly accessible, often due to political or institutional accountability requirements or because is has been formally published. It is stable and typically available in full, analysis can be undertaken unobtrusively and requires minimal ethical consideration. Documents, online media resources, and published data may also be easily revisited for the purposes of replication, enlargement, clarification or re-analysis (Maxfield & Babbie 2012; Johnson & Christensen 2012).

The accuracy of the documents and data collection used in this thesis is assumed and cannot be verified. The original reason for which documents and data have been compiled can limit both reliability and validity of subsequent analysis, as the content reflects a pre-determined focus. Jupp, Davies and Francis (2000) cite the 'dark figure of unrecorded crime' as a deficiency limiting the validity of crime data. Victoria Police crime statistics, for example, report only recorded crime. The offence categories are also fixed, and typically reported in summary form which limits more complex analysis. Formal concerns have been expressed about the accuracy of Victoria Police crime statistics and, in particular, the effect of political pressures upon the data (DCPC 2001a, 2010; Victorian Ombudsman 2009, 2011). These issues are acknowledged, but the data that was in the public domain has been analysed. Despite potential limitations, secondary document and data analysis enables the particular benefit, utilised across this thesis, of discerning patterns, longitudinal and comparative examination.

This thesis builds upon detailed contextual analysis of multiple document and data inputs. An inductive “immersion in data” (Hennink, Hutter & Bailey 2011 p.205) approach utilises both critical and interpretive analysis (Patton 1990). The analysis in relation to Charter compliance and the parliamentary debates is thematic and functional in purpose. It addresses the content and linear progress of the discourse and highlights key discursive structures (Van Dijk 1993; Chilton 2004). By focusing upon parliamentary processes and debates, the analysis is necessarily of the “power

elites” (Van Dijk 1993, p.255) and their role in the decision-making elements of legislative change.

A body of sustained research has examined media reporting of crime and criminal justice policy. The analysis of Newsbank records acknowledges the capacity of the media to shape policy (McCombs 2004; Altheide 2006; Beale 2006), and affect public perceptions of crime and justice (Gelb 2006). Newspapers are identified as one of the most influential contributors (Roberts & Indermaur 2009). Newsbank enables relevant media articles to be identified accurately, via key word search criteria. The content of articles can then be analysed systematically (Riffe, Lacy & Fico 2005; Schreier 2012). Coding techniques produce meaningful data that can be assessed, compared, repeated or expanded as necessary (Krippendorff 2004). Research coding categories are determined by the data available to support the objectives of the research (Willig 2001), and the application of content analysis is limited by the categories that are defined. The way in which research is theorised may impact the categories used (Banister et al. 2006). Where data analysis requires levels of cognition and interpretation beyond a straightforward count or the application of simple binary measures, this may limit the reliability and comparability of the research (Neuendorf 2002; Krippendorff 2004). This thesis used preliminary assessment of relevant media articles to discern the categories. The resulting analysis required limited subjective interpretation, as it comprised a simple count and a determination of the primary purpose of each article.

Interview research enables a deep, focused and more personal understanding of issues. This is a fundamental component of the research for this thesis, given both the embryonic nature of the Charter compliance processes in 2007, and the absence of judicial scrutiny of the banning provisions. Interview subjects are typically


12 The analysis addresses the extent to which the articles enabled meaningful scrutiny of the banning notice provisions. Whether the media influenced the decision to introduce banning is not examined.
determined by their relevance to the research topic, but a key challenge can be their identification and access (Kvale 1996; Maxfield & Babbie 2012). The research aims and questions for this thesis provide clear direction regarding the required participant 'type'. Gaining access to the Department of Justice did pose a particular challenge. The staff represent the incumbent elected government and are bound by issues of confidentiality. Governance processes, administrative imperatives, and underlying suspicions constructed multiple barriers for McGovern (2011) before commencing research with the NSW Police Media Unit. Similar challenges experienced in this research were overcome through clear expression of the research objectives and reassurance that all interview output would be anonymised.

Interviews may take a number of general forms, from the fully scripted to the unstructured (May 2001). The semi-structured interviews used in this thesis draw together both extremes. Key themes are evident, and a level of comparability is enabled between interview findings. The specific direction of each interview may vary and provides a valuable tool for the discovery and examination of key themes (Jupp, Davies & Francis 2000; May 2001). The interviews facilitate insight into the research issues from the participants' viewpoint; the insider or 'emic' perspective (Jupp, Davies & Francis 2000; Hennink, Hutter & Bailey 2011; Bartels & Richards 2011). While the interviews with the Department of Justice and Victoria Police focused upon procedure, the exploratory interviews with Magistrates were more subjective. They examined experiences and perceptions of the banning notice provisions, and broader issues that they encompass.

Effective interviews require the establishment of good rapport between participant and interviewer (Kvale 1996; Jupp, Davies & Francis 2000; Hennink, Hutter & Bailey 2011). Flynn (2011) describes the particular challenges of research with criminal justice agents. The legal context, in part due to the adversarial traditions, can hinder the establishment of trust. The researcher's personal circumstances and background bring a particular perspective that must be acknowledged. Dixon (2011) describes the benefits of both being an insider (access and instant rapport) and an
outsider (ability to ask naïve but useful questions) in various research contexts. As an outsider to the Victorian legal and judicial system, the clear articulation of the research issues during preliminary discussions facilitated the transcending of some initial boundaries. Subsequent rapport was built upon a mutual understanding of the research aims and of key processes, having served as a Magistrate in the UK. What Merton refers to as “socially shared realities” (1972, p.15) enabled some of the challenges to be overcome to facilitate open and candid discussion.

The research methodology and specific approaches used in this thesis combine to produce a contextual, in-depth, theoretically informed and internally valid examination of the way in which the banning notice provisions were enacted in Victoria. It is emphasised that no evaluation of the effectiveness of banning notices has been undertaken. However, the broader external assessment of the rationale upon which the banning legislation is based, and the extent of ongoing scrutiny of its application, informs analysis of the implications for the balance of individual rights and public protection in the administration of justice.

The specific research findings are documented in the following three chapters. Chapter Five first examines the application of the Charter Act compliance processes to the banning notice Bills.
Chapter Five

Pre-enactment Scrutiny of Victoria’s Banning Notice Provisions

Analysis of Charter Act Compliance
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Introduction

Victoria’s Charter of Human Rights and Responsibilities (‘the Charter’/’Charter Act’) was passed by the Victorian Parliament in 2006. New legislative provisions were subject to Charter compliance during 2007, with full implementation of the Charter Act on 1 January 2008. The Charter articulates 27 core human rights that are afforded the people of Victoria.

Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person (Charter Act 2006, s7(3)).

The individual rights protected by the Charter mirror core rights enshrined in comparative international conventions, and longstanding common law tradition. They include a range of fundamental protections such as the right to life (s9), freedom from forced work (s11), and cultural and property rights (s19, 20). The way in which Victoria’s banning notices are imposed invokes a number of specific Charter rights in relation to freedom of movement, privacy, security and due process protections. The way in which these rights were evaluated as part of the mandated Charter compliance processes has significant implications for individual recipients of banning notices, and for the overall effectiveness of the Charter in ensuring that legislation is passed that protects the human rights of Victorians.

This is the first of two chapters examining the pre-enactment parliamentary scrutiny of the banning notice legislative provisions. It presents a detailed empirical analysis of the application of Charter compliance processes to the Liquor Control Reform Amendment Act 2007 (‘LCRA Act/Bill 2007’) and the Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Act 2010 (‘JLA Act/Bill 2010’). Charter rights may be limited where sufficient need can be established and justified (Charter Act 2006, s7(2)). This chapter explores the way in which limitations of Charter rights were justified for the banning notice Bills, and examines whether

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1 Both Bills contain multiple legislative provisions. Only those directly related to the imposition and enforcement of banning notices are examined in this research, and they are outlined in Chapter Two.
additional rights that are undermined by the banning provisions should have been recognised in the compliance process for each Bill.

The first section of this chapter outlines the Charter Act compliance processes, and examines their application to the banning notice Bills. The contents of the Statements of Compatibility for the LCRA Bill 2007 and JLA Bill 2010 are first documented. The key Charter rights that are affected by the banning provisions are then analysed in detail. The analysis considers whether the limitations of specific rights were sufficiently acknowledged in the Statements of Compatibility, and whether the justifications for each limitation met the expectations of the Charter Act. Significant omissions and deficiencies in the consideration of impacted Charter rights are identified and discussed. The effectiveness of the subsequent Scrutiny of Acts and Regulations Committee (SARC) review of the each of the banning notice Bills is then explored.

The LCRA Bill 2007 was one of the first legislative proposals subject to Charter compliance requirements. The final section of this chapter examines the preparedness and operational effectiveness of the Charter processes in the Department of Justice, and how reasonable limitations of Charter rights can be determined. The analysis combines the findings of formal Charter review reports with interviews conducted at the Human Rights Unit, in Victoria’s Department of Justice. The chapter concludes by considering whether the Charter Act compliance processes succeeded in ensuring an open and comprehensive assessment of the consequences of Victoria’s banning notice provisions for individual rights and due process protections.

5.1 The Process of Charter Compliance

A key function of Victoria’s bicameral parliamentary system is to pass legislation that is fair and proportionate (Parliament of Victoria n.d.). Government Bills navigate a staged process through the Legislative Assembly (lower house) and Legislative
Council (upper house), with their introduction, first, second and third reading. The majority of debate in both Houses follows the second reading of a Bill, when speeches are made in support and opposition, questions are asked, and amendments discussed. Successful Bills are then presented for Royal Assent. With the enactment of the Charter Act, a “new and common framework” was introduced to support the development of statutory provisions, and to ensure that Bills are scrutinised to reflect the protections enshrined in the Charter. Compliance requirements are articulated in the Charter Act and in formal Guidelines for Legislation and Policy Officers in Victoria (‘the Guidelines’). The Guidelines contain advice for each human right, explain the compliance processes, and are used by Government departments to ensure policy development is consistent with the expectations of the Charter Act.

Both the LCRA Bill 2007 and JLA Bill 2010 were subject to the compliance requirements of the Charter Act. The Human Rights Unit, within Victoria’s Department of Justice, was responsible for the development of the Guidelines to ensure that Charter compatibility was embedded across the process of legislative development (Department of Justice 2008b; VEOHRC 2008, p.10). The Charter mandates that human rights must be assessed at all stages of policy development (Victorian Government Solicitor’s Office (VGSO) 2007; Department of Justice 2008b). The departmental officer overseeing a legislative proposal is required, on behalf of the relevant Minister, to undertake an assessment of how the proposal is affected by the Charter. The Guidelines offer advice regarding each of the 27 Charter rights. The likely policy triggers are identified, along with the scope of the right within international and comparative law, guidance on permissible reasonable limits, and ways to optimise compliance (Department of Justice 2008b, p.18).

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2 Both the LCRA Bill 2007 and JLA Bill 2010 were Government Bills initiated in the Legislative Assembly. The drafting and initiation process differs for Non-Government Bills or those introduced in the Legislative Council.

3 From the Victorian Government submission to the first four year Charter Review (Submission 324, cited in SARC 2011, p.79).

4 Published in July 2008, by the Human Rights Unit, Department of Justice.
The pre-enactment Charter compliance process comprises three key stages; initial policy analysis, impact assessment via a tabled Statement of Compatibility, and cross-party review by the Scrutiny of Acts and Regulations Committee (SARC). Each stage is broadly sequential. Initial policy analysis is typically classified as ‘cabinet in confidence’, and generally not available for public review. The impact assessment for the Statement of Compatibility, therefore, builds on analysis that is not subject to open scrutiny, and feeds into the parliamentary debates (which are analysed in Chapter Six). The SARC review typically runs concurrently with the parliamentary debates.

The Statement of Compatibility (‘the Statement’) is tabled to both Houses of Parliament at the first reading of a Bill (Charter Act 2006, s28; Department of Justice 2008b, p.27). A template Statement directs policy officers to set out the basis of the proposed legislation before addressing the human rights issues (Department of Justice 2008b, p.202). The onus is placed upon policy officers to “consider methodically each of the Charter rights as well as each of the provisions of the Bill” (VGSO 2007, p.3). Each part of a Bill which is considered to interact with a Charter right must be analysed in detail to confirm how the right is affected. If a Charter right is limited in any way by the proposed legislation, this limitation must be fully justified and any less restrictive means to achieve the same purpose must be considered (Charter Act 2006, s7(2)).

Rights are not absolute and may be waived where sufficient justification is evident. Section 7(2) of the Charter Act permits justifiable limitations upon the human rights it upholds. For each right that is affected by a legislative proposal, the Charter requires that a number of core considerations are documented in the Statement.

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

5 Unless a cabinet-in-confidence document is published during the term of a government it may not be released at a later date (SARC 2011, p.79).
(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (Charter Act 2006, s7(2)).

Any limitation of a Charter right must be “demonstrably justified”. The Guidelines assert that “assumptions will not be enough” (Department of Justice 2008b, p.42). It is expected that research material and empirical evidence will be presented to support any proposed limitation, and must reflect “societal concerns that are pressing and substantial…..more than just a common good must be strived for” (p.43). The template Statement included in the Guidelines (Department of Justice 2008b, Appendix C) requires that each of the section 7(2) considerations, (a) - (e), is completed for any proposed limitation. An additional point, (f), covers “any other relevant factors”. Compliance with these s7(2) requirements, and their component parts ((a) to (e)), is examined in the next section of this chapter.

Following the tabling of the Statement of Compatibility in parliament a further level of Charter compliance review is enabled via SARC. The remit of SARC pre-dates the Charter, and is outlined in Victoria’s Parliamentary Committees Act 2003. It includes consideration of the impact of any Bill upon rights or freedoms (which are not defined), or which “insufficiently subjects the exercise of legislative power to parliamentary scrutiny” (s17). Under the Charter Act, SARC must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights (Charter Act 2006, s30).

The SARC review facilitates cross-party scrutiny, independent of analysis already undertaken for the impact assessment and Statement of Compatibility. SARC may ask questions and seek clarification from the relevant Minister about Charter compliance for any proposed legislation. Issues relating to legislative practices and compatibility with the Charter are identified and reported by SARC to the Victorian
Parliament via Alert Digests (Parliament of Victoria 2011). However, the limited power of SARC to effect change is conceded in the documented SARC process.

It must be emphasised that the Committee does not have legislative or regulatory powers. It has the power to report to parliament and make recommendations, but it is the Minister's responsibility to address those recommendations or findings (Parliament of Victoria, 2011).

Although the SARC review takes place after the tabling of a Statement of Compatibility, there is no clear timeline for the review or the Ministerial responses to any documented concerns.6

The Charter’s operational principles are clear, consistent and compatible with the human rights that it seeks to safeguard. The strength of the Charter and its ability to protect human rights is determined by its application rather than the words in the Charter Act.7 The Charter is not constitutionally enshrined and its rights are not absolute. As a legislative Act, the Victorian Parliament retains the power to both enforce and circumvent its provisions. The way in which Statements are framed, the rigour of parliamentary scrutiny, and the transparent application of Charter principles are essential components of an effectively implemented Charter. The application of the Charter Act compliance processes to the banning notice provisions is, therefore, a fundamental consideration of this thesis. As the initial policy analysis is not in the public domain, the Statements of Compatibility for the LCRA Bill 2007 and the JLA Bill 2010 are first examined in detail.

5.1.i Statements of Compatibility

The Statements of Compatibility for the LCRA Bill 2007 and JLA Bill 2010, documented in the Hansard record of parliamentary debates, have been analysed for this research. The Statements for both Bills were tabled by the incumbent Labor Government and each conveys similar language, tone and underlying assumptions.

6 Issues relating to the timing of the SARC review and the effect upon parliamentary debates are discussed in Chapter Six.

7 Embodying the notion of ‘law in books and law in action’ (Pound 1910; Halperin 2011).
The sections of each Statement that address the police-imposed on-the-spot banning provisions have been examined to identify the human rights that are explicitly stated as being affected. Charter rights may be limited, but any limitation is expected to be fully justified. All parts ((a) to (e)) of section 7(2) the Charter Act must be documented in the Statement of Compatibility. The specific human rights observations within each Statement have been noted along with the extent of compliance with the section 7(2) requirements, and the respective Ministerial decisions. The next two sections provide an overview of the content of each Statement. This is followed by a detailed examination of the key Charter rights that are affected by the banning notice provisions.

5.1.i(a) Liquor Control Reform Amendment Bill 2007

As the first visible stage of the Charter compliance process, the Statement of Compatibility for the LCRA Bill 2007, ('2007 Statement'), was tabled in the Legislative Assembly by the Minister for Consumer Affairs (Robinson, Labor) on 18 November 2007, and in the Legislative Council on 22 November 2007. The 2007 Statement notes the effect of the Bill upon four Charter rights: freedom of movement (s12), privacy and reputation (s13), liberty and security (s21), and the presumption of innocence (one element of the rights in criminal proceedings (s25)). Nevertheless, the proposed legislation was considered to be “compatible with the human rights protected by the Charter” (Legislative Assembly 2007a, 3818).

The Charter right to freedom of movement (s12) received the most attention in the 2007 Statement. Acknowledging the Charter requirement to justify any limitation of a Charter right (s7(2)), the Statement cited Article 12 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR provides a precedent for a

8 The Consumer Affairs Ministry had responsibility for liquor regulation and was one part of an expansive Department of Justice.

9 The Minister for Environment and Climate Change (Jennings, Labor) tabled the Statement in the Legislative Council, on behalf of the Minister for Consumer Affairs.
limitation on the right to move freely where this may enhance the freedom and safety of others. However, the 2007 Statement offered no empirical evidence to support the need to protect the broader community in Victoria, or of a banning notice as the most appropriate mechanism. The limitation upon freedom of movement was further justified in the Statement with reference to banning notices being discretionary and imposed by an approved police officer.

The intention is that only officers who have received training in liquor licensing or have been authorised by such officers will be able to give a banning notice (Legislative Assembly 2007a, 3819).

That bans are limited to 24 hours and to the designated area, and are subject to variation by a senior police officer were also noted as reasonable aspects of the limitation. Across the justifications no evidence or objective analysis was offered. The need is stated and banning notices presumed to be the necessary response, with the 2007 Statement asserting that “any less restrictive means would not achieve the purposes of the provisions as effectively” (3819). No evidence was provided and no consideration given to the full impact of a banning notice on the Charter right to move freely.

The effect of banning notices upon the rights to privacy and reputation (s13) and liberty and security (s21) were both noted in a limited way in the 2007 Statement. The section 7(2) considerations were not fully addressed for either right. The LCRA Bill 2007 requirement for a recipient to disclose personal information to a police officer imposing a banning notice impacts the Charter right to privacy and reputation (s13). Of the section 7(2) requirements, only the nature of the right being limited (part a) was addressed. The Statement contended that information disclosure was essential to enable banning notice enforcement, and this was presented as sufficient justification to limit the Charter right to privacy. The Statement declared that

whilst this may well interfere with a person's privacy, the interference is neither unlawful nor arbitrary and does not violate the right to privacy in section 13 of the Charter (Legislative Assembly 2007a, 3819).
Similarly, the permitted use of reasonable force by police officers to ensure the recipient of a banning notice leaves the designated area was accepted as limiting the right to liberty and security (s21). Of the section 7(2) requirements, again only the nature of the right being limited (part a) was referenced. The Statement contended that “...the fact that the force used can be no more than is reasonably necessary” (3819) was sufficient justification to limit the Charter right to security. For each of these two Charter rights, the other section 7(2) requirements (parts (b) to (e)) were not addressed at all. No evidence was presented to support the need to compel personal information to be provided or to use reasonable force, and no consideration was given to alternative approaches. Nevertheless, the 2007 Statement determined that both limitations of the Charter Act were “reasonable and justified” (3819).

The presumption of innocence component of the Charter right in relation to criminal proceedings (s25) was discussed in the 2007 Statement, but only in the context of alleged breaches of banning notices. There was no consideration of the way in which this right is affected when a banning notice is first imposed. For the offence of banning notice breaches, the Statement conceded that the strict liability provisions in the LCRA Bill 2007 place the burden of proof on the defendant to “escape liability in circumstances of honest and reasonable mistake or total absence of fault” (Legislative Assembly 2007a, 3820). Any less restrictive means were claimed to be inappropriate.

If the burden were on the prosecution, it would be too easy to escape liability... An evidential onus would be too easily discharged by a defendant and the prosecution would have difficulty in proving the absence of the defence beyond reasonable doubt (3820).

A further justification for limiting the presumption of innocence was that the penalty for a banning notice breach is financial: “it is also relevant that the offence is one that carries a relatively small fine only” (3820). No further explanation was offered. The Statement concluded “the limitation is reasonable and justified pursuant to section 7(2) of the Charter” (3820). No empirical or other evidence was offered to justify the limitation. There was no consideration at all of the limitation of the presumption of
innocence caused by the way in which banning notices are imposed. No other aspects of the Charter rights in relation to criminal proceedings were acknowledged in the 2007 Statement.

For each of the Charter rights deemed to be affected by the LCRA Bill 2007 a relevant limitation of the Charter Act was conceded in the 2007 Statement. However, even though the Statement failed to address each of the mandated section 7(2) considerations, the limitations of the Charter Act were declared to be justified and reasonable. The 2007 Statement further justified banning notices as a mechanism to uphold the Charter rights of the broader population, in relation to protecting their rights to life (s9), privacy (s13), property (s20) and security of person (s21). No evidence, explanation or substantiation was provided in the Statement to support the need for such community protection or the effectiveness of banning to ensure that these Charter rights of the broader population will be upheld.

5.1.i(b) Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Bill 2010

The Statement of Compatibility for the JLA Bill 2010, (‘2010 Statement’), was tabled by the Attorney-General in the Legislative Assembly on 25 March 2010 and in the Legislative Council on the 15 April 2010. In common with the LCRA Bill 2007, the JLA Bill 2010 comprised multiple provisions and considerations. Only one element of the Bill related to banning, and extended the period for which a banning notice may be imposed to 72 hours. The focus of the 2010 Statement was significantly narrower than the 2007 Statement with respect to Charter rights considered relevant to the banning provisions. Only the effect upon the right to freedom of movement was acknowledged, but in concluding the 2010 Statement the Attorney-General Rob Hulls asserted

I consider that the Bill is compatible with the Charter because, to the extent that some provisions may limit human rights, those limitations are

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10 The Minister for Planning tabled the Statement in the Legislative Council, on behalf of the Attorney-General.
reasonable and demonstrably justified in a free and democratic society (Legislative Assembly 2010a, 1132).

All of the Charter Act section 7(2) considerations were noted in relation to the limitation of the right to move freely, but the same justifying rationale was used in the 2010 Statement as in the 2007 Statement. The restriction on freedom of movement was regarded as reasonable, and any less restrictive means “would not achieve the purposes of the provisions as effectively” (1132). The need to protect the public was declared by Hulls in the 2010 Statement, and banning was presumed to be an effective mechanism.

The extension of the maximum duration for which a banning notice may be made, to 72 hours, is reasonable and appropriate as there have been a number of people to whom police have had to give a banning notice on multiple occasions. Police have used the banning notice system effectively since its inception; however, its efficacy can be enhanced through enabling police, in appropriate circumstances, to give notices of a significantly longer duration. The amendment is intended to increase the deterrent effect of banning notices, reduce the incidence of alcohol-related violence and disorder and, consequently, enhance public safety (1132).

No evidence was presented to support the increased limitation on freedom of movement, to justify the need to “enhance public safety” or of banning as an appropriate response to the perceived issues. The 2010 Statement continued to regard banning notices as “reasonable and proportionate” but did not cite any empirical evidence or research data.

Given the importance of protecting public order and the rights and freedoms of others, and having regard to the safeguards that are and will continue to be in place..... any limitation on the right to freedom of movement is reasonable and proportionate to its purpose (1132).

Analysis for the Victorian Government submission into the first formal review of the Charter Act, categorised the 2010 Statement as being of “high” complexity (State Government of Victoria 2011, p.74). This suggests that a detailed assessment is necessary to ensure appropriate understanding of potential consequences of the proposed legislation for Charter compliance. The 2010 Statement does address other
provisions within the JLA Bill 2010, but for the change to the permitted length of a banning notice it accepted the assumptions embedded in the 2007 Statement and only addressed the right to freedom of movement explicitly. No other limitations of Charter rights were noted in the 2010 Statement.

5.1.ii Key Charter Rights Limited by Banning Notices

The 2007 and 2010 Statements both acknowledged limitations of Charter rights as a result of the LCRA Bill 2007 and JLA Bill 2010. However, key aspects in relation to the justification for such limitations are missing from both Statements. Furthermore, although the 2007 Statement provided a more thorough examination of Charter rights than the 2010 Statement, by mapping the specifics of the banning proposals against each Statement it is evident that not all of the Charter rights limited by banning notices were recognised. Detailed analysis of the LCRA Bill 2007 and JLA Bill 2010 suggests that the fundamental features of banning notices invokes five of the 27 core Charter rights, summarised in table 5.1.

Table 5.1: Charter rights limited by the banning notice provisions

<table>
<thead>
<tr>
<th>Charter Right</th>
<th>Relevance to Banning Notices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom of movement (s12)</td>
<td>Banning notices prohibit movement into and around public areas.</td>
</tr>
<tr>
<td>Privacy and reputation (s13)</td>
<td>Banning notice recipients are compelled to provide their personal details to a requesting police officer. There is a potential risk to the reputation of a banning notice recipient of being summarily moved-on in public.</td>
</tr>
<tr>
<td>Right to liberty and security of person (s21)</td>
<td>Police officers may use reasonable force to compel a banning notice recipient to leave the designated area</td>
</tr>
<tr>
<td>Fair hearing (s24)</td>
<td>Banning notices are imposed summarily, on-the-spot by police officers. There is no opportunity to present evidence or contest the notice via the courts</td>
</tr>
<tr>
<td>Rights in relation to criminal proceedings (s25)</td>
<td>Banning notices affect a number of due process protections. They may be imposed pre-emptively, presume guilt and do not permit judicial appeal.</td>
</tr>
</tbody>
</table>

The effect of the LCRA Bill 2007 upon freedom of movement, privacy and reputation, and the right to liberty and security of person was acknowledged, albeit
inadequately, in the 2007 Statement. One element of the detailed Charter right in relation to criminal proceedings, the presumption of innocence, was also referenced in the 2007 Statement but only for breaches of a banning notice. The reputation aspect of section 13, the right to a fair hearing and the other components in relation to criminal proceedings were not mentioned in the 2007 Statement. The 2010 Statement noted only the effect of the JLA Bill 2010 upon freedom of movement.

The preliminary analysis of the 2007 and 2010 Statements has been extended to examine these five Charter rights in detail. The policy triggers noted in the Guidelines (Department of Justice 2008b) are highlighted for each of the five rights, and their relevance to the banning provisions is explained. A number of significant anomalies, flaws and omissions have been identified within each Statement which limit the extent of Charter compliance.

5.1.ii(a) Section 12: Freedom of Movement

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live. (Charter Act 2006, s12)

As banning notices prevent recipients entering the area from which they are banned, freedom of movement is the most salient Charter right affected. Policy triggers identified in the Charter Guidelines include any proposed legislation that “limits the ability of individuals to move through, remain in, or enter or depart from areas of public space” (Department of Justice 2008b, p.77). The Guidelines state that “public authorities must refrain from interfering with a person's freedom of movement” (p. 78), and any restriction “should be rational and proportionate” (p.79). In limiting access to a public space, such as public areas within designated zones, the Guidelines declare that consideration be given to the period of time the restriction is in place, the criteria determining the exclusion and the extent of the area covered (p.80).

This is the only Charter right that is discussed in both Statements. The 2007 Statement does refer to the limits on the temporal and geographical aspects of
banning notices. Specifically, the 2007 Statement recognised that the period of the ban is 24 hours and that the physical reach of the ban is restricted to a designated area (the town centres and entertainment districts that are ‘declared’ by the Victorian Commission for Gambling and Liquor Licensing (VCGLR) as designated areas and in which banning notices may be imposed). This acknowledges the section 7(2) Charter Act expectation of applying the least restrictive limitation to the right (Legislative Assembly 2007a, 3819). The 2007 Statement also referenced safeguards for people who live or work in designated areas and that a ban may only be imposed “on reasonable grounds” (3819). These aspects of the legislation are considered in the Statement to be sufficient protection for the right of freedom of movement. Despite the unequivocal requirement that any ‘reasonable limitation’ of a Charter right must be demonstrable and not rooted in assumptions (Department of Justice 2008b, p.42), no evidence of any sort was presented in the 2007 Statement to support the proposed limitation on freedom of movement.

With the subsequent extension of a banning notice to 72 hours, the 2010 Statement asserted that only “in appropriate circumstances” (Legislative Assembly 2010a, 1132) will an extended ban be imposed. The term “in appropriate circumstances” shows some acknowledgment of the least restrictive requirement of the limitation of the right to move freely. However, not only is the need for an increase in the permissible length of a ban not empirically justified in the 2010 Statement, the failure to quantify what is meant by “in appropriate circumstances” creates uncertainty for the way in which it is applied to banning notices. Data regarding the use of the banning notice provisions is reported to the Victorian Parliament each year by the Chief Commissioner of Police.11 However, as no data reporting the actual length of banning notices is published the application of the “in appropriate circumstances” requirement is not subject to public scrutiny.

11 The published banning notice data is analysed and discussed in Chapter Seven.
As part of this research, a request was submitted to the Safe Streets task force\textsuperscript{12} in the Melbourne CBD for clarification about how the length of a banning notice is determined. In particular, to understand how the “in appropriate circumstances” clause is applied. The preliminary response from a senior Victoria Police officer indicated that the default position was to impose a ban for the minimum period of 24 hours, as this addresses the most pressing concern of the officer in the street, to remove the individual from a problematic situation. This suggests conformance with the expected proportionality in the way that the banning notice restriction is applied and implicit acknowledgment that longer bans should be imposed only “in appropriate circumstances.” However, subsequent analysis of a subset of banning notices was undertaken by the senior officer (referred to by the pseudonym VP1).\textsuperscript{13}

The findings reported by VP1 confounded initial expectations. The notices analysed were all imposed in 2013 in the Melbourne CBD. VP1 reported that every notice analysed had been issued for the full 72 hour period. As a direct result of this unexpected finding, VP1 advised that the formal patrol briefing documentation delivered to the Safe Streets task force before each night shift had been amended. Police officers are now explicitly instructed to impose a 24 hour ban, unless exceptional circumstances justify a longer ban. While still discretionary, this change does attempt to acknowledge the “in appropriate circumstances” requirement of the \textit{JLA Act 2010}.\textsuperscript{14}

Significantly, the 2010 Statement did not address why the provisions in the \textit{LCRA Act 2007} were insufficient, necessitating additional discretionary police powers via an extended time period for banning notices. That a number individuals had received multiple banning notices was cited in the 2010 Statement, and extending the

\begin{footnotes}
\item \textsuperscript{12} See Chapter Four, footnote 2.
\item \textsuperscript{13} The accuracy of this research cannot be verified as individual banning notice records are not publicly accessible.
\item \textsuperscript{14} This procedural change is a direct result of research initiated for this thesis, rather than from the formal operationalisation of the banning notice legislation. The absence of effective data collection and review processes (which is discussed further in Chapter Seven) means that, without this research, the imposition of unnecessarily long banning notices could have continued indefinitely.
\end{footnotes}
permissible length of a ban was presumed to address this. In tabling the 2010 Statement, Attorney-General Hulls claimed

The amendment is intended to increase the deterrent effect of banning notices, reduce the incidence of alcohol-related violence and disorder and, consequently, enhance public safety (Legislative Assembly 2010a, 1132).

Hulls did not demonstrate the inadequacy of existing police powers or empirically support the case for their extension.

One aspect of the limit on freedom of movement not considered in either Statement is the potential permissible size of designated areas from which a recipient of a banning notices may be excluded. Chapter Two confirmed that designated areas are declared by the Victorian Commission for Gambling and Liquor Regulation (VCGLR), in consultation with the Chief Commissioner of Victoria Police, where the level of alcohol-related violence and disorder is deemed sufficient. However, there are no restrictions on their size. Potentially expansive spatial designation could give rise to significant areas from which a person may be excluded, but this is not addressed in either Statement.

Both the 2007 and 2010 Statements acknowledged the effect of banning notices upon freedom of movement, but both used the same over-riding justification to erode that right. Specifically, that any “less restrictive” conditions would not ensure the stated purpose of the provisions to ensure public order and community protection.

The limitation imposed on freedom of movement is directly and rationally connected with the purpose of the provisions (Legislative Assembly 2007a, 3819 [Robinson, Labor]).

Given the importance of protecting public order and the rights and freedoms of others, and having regard to the safeguards that are and will continue to be in place..... any limitation on the right to freedom of movement is reasonable and proportionate to its purpose (Legislative Assembly, 2010a, 1132 [Hulls, Labor]).

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15 Data recording the actual number of multiple orders imposed is explored in Chapter Seven.
Clear anomalies are evident in both the 2007 and 2010 Statements. The analysis provided in the Statements was not thorough or complete, and no data or research material was used to support the determinations that the restrictions on the right to freedom of movement is reasonable, in any measurable or objective sense. *Charter Act* compliance was selective and incomplete.

### 5.1.ii(b) Section 13: Privacy and Reputation

A person has the right -
- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked (*Charter Act 2006*, s13)

Any legislative provision that “involves the collection of personal information, compulsorily or otherwise” (Department of Justice 2008b, p.81) triggers consideration of the Charter right to privacy and reputation. The relevance of this right to the banning provisions relates to the requirement in the *LCRA Act 2007* (retained in the *JLA Act 2010*) for recipients of a banning notice to provide personal information to police. The 2007 Statement accepted that this may interfere with the Charter right to privacy, but asserted that the interference is necessary for the enforcement of the banning notice, and that the banning notice recipient’s right to privacy is not contravened.

…the disclosure of certain information for the purpose of enforcing banning notices…. may well interfere with a person’s privacy [but] the interference is neither unlawful nor arbitrary and does not violate the right to privacy in section 13 of the Charter (Legislative Assembly 2007a, 3819).

Significantly, no further comment was made in relation to this right in the 2007 Statement. The 2010 Statement did not address the right to privacy at all.

Where the line is drawn between an interference or a violation of a Charter right was not established in either Statement. Why the interference admitted in the 2007 Statement does not constitute a violation was also not explained. The Charter refers
to “limitations” on Charter rights, but does not make clear how this relates to an interference. The language used in the 2007 Statement is ambiguous, and this is a significant issue when assessing Charter compliance of the LCRA Bill 2007. A banning notice recipient may not have committed a criminal act or have done anything wrong. Given the possible pre-emptive nature of the banning provisions, the expectation that personal information must be given to police to enable them to enforce the notice arguably does limit the Charter right to privacy. This interference with a person’s privacy was presented in the 2007 Statement as an absolute necessity. Despite the acceptance of an interference with a Charter right, the denial of any violation means that the section 7(2) requirement to fully justify any limitation of a Charter right was ignored. There was no consideration of less restrictive means to achieve the purpose of enforcing a banning notice. Nor was evidence presented to justify either the interference with the right to privacy, or the claim that the right to privacy is not actually limited.

The consequences for a banning notice recipient of not providing their personal details may be significant, and include an infringement notice, or even arrest for resisting or obstructing the police in the administration of their duties (LCRA Act 2007, s148D). No data is available to indicate the extent to which banning notice recipients have refused to provide their personal information. When considering the appropriateness of this interference with the right to privacy under the Charter, a parallel could be drawn to the judgements laid down by both the Victorian Magistrates’ Court and the Supreme Court of Victoria in the case of Hemingway v Hamilton (2011) VMC 10.

Charged with a contravention of the Summary Offences Act 1966 (s52(1)), Hamilton was accused of resisting a police officer by running away and refusing to answer questions. At the initial Magistrates’ Court hearing, the Magistrate concluded that whilst it may be argued that Mr Hamilton had a moral or social duty to stop when requested to do so and assist police with their enquiries, he had no legal obligation to do so (Hemingway v Hamilton (2011) VMC 10, paragraph 12).
A Supreme Court review of this ruling did not specifically examine the legal issue of a suspect’s refusal to provide his name and address when requested to by a police officer, but whether the police had the power to require the suspect to stop and speak to them at all, given that he was not in the process of being arrested (DPP v Hamilton (2011) VSC 598). In confirming the decision of the Magistrate, and alluding to human rights expressed in Victoria’s Charter Act, Supreme Court Judge Kaye contended that as Hamilton was not being arrested, he had no obligation to speak to the police. Applying this scenario to the banning notice provisions, to be required to provide personal details, the recipient must first be stopped by a police officer. However, as in Hamilton’s case, a banning notice recipient is not being arrested. A ban can be issued pre-emptively and for a range of subjectively determined disorderly or quarrelsome behaviours that may be innocuous and for which intent may have been presumed by police. Therefore, whether an individual is obliged to stop and accept the ban, and therefore provide their personal details, is a valid point of discussion. The interference with the right to privacy in such a situation was not examined in detail in either Statement, and significantly has never been subject to judicial challenge or review.

The right of a banning recipient not to have their reputation unlawfully attacked was not considered in either Statement. When compared with privacy, the Guidelines offer very little clarification of what the reputation element of the section 13 right incorporates. The Charter Act does not define what is meant by ‘reputation’ or what would constitute ‘unlawful attack.’ The only qualifier in the Guidelines notes that an ‘unlawful attack’

is a public attack that is intended to harm the reputation of the person and is based on untrue statements (Department of Justice 2008b, p.88)

The summary imposition of a banning notice embodies the presumption that the recipient has behaved, or is expected to behave, in a way which necessitates their immediate removal from a designated area. No evidence is required to be recorded.

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16 The lack of judicial scrutiny of the banning notice provisions is examined in detail in Chapter Seven.
The legislation requires the recipient to accept the ban and police officers are empowered to use reasonable force to compel an individual to leave the designated area immediately. The banning provisions are not specifically intended to harm the reputation of recipients. However, as the decision to impose a banning notice is entirely discretionary it is possible that a ban may be imposed in error or as a result of incorrect assumptions (such as mistaken identity). In the light of research into discriminatory policing practices, there is an additional risk that police officers may target certain demographic groups. Without the option for independent review of individual banning notices, it is possible that a recipient may suffer damage to their reputation from both the act of being summarily removed from an area and a formal record of the ban against their name on the LEAP database. However, this aspect of the right to reputation was not addressed in the Statements for the banning provisions.

5.1.ii(c) Section 21: Right to Liberty and Security of Person

(1) Every person has a right to liberty and security
(Charter Act 2006, s21(1))

Liberty and security of person is a detailed right comprising eight components, with embedded sub-sections. The 2007 Statement addressed this right only in relation to the permissible use of “reasonable force” by police officers to ensure the recipient of a banning notice leaves the designated area (LCRA Act 2007, s148H). The use of force was considered justified in the context of implementing the ban, and regarded in the Statement as a reasonable limit on the right to liberty and security of person. The analysis in the Statement was minimal, with no evidence presented to justify how or why the limitation is necessary or reasonable. The actual use of force remains discretionary, raising issues of accountability, transparency and ongoing scrutiny.

17 Key literature is noted in Chapter Two, footnote 26.

18 The potential for the banning notice powers to be abused is discussed in Chapter Seven, in relation to both the published banning data and the interviews conducted with Victorian Magistrates.
Other aspects of the banning provisions relevant to the right to liberty and security were not discussed in the 2007 Statement. The Charter Guidelines offer several clear factors that must be considered in relation to this right. In particular law enforcement must not be arbitrary, and “arbitrariness includes elements of inappropriateness, injustice and lack of predictability” (Department of Justice 2008b, p.133). With reference to arrest and detention, the Charter states that clear reasons must be given for the decision, and legal review must be possible. The status of banning notices as quasi-criminal sanctions creates a difficulty in both respects. Recipients have their liberty impacted as they are not permitted free movement, may be forcibly removed from a designated area, and are subject to legal sanctions if they breach the banning notice. Yet recipients are not afforded the typical due process rights of those involved in criminal proceedings, and there is no right of judicial or independent appeal against the imposition of a banning notice.

The notion of predictability is particularly problematic for banning notices which can be imposed pre-emptively by police officers who may presume the disorderly intentions of a recipient. How the banning provisions fit with the Charter depiction of arbitrariness is unclear, and was not addressed at all in the 2007 or 2010 Statements. The lack of reason and evidence required for the imposition of a banning notice adds to the ambiguity. If a ban can be imposed pre-emptively, it is not necessarily possible to predict either its imposition or its effects. The discretion afforded police officers is absolute. How an officer may perceive and interpret an intention to behave in an anti-social manner in the NTE is inherently unpredictable, entirely subjective and potentially arbitrary. Such a decision may be influenced by a number of factors, both explicit and implicit, which are not visible or predictable. The absence of any judicial appeal against the imposition of a ban further compromises the right to liberty and security, as it is not possible to challenge the potential arbitrariness of police discretion to issue a banning notice. This significant omission in the banning legislation was not addressed in either Statement.

19 This embodies fundamental elements of the critique of pre-crime and the consequential dilution of intent (cf. Zedner, 2007c; Crawford, 2009; Ashworth & Zedner, 2011).
Of the section 7(2) Charter Act requirement to fully justify any limitations on a Charter right, the 2007 Statement only acknowledged the connection between the right to liberty and security, and the permissible use of reasonable force. However no evidential material or data was cited in support of a limitation of the right, and no less restrictive means were considered. The 2010 Statement did not address the right to liberty and security of person at all, even though the banning provisions were reinforced by extending the maximum period of a ban to 72 hours. The clearly documented Charter requirements were not applied fully in either Statement.

5.1.ii(d) Section 24: Fair Hearing

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing (Charter Act 2006, s24(1)).

The Charter right to a fair hearing relates primarily to procedural fairness, to “ensure the proper administration of justice” (Department of Justice 2008b, p.152) for criminal and civil proceedings. The notion of a public hearing is predicated on the principle of open justice: not only should justice be done, it should be seen to be done. It is also intended to contribute to a fair trial through public scrutiny (p.153).

Policy triggers for the Charter right to a fair hearing include proposed legislation that “creates or restricts rights of review for administrative decision-making and appeal” and/or “includes a privative clause (a clause that purports to make a decision final and ousts the jurisdiction of a court to review it)” (p.151).

The imposition of banning notice is a discretionary decision determined by a police officer on-the-spot. No reasoning or evidence is required to be documented, and no offence need actually have been committed. The decision to ban is not subject to independent or judicial review. However, the right to a fair hearing was not addressed at all in the 2007 or 2010 Statements. This finding constitutes a significant grey area with respect to the quasi-criminal banning legislation and Charter rights.
Under the *Charter Act* all persons charged with a criminal offence or party to civil proceedings should have the right to a fair, independent and impartial hearing. A banning notice is imposed on-the-spot by a police officer, it is not regarded as a criminal sanction and is not subject to any independent review (civil or judicial). Yet breach of a banning notice is a criminal offence. The impact assessment for the LCRA Bill 2007 appears to have determined (by omitting it from consideration in the 2007 Statement) that the imposition of a banning notice is not affected by the Charter right to a fair trial. This is despite the fact that a ban places a clear restriction upon freedom of movement, must be accepted, carries criminal consequences in the event of a breach, and is exclusively implemented and enforced by Victoria Police. A key criticism of comparative prohibitive orders is their blurring of criminal and civil boundaries, and the embedded dilution of procedural protections, such as the right to a fair hearing. Banning notices reduce due process expectations even further by not permitting any subsequent judicial appeal of individual decisions.

The Charter Guidelines do draw a distinction between criminal charges and decisions made by prosecutors and public authorities before a trial. In such cases the Guidelines concede that decisions made by public authorities when “not being the hearing of a criminal charge or the conduct of a civil proceeding” (Department of Justice 2008b, p.153) are not subject to the *Charter Act* s24(1) requirement to be held in public. However, there is no such qualifying statement made with respect to the right for such a decision to be fair. All decisions made by prosecutors, public authorities and in relation to a criminal charge must be “competent, independent and impartial” (p.153). Banning notices are imposed by members of a public authority, Victoria Police. Therefore, while the decision to ban does not necessarily need to be public, implied within the Guidelines is the need for it to be fair. The discretionary

20 Such as anti-social behaviour orders (ASBOs) in England and Wales, discussed in Chapter Two.

21 See, for example, Burney (2002, 2006), Ashworth (2004a), Crawford (2009), and Hadfield, Lister and Traynor (2009).

22 Provisions do exist for more complex administrative and judicial reviews of legislative, executive and other agency decisions. See Chapter Two, footnotes 20 and 24.
police decision to impose a ban is not reviewable, other than by a more senior police officer (LCRA Act 2007, s148E). No data is available in relation to the number of banning notices that have been reviewed by a senior police officer or their outcomes. There is no opportunity for the imposition of a ban to be judicially or independently reviewed, and a decision to ban is not always predictable or made in response to objectively defined or measurable behaviours. This is contrary to the expectations of the Charter right to a fair hearing.

The policy triggers for the right to a fair hearing apply to both the LCRA Bill 2007 and the JLA Bill 2010, but neither Statement made any reference to this right. Banning notices do not require a criminal charge, but they are administered on-the-spot by Victoria Police. Refusal to accept a banning notice and breach of a ban both constitute a criminal offence. Therefore, the Charter right to a fair hearing is relevant and should have been considered fully in the 2007 and 2010 Statements.

5.1.ii(e) Section 25: Rights in Criminal Proceedings

Section 25 of the Charter Act comprises a set of minimum due process guarantees. It incorporates a number of specific procedural rights, such as legal advice, and access to evidence and witnesses. Policy triggers for Charter rights in criminal proceedings include any proposed legislation that creates an offence requiring “the accused to prove or establish the absence of an element of an offence” (Department of Justice 2008b, p.157), or which contains a presumption of fact that puts the legal or evidential burden on the accused to rebut. Three components of this right are of particular relevance to both the imposition of banning notices and how their alleged breach is handled. These are

the right to be presumed innocent until proved guilty according to law (Charter Act 2006, s25(1)).

not to be compelled .... to confess guilt (Charter Act 2006, s25(2k)).

The absence of data is a significant gap which limits, in particular, any scrutiny of the inappropriate imposition of banning notices.
the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law (Charter Act 2006, s25(4)).

The only reference to these due process procedural rights in a Statement was made in 2007, and only in relation to banning notice breaches and the presumption of innocence. No aspect of the rights in criminal proceedings were addressed in the 2010 Statement. These are significant omissions in the Charter compliance process for both Bills.

The Charter Guidelines declare “the right to be presumed innocent until proven guilty is a fundamental common law principle” (Department of Justice 2008b, p. 158). However, this right was addressed in the 2007 Statement only in relation to a person who has been charged with a criminal offence by breaching a banning notice. This is a second grey area with respect to the banning provisions, and their quasi-criminal status. The imposition of a banning notices does not require a formal charge, but a ban contains an implicit presumption of guilt. Recipients are compelled to provide their personal information to the police officer and to accept the ban. Police may use ‘reasonable force’ to ensure a person leaves the designated area, which adds to the presumed guilt, or strict liability. In imposing a banning notice, the determination of guilt is made entirely by the police officer and cannot be reviewed, other than by another police officer. A ban can also be imposed pre-emptively, without any evidence of wrongdoing, but must still be accepted.

Although banning notices are not regarded as a criminal sanction, specific expectations in relation to infringement notices are pertinent to the banning provisions. The Charter Guidelines make reference to infringement notices in the context of minimum guarantees in criminal proceedings. Typically given for traffic offences, the Guidelines state that as infringement notices do not require a formal charge they are not protected by the minimum guarantees enshrined in the Charter Act (Department of Justice 2008b, p.164). However, the Guidelines do make it clear that infringement notice provisions should strive to protect due process procedural rights, by offering recipients the choice to elect a court resolution of the matter (p.
Victoria’s *Infringements Act 2006* reflects this expectation and outlines the options available for recipients of infringement notices who wish to challenge their imposition. Where a challenge is presented the infringement penalty, typically a fine, is not required to be paid until the review process is complete. While the infringement penalty may be imposed on-the-spot, minimum guarantees of judicial review and due process are enabled prior to the punishment taking effect. Legal representation may be sought, evidence may be requested, and police discretion to impose a penalty is subject to independent review.

Another comparative example is the ‘anti-hooning’ legislation enacted in Victoria. Introduced in 2006, police were permitted to immobilise or impound vehicles driven in a dangerous manner, for up to 48 hours. The powers were extended in 2011 to allow police to seize a vehicle on-the-spot and impound it for 30 days if they reasonably believe the driver has committed a hoon-related offence, regardless of who owns the car. While the penalty is immediate, and akin to a banning notice, the legislation permits a decision to impound a vehicle to be reversible upon appeal, unlike a banning notice.

Banning notices mirror infringement penalties and ‘anti-hooning’ powers in their immediate, on-the-spot, discretionary imposition. Analysis of the Charter Guidelines and comparisons with relevant legislative provisions suggest that the same principles and minimum guarantees should apply to all types of infringement notices to preserve due process rights in criminal proceedings. This includes, in particular, the option for judicial oversight of a discretionary police decision to punish. The expectation that formal Charter protections will apply to proceedings in relation to the imposition of a banning notice was not discussed at all in the 2007 or 2010 Statements. Its omission means that no consideration was given to the limitations of this right caused by the banning provisions or, significantly, to any justification for not permitting a clear right of appeal.

24 *Vehicle Impoundment and Other Amendments Act 2005* (Vic).

25 *Road Safety Amendment (Hoon Driving and Other Matters) Act 2011* (Vic).
Rights in criminal proceedings were not considered in either Statement with respect to the imposition of a banning notice, but the requirements for breach proceedings were discussed in the 2007 Statement. The LCRA Bill 2007 permitted reverse onus for banning notice breach proceedings, which affects both the presumption of innocence and burden of proof due process rights. Anyone accused of breaching a banning notice is required to prove a fact or issue of fundamental relevance to their claimed innocence. Rather than the prosecution being required to prove that the defendant knowingly and intentionally breached their banning notice, the onus is placed upon the defence to prove one or both of two permissible scenarios: an “honest and reasonable” mistake and/or “circumstances beyond the control” of the defendant (LCRA Act 2007, s148F(3)).

The Charter Guidelines indicate that reverse onus offences are not prohibited and do not necessarily breach Charter rights. However, in common with restrictions on Charter rights in general, reverse onus inclusions “must be a reasonable limitation that can be demonstrably justified” (Department of Justice 2008b, p.158). The 2007 Statement discussed the use of reverse onus principles in relation to banning notice breach proceedings only. Accepting that the burden of proof is placed upon the defendant to “escape liability in circumstances of honest and reasonable mistake or total absence of fault” (Legislative Assembly 2007a, 3820), the 2007 Statement asserted that

… the prosecution would have difficulty in proving the absence of defence beyond reasonable doubt. If the burden were on the prosecution, it would be too easy to escape liability… Less restrictive means would not achieve the purpose of the provisions as effectively. An evidential onus would be too easily discharged by a defendant and the prosecution would have difficulty in proving the absence of the defence beyond reasonable doubt (3820).

All the relevant Charter Act section 7(2) factors in relation to justifying a limitation of Charter rights appear to be addressed within the 2007 Statement, but no actual evidence was presented in support of the validity of the reverse onus limitation. The justifications were built around assumption rather than reasoned analysis, in clear
contravention of the Charter Guidelines. Furthermore, the 2007 Statement implied an additional level of justification for permitting a reversed evidential onus, as the penalty for a breach is only financial. This suggests that it is more acceptable to limit rights under the Charter if the potential consequences are minor. However, the status of Charter rights should not be determined by consequences or their absolute value. As Bateman (2009) makes clear, mechanisms such as reverse onus fundamentally subvert due process protections. Yet this was overlooked in the 2007 Statement in favour of the overriding need to ease the prosecutorial burden.

Statements of Compatibility are tabled in parliament as a factual assessment of Charter compliance. When a Statement is presented and considers a Bill to be compatible with the Charter, there is no evidence of specific challenge by parliamentarians and a Statement has never been revoked or overturned. Subsequent parliamentary debate may allow points of interest and concern to be raised and considered. However, particularly where majority or bi-partisan support exists for a proposed legislative change, the likelihood of detailed interrogation of Statements and related legislative provisions is low. During the first four years of the operation of the Charter Act, only two Statements of Compatibility prompted amendments to legislative provisions (SARC 2011, p.86). The specific content of Statements, including flaws, assumptions and omissions, largely determines subsequent parliamentary debate. One final safeguard, and a key phase of Charter compliance, is the process of review by the Scrutiny of Acts and Regulations Committee (SARC).

5.1.iii Scrutiny of Acts & Regulations Committee (SARC) Review

Analysis of the SARC reviews of the LCRA Bill 2007 and JLA Bill 2010 for this thesis indicates that a number of issues of direct relevance to both human rights and procedural due process protections were identified. The ways in which the concerns

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26 The LCRA Bill 2007 and JLA Bill 2010 were both passed when the incumbent Labor Government had majorities in the Legislative Assembly and the Legislative Council.
raised by SARC were addressed add to the contention that the Charter compliance processes applied to the banning notice provisions were flawed.

5.1.iii(a) Liquor Control Reform Amendment Bill 2007

Following their review of the LCRA Bill 2007, SARC’s published analysis focused upon three Charter compliance issues. Firstly, with respect to the creation of the new offence of entering or staying in an area contrary to a banning notice, and the potential for police to use reasonable force to remove or prevent re-entry, SARC “considers that these provisions may infringe such persons' rights to freedom of movement and liberty” (SARC, 2007). Secondly, the SARC review expressed concern about the absence of any restriction upon the potential size of a designated area.

The Committee observes that there are no constraints as to the size of the area designated by the Director but rather that the area must merely contain a public place affected by relevant violence near licensed premises (SARC, 2007).

Thirdly, by reversing the onus of proof in cases of banning notice breaches SARC “considers that these provisions may infringe such defendants' rights to be presumed innocent until proven guilty” (SARC, 2007). Usual due process procedures require the prosecution to prove beyond reasonable doubt the absence of any mistakes of fact or unavoidable circumstance, which may be regarded as acceptable defence and absence of criminal responsibility. The Charter Guidelines make clear that reverse onus imposes an additional burden on the accused, may limit the presumption of innocence and therefore must be examined carefully to determine if its use breaches the right to be presumed innocent (Department of Justice 2008b, p.158).

To address these concerns SARC sought specific advice and clarification from the Minister with respect to two key facets of the LCRA Bill 2007.

Why is there no limit in new section 147(1) on the size of the areas that may be designated …Given the availability of circumstantial evidence to disprove reasonable mistakes and reasonably unavoidable circumstances
... why are the reverse burdens of proof in new sections 148F(3) ... necessary to enforce compliance with banning notices... (SARC, 2007).

Despite the formal request by SARC no discernible response was provided via an Alert Digest or during the parliamentary debates in 2007. The SARC review of the LCRA Bill 2007 had no effect upon the Charter compliance process or the enacted legislation. In its first annual report into the operation of the Charter, the Victorian Equal Opportunities and Human Rights Commission (VEOHRC) expressed concern about limitations in SARC’s role in the Charter compliance process.

While SARC raised concerns about the Charter compatibility of several Bills, only one Bill appears to have been amended in response to these concerns. The Commission is concerned that SARC’s comments do not become simply an end in themselves, but form part of a robust, genuine exchange on human rights. The Commission will monitor this aspect more closely in 2008 (VEOHRC 2008, p.12).

The first four year Charter review27 found that only two Statements of Compatibility were amended in response to SARC concerns,28 and that nearly all Bills about which SARC noted concern regarding a potential incompatibility with Charter rights were passed unchanged (SARC 2011, p.86). This finding is evidenced by the progression of the LCRA Bill 2007. SARC raised specific and relevant concerns, but none were addressed publicly by the Minister in parliament. Both the 2007 Statement and the legislation remained unchanged.

5.1.iii(b) Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Bill 2010

There is some acknowledgement of the concerns expressed by VEOHRC in its first annual report in the SARC review of the JLA Bill 2010. In their attempt to scrutinise the increasing scope and reach of banning provisions, SARC made a number of key

27 Section 44 of Victoria’s Charter Act includes provision for ongoing review. The first formal four year review was conducted by SARC in 2011.

28 More than 400 Statements of Compatibility were tabled to the Victorian Parliament in the period before July 2011 (SARC 2011, p.84).
observations and documented concerns regarding the 2010 Bill. Specifically, SARC posed questions about the fairness of the implementation of 72 hour bans, in terms of possible restrictions upon freedom of movement, and whether banning notices are inherently punitive, rather than preventative.

While the Committee appreciates that allowing banning notices to be issued for longer periods may be effective in reducing the incidence of violence or disorder, it is concerned that clause 49 may qualitatively change the banning notice scheme in two respects:

The Committee refers to Parliament for its consideration the questions of whether or not clause 49’s extension of the maximum period for banning notices to 72 hours:

- by potentially allowing people to be banned by police from travelling through a city or town’s centre for legitimate weekday activities, is a reasonable limit on the Charter’s right to freedom of movement; and
- by increasing the deterrent effect of banning notices, engages the Charter’s rights with respect to the punishment of suspected criminal behaviour, including the right to a fair hearing by an independent tribunal, the presumption of innocence and appeal rights (SARC 2010a, p.7-8).

SARC also questioned the effect of extended bans upon individual rights and due process.

The Committee is concerned that the use of 72-hour banning notices to deter people who are repeatedly suspected of offences in a designated area may amount to punishment of suspected criminal behaviour by police officers without a charge, trial or appeal and therefore may engage the Charter’s rights with respect to criminal punishment, including a fair hearing by an independent tribunal, the presumption of innocence and the right to appeal to a court (SARC 2010a, p.8).

The response of the Attorney-General Hulls is documented in a published Alert Digest, demonstrating a clear procedural advancement in the Charter compliance process. Hulls emphasised the requirement that banning notices may only be given by a relevant police officer to someone reasonably believed to have committed, or be in the process of committing, an offence within a designated area. Significantly, Hulls stated

these provisions ensure that banning notices are only given where there are strong community protection grounds for doing so and they would be
a proportionate response to a risk of alcohol-related violence or disorder. As such, while it is possible that a 72-hour banning notice issued on a weekend may now prevent a person from availing themselves of the most efficient or timely route to, for example, their place of work on the following Monday, in my opinion, the purpose that is fulfilled by such a notice outweighs any temporary inconvenience that may or may not be caused to that person.

The potential for any such inconvenience was also possible prior to these amendments, under the previous 24-hour maximum period. For example, a notice issued on a Friday night may have prevented a person from conveniently travelling to his or her place of work on the Saturday (SARC 2010b, p.14).

Without explaining why, Hulls asserted that the potential effect of the increase to 72 hours was not significantly or qualitatively different from that possible under the existing 24 hour model. Therefore, no new issues relating to Charter rights were regarded by Hulls as relevant to the JLA Bill 2010.

With respect to the second concern raised by SARC, about the possible punitive nature of banning notices, Hulls reiterated the fundamentally protective and deterrent purpose of a ban. He made clear his view that the non-criminal status of banning notices rendered the right to a fair hearing irrelevant. Hulls claimed that banning notices should not be regarded as punishment and do not amount to a criminal charge, thereby side-stepping the Charter right to a fair hearing. However, Hulls presented no evidence to support either the need to ban or its likely effectiveness in ensuring community protection. Despite the contradiction in Hulls’ response to SARC, regarding the notion that a banning notice may act as a deterrent despite not being a punishment, no further exchange between SARC and the Minister is evident. The JLA Bill 2010 proceeded through the parliamentary process and the JLA Act came into operation in January 2011 unchanged.

Analysis of the timing of the JLA Bill 2010 and its Charter compliance processes reveals a significant anomaly. Hansard records show that the Bill was introduced into the Legislative Assembly on 23 March 2010. SARC documented its concerns in Alert Digest No. 5, published on 13 April 2010. The Bill received Royal Assent on
25 May 2010. However, the formal response to SARC’s concerns was not published until Alert Digest No. 14 on 5 October 2010, which reported the specific Ministerial response dated 20 September 2010, nearly four months after the JLA Bill received Royal Assent. While some procedural improvement in the SARC review process is noted, in the provision by Hulls of a documented response, its timing renders the content of the response obsolete in the context of meaningful Charter compliance and parliamentary scrutiny.

5.2 Early Charter Compliance

Despite the formal Guidelines and clear procedures within the Charter Act, there were a number of omissions and anomalies in the application of Charter compliance processes to the banning notice provisions. This research has examined how such oversights could be possible. Through a detailed secondary analysis of key Charter reports and exploratory interviews held within the Department of Justice, two fundamental procedural elements have been considered in relation to the LCRA Bill 2007 and JLA Bill 2010. Firstly, as the LCRA Bill 2007 was one of the early pieces of legislation to which the Charter Act was applied, the capability and state of readiness of the Department of Justice is assessed to determine whether an operational process vacuum was evident. Secondly, the Guidelines are clear that any limitations on human rights must be reasoned and evidence-based, and that less restrictive means of achieving the same purpose must be properly considered (Department of Justice 2008b, p.42-47). Therefore, what constitutes a reasonable limitation and demonstrable justification of a limitation are explored in relation to the banning notice provisions. These two procedural issues are examined in the following sections.

5.2.i Operational Process Vacuum?

A key question when considering the Charter compliance of the LCRA Bill 2007 is whether the Department of Justice was fully prepared for the Charter’s operational
requirements. The first four year Charter review noted that the processes for human rights assessment of new legislative provisions “may not be uniform over time and across different parts of the government” (SARC 2011, p.81). Since the enactment of the Charter Act, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has undertaken annual reviews of the Charter’s functioning. In its first annual report VEOHRC described 2007 as “a year of preparation” (VEOHRC 2008, p.4).29 The LCRA Bill 2007 was one of the first pieces of legislation subject to the compliance requirements of the Charter Act. However, despite the Charter taking effect for new legislative proposals during 2007, the formal Charter Guidelines were not published until July 2008, after the LCRA Act 2007 had passed through the parliamentary process. This raises the possibility of an operational process vacuum during the early months of the operation of the Charter, which could account for some of the compliance issues relating to LCRA Bill 2007.

The Human Rights Unit within the Department of Justice was developed to support the Charter Act (SARC 2011, p.79). The Human Rights Unit produced the Charter Guidelines and led the Charter specific communication strategies across the whole Victorian Government during 2007 (VEOHRC 2008, p.7). As the Department also driving the assessment of the LCRA Bill 2007, it was at the forefront of the Charter readiness preparations. The first VEOHRC annual report assessed the Charter compliance preparedness of ten government departments across three broad indicators: communication, education and support; law and legislation; policies and service delivery (VEOHRC 2008, p.6). The Department of Justice was considered to be in an “advanced” state of readiness and preparedness for the Charter requirements (p.9). It is reasonable to conclude that compliance procedures for new legislative provisions emanating from within the Department of Justice, such as the LCRA Bill 2007, were not hindered in any tangible sense by key factors such as a lack of

29 This assessment echoes the title of the first annual report by the VEOHRC, ‘First Steps Forward’ (2008).
understanding, procedural awareness, cultural 'buy-in' or operationally effective processes.\(^{30}\)

To validate the information contained within the VEOHRC’s annual reviews and the mandated four year Charter review, exploratory interview research was conducted for this thesis with stakeholders \((n=3)\) at the Department of Justice. Two key objectives of the interviews were to examine more directly the state of readiness of the Department at the time of the LCRA Bill 2007, and to gain first hand insight into the application of the processes underpinning Charter Compliance. As long standing employees of the Department, the interviewees were qualified to discussed the processes by which the Charter was introduced, policy transition and any issues or learning that was evident. To maintain confidentiality, they are referred to as DoJ1, DoJ2, DoJ3. Each offered candid and detailed perspectives, with DoJ1 providing the most comprehensive input.

The interviewees were asked a number of direct questions about the Guidelines and processes that were in place during 2007. All interviewees confirmed that a draft version of the Guidelines was in circulation well before its formal publication in July 2008. They made clear that no material differences are evident between the draft and final versions of the Guidelines. The interviewees agreed that the Guidelines were actively and closely followed by Department of Justice policy officers in 2007, the period during which the LCRA Bill 2007 was developed. Significantly, while the Charter introduced formal processes to ensure legislative compliance, the interviewees highlighted the pre-Charter and post-Charter continuity in terms of both processes and Departmental personnel. For example

I'd probably make the point to you that pre- and post-Charter we don't typically have a different group of people necessarily involved. It's the same sort of policy officers involved who would have hitherto looked at a proposal and I guess what the Charter does is provide a framework

\(^{30}\) Such factors have been found to inhibit success across a range of change management contexts (Paton & McCalman 2008; Seddon 2008); but there is no evidence that they affected Charter compliance within Victoria’s Department of Justice.
around the analysis that arguably occurred anyway but perhaps not in as structured a form (DoJ1).

There was consensus across the interviews regarding the preparedness of the Department of Justice for the requirements of the Charter. This supports the finding of the 2008 VEOHRC report that clear processes were in place within the Department of Justice at the time of consideration of the LCRA Bill 2007.

As clear procedures were evident when the LCRA Bill 2007 was progressing through the Charter processes, this raises the question of how the Charter compliance anomalies identified in this research were possible. The interviews explored challenges for the Charter related scrutiny of legislative proposals. The interviewees raise a number of concerns about the way in which the Guidelines were implemented in the early years of the Charter. The length and complexity of the Guidelines themselves, at 246 pages when compared with the 44 page Charter Act, was noted by DoJ1.

The fact that a guideline can be that thick for an Act that is that thin tells you something I think (DoJ1).

The interviewees agreed that Statements of Compatibility were not always accessible to their target audience, or necessarily relevant. DoJ1 provided an interesting perspective on the challenge of ensuring balance in policy development. Specifically, DoJ1 observed the difficulty of balancing the expectations of Charter compliance with meaningful and accessible documentation.

Blind Freddy could have seen it on several occasions… it [a Statement of Compatibility] is not an accessible document, at least it wasn't in the first instance… how you inject rigour and accessibility in a document like that is always going to be a fine balancing act…The Guideline, and this is the problem with a Guideline in a new environment, it becomes like a ticker box. We have to go through 7(2) and then each and every one of them [Charter rights], and then statements started to become 30 pages. Then you wonder who's accessing this, who's getting any sort of sense of understanding from it? Certainly not the general community. Then it was a question of are we going through the process of these arguments just for the sake of being able to tick the box? So we started to have a look at it as well. Over time you'll notice that the statements themselves have
become shorter. Ultimately, if it's not relevant to discuss, why discuss it? (DoJ1).

As a result of the detailed Charter compliance expectations, the interviewees assessed early Statements as often being too long, too legalistic and addressing points that were not always directly relevant. DoJ1 commented “we found them [Statements of Compatibility] a bit repetitive,” and contended that

One of the two practical issues that I kept coming across time and time again was just the length of the blessed things; I've got to stand up and actually read this. I'm going to have to put a half a day into this (DoJ1).

The perspectives offered by the interviewees support key recommendations from the annual and four year Charter review processes (VEOHRC 2008, 2009, 2010, 2011; SARC 2011). The result was a progressive streamlining of the Charter compliance process, to produce Statements that are more digestible and understandable to a wider audience. DoJ2 noted the change.

And also the understanding of the rights. There's been case law, there is a whole body of Statements of Compatibility, commentary by SARC, that all contributes to it. Even the Guidelines themselves, there was the review of the Charter, and one of the recommendations around Statements of Compatibility was to streamline (DoJ2).

Although the Charter Guidelines have not been updated since their original publication in 2008, DoJ3 summarised that the Statements are now probably a little more narrative in style rather than a formulaic approach; which goes with talking about the balance and being transparent and accessible, rather than the legalistic formulaic approach (DoJ3).

DoJ1 considered the way in which the Statements are used by parliamentarians, and emphasised the importance of ensuring that Statements are accessible.

We argue that the simpler and the plainer English that the statements are written in, the more the members will be able to debate it. Ultimately the statement speaks to the legislation itself, and it is the legislation that they are there to debate (DoJ1).

The expectation that documents such as Statements of Compatibility be accessible and relevant for parliamentarians is sensible, but how the ‘relevant’ content is
determined remains significant. The 2007 Statement was regarded by the interviewees as being long,\textsuperscript{31} when compared with other Statements. However, analysis for this thesis has found that, despite its perceived length, key areas of relevance were not addressed in the 2007 Statement. In particular, the *Charter Act* section 7(2) requirements to fully justify any limitation on Charter rights lacks specificity and completeness, and a number of affected human rights were not referenced at all in the 2007 Statement.

The potential consequences of the streamlining of Statements of Compatibility are documented in the 2012 annual Charter report. VEOHRC noted that

there are some instances, however, where Statements of Compatibility are less comprehensive than SARC or bodies with an interest in the issue might consider sufficient (2012, p.24).

Corrections Victoria is cited as one agency that “no longer discusses ‘routine’ or ‘clearly reasonable’ human rights limitations” (VEOHRC 2012, p.24). However, the balance between accessibility and relevance is complex. Shorter Statements are not necessarily better, particularly to facilitate effective and meaningful scrutiny, if core aspects of Charter compliance are missing. The priority for any impact assessment process should be thorough and accurate analysis. Mindful of the need to be concise without verbosity, the resulting Statement of Compatibility should still be comprehensive as to its potential human rights consequences. If an issue is presented in a way that is too complex for parliamentarians to understand, not addressing it at all is not an appropriate solution. Charter compliance is a process of public accountability for legislative action. Failure to consider all affected rights, for whatever reason, is anathema to the fundamental purpose of the Charter. Therefore the focus across parliament should be to ensure relevance, completeness, clarity and total conformity with Charter requirements. This was not the case for the LCRA Bill 2007 or the JLA Bill 2010.

\textsuperscript{31} The Statement covered four pages in Hansard.
5.2.ii ‘Unreasonable Limitations’?

The second procedural issue relevant to the Charter compliance of the banning provisions is what constitutes both a reasonable limitation and the demonstrable justification of a limitation. The term “reasonable” was used in the 2007 and 2010 Statements to substantiate each noted limitation upon a Charter right. What is meant by a 'reasonable' limitation is examined in the Charter's Guidelines (Department of Justice 2008b, p.42-47). Epitomising the balancing paradigm, the determination of reasonable limits is regarded as a “balancing exercise whereby the needs of the State are balanced against the rights of individuals” (p.42). There is a clear expectation that the limit must impact the human right as little as is reasonably possible but still achieve the objective of the limitation as effectively. An excessive impairment will mean the limit is unlikely to be a reasonable one (Department of Justice 2008b, p.42).

The Guidelines make clear that the state is required to demonstrate that the reasonable limit is justified.

… material should be available that demonstrates a limit is justifiable, such as studies, reviews, inquiries and consultation findings. Assumptions will not be enough (p.42).

The Guidelines also require consideration of proportionality between the purpose of the limitation, restriction or interference with a right and the means employed to achieve that purpose (p.44).

The Guidelines reflect the broader requirement for evidence-based policy development. There is also a clear linkage to the literature examined in Chapter Three regarding the issues of legislative change proceeding without sufficient evidence of need or consideration of the potential consequences. In particular, Michaelsen’s (2006) ‘proportionality test’ of the necessity, suitability and appropriateness of legislative responses is embodied in the Charter Act and its Guidelines. However, despite these clear expectations no evidence, empirical or

32 This was noted explicitly in the Victorian Government inquiry into the reduction of harmful alcohol consumption (DCPC 2006), a year before the introduction of the LCRA Bill 2007.

otherwise, was presented in support of any of the limitations outlined in either the 2007 or 2010 Statements. This aspect of Charter compliance was far from comprehensive. Given these issues and the absence of an accessible audit trail of how each right affected by the banning notice Bills was determined, the Department of Justice interviewees were asked how, in principle, legislative proposals are assessed against the *Charter Act*. DoJ1 highlighted the complexity and subjectivity inherent in determining what is a reasonable impact of a Charter right.

The dilemma we always have with the Charter, and it always will ever be thus, is… we are not talking about a range of objective statements against which there is a yes/no. And it’s a contested space. What I might see as balanced and appropriate others may not. It’s in that evolutionary process of trying to work out what and where we land on it. Some things are more difficult than others… some reforms are quite challenging (DoJ1).

When asked to expand on the notion of what constitutes a ‘balanced response’, DoJ1 asserted “that’s a toughy”. In determining how a balanced response is achieved, the notion of balancing individual rights against the rights of the community at large is a fundamental consideration.

How many children must die for this to be material? That becomes a very real issue in the legislative space when you are trying to think of consequences… how many peoples lives do you put at risk? If there has been one or two deaths it is OK for you to act or is that disproportionate? And where do you go with that sort of balance? It’s proving challenging in a justice environment even. Even without the Charter analysis that’s still the same. Without the Charter guiding us, there is always that imposition of the state and its coercive power on the community and wherein is that balance achieved... and that's a toughy (DoJ1).

This explanation by DoJ1 highlights core issues across the ‘re-balancing’ literature discussed in Chapter Three, regarding the way in which the need for state initiated responses are weighed up against their potential consequences. Where the lines should be drawn is complex and cannot necessarily be objectively determined. The interviewees agreed that where possible evidence, such as crime statistics and other data, was applied to the impact assessment of policy proposals. In terms of the use of material to substantiate and support the reasonable limitations, DoJ3 noted a significant issue of availability.
... it's hard to get the evidence. When ministers try to base the policy on evidence, it's not always easy to pinpoint comparison with other jurisdictions… when explaining the reasonableness and proportionality, it’s helpful if you are able to look at evidence from other jurisdictions but its not always easy to compare what might be apples and oranges sometimes, so its always a tricky balancing act (DoJ3).

Notwithstanding the challenges identified by DoJ3, the Charter Act requires limitations of Charter rights to be based upon empirical evidence. This is not only to substantiate the need for any given right to be limited, but to support the effectiveness of the proposed limitation.34 This is a fundamental check on the power of parliament to circumvent Charter rights. If the required evidence is not available, then it is difficult to justify a proposed limitation of a Charter right as being reasonable. The challenge of justifying new policy is acknowledged, particularly where no evidence of the success of a proposed new measure may yet exist. However, when the JLA Bill 2010 was introduced, the banning provisions had been operational for over two years. If sufficient evidence to support their need was available, it should have been presented in the 2010 Statement. That this key requirement of the Charter Act was not observed brings into question both the need for, and effectiveness of, extending banning notices to 72 hours. The extent to which any less restrictive means were considered with respect to each of the limitations identified remains unknown.

All interviewees expressed concern about the ability of the Charter Act to fulfil its stated remit. Despite the passage of time since its enactment, the opportunity to refine the Charter procedures, and being part of the Department that acts as arbiter for the Charter Guidelines, DoJ1 conceded that challenges were embedded in the way in which Charter processes work.

… the difficulty of trying to give life to concepts that are about some fundamentally held shared values of our community in the context of how it is we legislate. Trying to give life to that and trying to describe the process by which the legislators try to address some of that, wherein they

34 It is difficult to meaningfully evaluate the effect of a proposed new measure without a clear statement of its need and purpose.
think its infringed or otherwise impacted. Its a tough ask. I'm not surprised no other jurisdiction has gone ahead and done it this way to be honest (DoJ1).

Formal disquiet about shortcomings in the content of Statements of Compatibility was not evident until the VEOHRC’s 2009 annual report, which made observations pertinent to the 2007 Statement. VEOHRC expressed concern that proposed limitations upon rights were justified by perceptions of community concern rather than empirical or research evidence of their benefits. VEOHRC commented specifically upon enhanced police-imposed stop and search powers.35

Recognising that limits on human rights are necessary in certain circumstances, the Commission’s view is that the government failed to demonstrate that the curtailing of rights through these increased police powers would result in a reduction in alcohol-related violence or knife-crime, or lead to an improvement in the safety of the Victorian community. While understanding the motivation behind these laws – and supporting measures to make public places safer – it is unfortunate that a more rigorous consideration of the human rights issues involved was not undertaken… (2010, p.5).

VEOHRC made clear its expectation that Statements of Compatibility must rigorously address the elements of section 7(2) of the Charter Act when it is being asserted that limitations on rights are reasonable and permissible (2010, p.94).

Furthermore, compliance was regarded as essential for the integrity and perceived value of the Charter to be upheld: “complying with proper processes is essential to ensuring parliamentary and public confidence in the human rights dialogue.” (2010, p.94). Human rights issues must be subject to the broadest scrutiny and full accountability. A genuine dialogue process facilitates a vital exchange of ideas, enabling human rights impacts to be robustly debated (2010, p.94).

Although too late for the LCRA Bill 2007, this was clear recognition from VEOHRC of the Charter compliance requirements and an explicit statement of expectation, as part of their formal annual review process. It is reasonable to expect that these

expectations would be applied to the JLA Bill 2010. However, the analysis conducted for this thesis demonstrates that fundamental issues persisted and the 2010 Statement failed to assess thoroughly the Charter rights affected by the JLA Bill 2010.

5.3 Chapter Conclusion

The Statement of Compatibility is a core component of Victoria’s Charter compliance process and the vehicle through which proposed legislation is presented to the Victorian Parliament. Clearly documented requirements confirm the processes to be followed and the content to be included in each Statement. There were flaws and omissions in both the 2007 and 2010 Statements, and their compliance with Charter expectations was compromised. While the 2007 Statement identified a number of human rights issues in relation to the LCRA Bill 2007, it was not a comprehensive impact assessment. Consideration of the right to move freely, the rights to privacy and reputation, liberty and security, and rights in relation to criminal proceedings were incomplete and lacked significant detail regarding their proposed limitations. The Charter right to a fair trial was not addressed at all. The 2010 Statement only considered freedom of movement in relation to the JLA Bill 2010.

No empirical evidence or objective analysis was presented in support of any of the limitations of Charter rights in either Statement. Issues of alcohol-related disorder in the NTE were claimed, and banning presented as a necessary and appropriate response. The failure to provide specific evidence-based reasoning for any of the affected Charter rights rendered impossible an assessment of whether the limitation of rights had a permissible purpose, were proportionate, or addressed the threat that was presumed. This absence of transparency created the potential for unseen political or other priorities to influence what should be a process of objective assessment. Lack of open disclosure of policy rationales or relevant research evidence enables significant legislative change to be built upon fundamentally flawed logic, which is opaque to scrutiny and challenge. Parliamentary processes that flow from the early
Charter compliance analysis should act as a safeguard to ensure all policy implications are understood, that the effect upon Victorians is debated openly, and that legislation is only passed following comprehensive discussion in parliament.

The deficiencies identified in the analysis of the 2007 and 2010 Statements do not relate to their complexity, length or style. There were omissions in the acknowledged effect of the proposed banning provisions upon core human rights. Accusations of a “ticker box” (DOJ1) approach cannot be levelled at the 2007 Statement. While it is hard to argue against the notion that if it is not relevant to discuss then do not discuss it, the key point should be how relevance itself is determined. The Department of Justice interviewees conceded that the impact assessment process is not necessarily objective. This is despite the clear articulation of Charter rights and of appropriate policy triggers which should prompt their consideration and assessment. Core human rights affected by the banning notice provisions were either not addressed in the 2007 and 2010 Statements, or were not addressed completely, particularly with respect to consideration of the required section 7(2) analysis of the proposed limitations of Charter rights. Despite a drive to streamline Statements, the Charter Guidelines are unambiguous in their expectation that all Charter requirements will be addressed (Department of Justice, 2008b). Each Charter right must be considered in relation to each provision of a Bill (VGSO 2007, p.3). How the precise Charter impact of the LCRA Bill 2007 and JLA Bill 2010 was determined is unknown. The Cabinet in Confidence status of the preliminary impact assessment undertaken for both Bills precludes any analysis. The 2007 and 2010 Statements themselves are the only inputs to an examination of the Charter rights deemed to be limited by the banning notice Bills. Whether other rights were considered in the early impact assessment and then dismissed, or were not considered at all, is not known.

SARC identified concerns about the Charter Act compliance of both the LCRA Bill 2007 and JLA Bill 2010. Yet both Bills passed through parliament unchanged. The documented SARC concerns are missing from both the 2007 and 2010 Statements of Compatibility. If thorough assessment of the human rights consequences of the Bills
is undertaken early in the development of policy, according to the Charter and its Guidelines, then the issues identified by SARC should have been identified in the Statements. Victoria’s Charter uses a parliamentary scrutiny model. However, its effectiveness is clearly undermined if the scrutiny is insufficient and misses, or ignores, key human rights consequences. This weakness confounds Williams’ (2007b) hope that the Charter Act would enable more transparent and accountable protection of human rights in Victoria. The findings documented in this chapter align more with assertions of a disconnect between human rights policy and practice, both in general (Landman 2004; Pue 2008; Gearty 2009; Horrigan 2012) and in Victoria more specifically (Debeljak 2011; Lau 2012; Hiebert 2012).

Procedural and timing issues were also evident with respect to both Bills. The SARC concerns about the LCRA Bill 2007 received no Ministerial response. There is a suggestion of positive procedural changes by the time the JLA Bill 2010 was introduced. Most notably the issues raised by SARC did elicit a Ministerial response via an Alert Digest. However, the SARC concerns, including the impact of the banning provisions upon due process rights and their potentially punitive nature, were not sufficient to generate parliamentary discussion or review of the policy proposals by the Minister. The power to decide the detail of both banning notice Bills remained with the relevant Minister.

Not only was the Ministerial response to the JLA Bill 2010 dismissive of the legitimate concerns highlighted by SARC, it was received after the enactment of the Bill. How this facilitates open and effective scrutiny of legislation is unclear. Due to the timing of the SARC review processes, their concerns were not visible during parliamentary debates of the legislation, and did not feed into an effective analysis of the provisions. The Charter compliance of both banning notice Bills was directly affected by such timing issues. The SARC concerns regarding the LCRA Bill 2007 were not addressed at all. The SARC concerns in relation to the JLA Bill 2010 were accessible only after the Bill had been approved. Neither scenario is commensurate with open and accountable Charter compliance, or effective parliamentary scrutiny.
Overall, this chapter has found that the *Charter Act* compliance processes for the LCRA Bill 2007 and JLA Bill 2010 did not ensure a comprehensive assessment of the consequences of Victoria’s banning notice provisions for individual rights and due process protections. Statements of Compatibility are not routinely debated in parliament but their tabling initiates the formal stages of the parliamentary debate of legislative proposals. The next chapter provides a detailed examination of the debates of the two banning Bills.
Chapter Six

Pre-enactment Scrutiny of Victoria’s Banning Notice Provisions

Analysis of Parliamentary Debates: Pressures, Rights & Presumptions
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6 Introduction

A key function of both the Legislative Assembly and Legislative Council is to hold
the Victorian Government to account for its policies, actions and spending.

The Parliament of Victoria through its elected representatives is
accountable to the Victorian community for the provision and conduct of
representative government in the interests of Victorians (Department of
Legislative Assembly 2008, p.5).

Since the passage of the Charter Act in 2006, parliamentary scrutiny of legislative
provisions includes the specific requirements of Charter compliance in addition to
the customary debates, discussion and amendment in both Houses and across the
supporting Committees. The Charter compliance impact assessment produces a
Statement of Compatibility which is tabled in the Legislative Assembly following the
introduction and first reading of a Bill.¹ The substantive cross party debates take
place during the second reading phase. The SARC review typically occurs
concurrently with the debates and should enable Charter related issues to be raised in
parliament before the final reading of a Bill. Victoria’s bicameral parliament has a
party structure embodying longstanding ideological differences.² With a clear
expectation of parliamentary accountability, it is a reasonable presumption that
debate will be thorough, robust, visible and exercised in the interests of all Victorians
to ensure effective scrutiny of legislative proposals.

Concerns about the Charter compliance of the banning notice provisions were
documented in Chapter Five. This chapter completes the examination of the
parliamentary scrutiny of the Liquor Control Reform Amendment Act 2007 (‘LCRA
Act/Bill 2007’) and the Justice Legislation Amendment (Victims of Crime Assistance
& Other Matters) Act 2010 (‘JLA Act/Bill 2010’). A functional and thematic analysis
of the Hansard record of debates and supporting contextual documentation has been

¹ See Chapter Five, footnote 2.

² Labor and the more conservative aligned Liberal/Nationals Coalition are the major political parties
in Victoria, with the Greens occupying a more minor role.
conducted. This has identified significant themes and issues in relation to the rigour and balance of the scrutiny of the banning notice Bills.

This chapter comprises four sections. The first presents an overview of the passage of the LCRA Bill 2007 and JLA Bill 2010. The influence of time pressures on each Bill is then discussed, with consideration of how the resulting concessions affected the detail of the banning notice legislation. The consequences of the documented Charter compliance issues in relation to key elements of the banning provisions are examined in the third section. Aspects of the parliamentary debates relating to the way in which the banning notices undermine individual rights are highlighted, and key omissions are identified for each of the two Bills. The final section of this chapter considers both Bills together and examines broader considerations, evident across the debates, that underpin the parliamentary discourse and influence the detail of the resulting banning provisions. There was an embedded assumption that ‘something must be done’ (Ashworth 2006b; Crawford 2013) to address violence in the night-time economy (NTE). In addition, the use of fear to legitimise the prioritisation of community protection over individual rights, the notion of ‘them’ and ‘us’ in relation to the need for and consequences of banning, and the conflation of intent and punishment all combined to shape the way in which balance was applied to the banning notice legislation.

6.1 The Passage of the Banning Notice Bills

6.1.i Liquor Control Reform Amendment Bill 2007

The LCRA Bill was introduced in the Legislative Assembly on 3 October 2007, with the Statement of Compatibility tabled on 1 November 2007, and the pivotal second reading debates on 21-22 November 2007. The Labor proponents of the Bill asserted its need and presumed effectiveness. However, Liberal and Nationals opposition members, such as Asher (Liberal) and Ryan (Nationals), were more circumspect. Specific concern was raised by opposition speakers about the absence of any appeal mechanism and of possible consequences for vulnerable groups, such as Indigenous
and homeless Victorians. The risk that the banning measures may not address the underlying issues relating to anti-social behaviour in the NTE was also noted. Table 6.1 summarises the key stages of parliamentary approval, highlighting in particular the rapid movement of the Bill between the Houses on 5-6 December 2007.

Table 6.1: Passage of the LCRA Bill 2007 through the Victorian Parliament

<table>
<thead>
<tr>
<th>House</th>
<th>Parliamentary Stage</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative Assembly</td>
<td>Introduction</td>
<td>3 October 2007</td>
</tr>
<tr>
<td></td>
<td>First Reading</td>
<td>1 November 2007</td>
</tr>
<tr>
<td></td>
<td>Statement of Compatibility</td>
<td>21-22 November 2007</td>
</tr>
<tr>
<td></td>
<td>Second Reading</td>
<td>22 November 2007</td>
</tr>
<tr>
<td></td>
<td>Third Reading</td>
<td></td>
</tr>
<tr>
<td>Legislative Council</td>
<td>Introduction</td>
<td>22 November 2007</td>
</tr>
<tr>
<td></td>
<td>First Reading</td>
<td>5-6 December 2007</td>
</tr>
<tr>
<td></td>
<td>Statement of Compatibility</td>
<td>5-6 December 2007</td>
</tr>
<tr>
<td></td>
<td>Second Reading</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legislation Committee</td>
<td></td>
</tr>
<tr>
<td>Legislative Assembly</td>
<td>Second Reading; Amendments from Council</td>
<td>6 December 2007</td>
</tr>
<tr>
<td>Legislative Council</td>
<td>Second Reading; Amendments returned from Assembly</td>
<td>6 December 2007</td>
</tr>
<tr>
<td></td>
<td>Third Reading</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Royal Assent</td>
<td>18 December 2007</td>
</tr>
</tbody>
</table>

Following the introduction of the Bill to the Legislative Council on 22 November 2007 a number of amendments were proposed during the second reading on 5-6 December 2007. Ten amendments related directly to aspects of the banning provisions, three of which concerned the most contentious part of the Bill: the absence of a mechanism to appeal receipt of a banning notice. Six of the ten proposals generated no comment. Discussion of the other four was limited to simple statements of support or opposition. The actual issues to which each amendment pertained, or their potential consequences, were not debated. Six amendments were approved by the Legislative Council on 6 December 2007, and the Bill was returned to the Legislative Assembly for review on the same day. Three of the six amendments were passed with little substantive input from the Assembly members. The remaining three amendments, all of which related to the right of judicial appeal,
elicited the most expansive discussion of the entire legislative process. However, despite the articulation of a number of concerns, the LCRA Bill 2007 was passed on 18 December 2007.

6.1.ii Justice Legislation Amendment (Victims of Crime & Other Matters) Bill, 2010

The JLA Bill 2010 contained multiple legislative provisions, only one of which related to the increase in the permissible length of banning notices to 72 hours. The Bill was introduced to the Legislative Assembly on 23 March 2010, and moved through the Assembly and Council phases with minimal delay and with no amendments relevant to the banning provisions. The passage of the JLA Bill 2010 is summarised in table 6.2.

Table 6.2: Passage of the JLA Bill 2010 through the Victorian Parliament

<table>
<thead>
<tr>
<th>House</th>
<th>Parliamentary Stage</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative Assembly</td>
<td>Introduction</td>
<td>23 March 2010</td>
</tr>
<tr>
<td></td>
<td>First Reading</td>
<td>25 March 2010</td>
</tr>
<tr>
<td></td>
<td>Statement of Compatibility</td>
<td>13 April 2010</td>
</tr>
<tr>
<td></td>
<td>Second Reading</td>
<td>14-15 April 2010</td>
</tr>
<tr>
<td></td>
<td>Appropriation Message</td>
<td>15 April 2010</td>
</tr>
<tr>
<td></td>
<td>Second Reading (continued)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Third Reading</td>
<td></td>
</tr>
<tr>
<td>Legislative Council</td>
<td>Introduction</td>
<td>15 April 2010</td>
</tr>
<tr>
<td></td>
<td>First Reading</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Statement of Compatibility</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Second Reading</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Second Reading (continued)</td>
<td>6 May 2010</td>
</tr>
<tr>
<td></td>
<td>Royal Assent</td>
<td>18 May 2010</td>
</tr>
</tbody>
</table>

Two key matters were raised in the debate of the JLA Bill 2010. Firstly, concern was expressed for banning notice recipients who may need to travel to work through a designated area from which they are banned. Secondly, the risk of ongoing temporal and spatial extension of banning notices, beyond 72 hours and the current delineation of designated areas, was highlighted. The potential impact of banning notices upon
vulnerable groups and the lack of appeal against such police-imposed orders, a key part of the discourse in 2007, were not mentioned in 2010.

Only one member (Pennicuik, Green Party), during the second reading debate in the Legislative Council on 6 May 2010, raised specific concerns about freedom of movement and the lack of evidence supporting the effectiveness of banning as a mechanism to address disorder in the NTE. Both issues were dismissed by Government speakers. No discussion was forthcoming and no questions were answered. A clear absence of openness directly limited the scrutiny of the banning provisions. No other significant reference was made across the 2010 debates to individual rights, procedural due process or the use of discretionary summary justice by police. Both main parties, the Labor Government and Liberal/Nationals Coalition, embedded their contributions with an assumption that banning notices work, and affect only those who deserve them.

6.2 Parliamentary Scrutiny: Too Little Time?

Before examining how the core components of Victoria’s banning notices were debated and justified in 2007 and 2010, the specific effect of limited parliamentary time is considered. Chapter Five noted issues related to the timing of the SARC review of the banning provisions, which contributed to the ineffectiveness of the Charter compliance processes. Additional time pressures were a key characteristic across the parliamentary debates of both Bills.

6.2.i Liquor Control Reform Amendment Bill, 2007

The LCRA Bill was passed on the final parliamentary sitting day of 2007. Examination of Hansard reveals a tangible and building pressure to pass the Bill throughout the amendment debate in the Legislative Assembly on 6 December 2007. A determination was evident that the Bill be enacted before the end of the sitting year, in readiness for the Christmas and New Year period, when summer weather and
long evenings combine to produce optimum conditions conducive to late night drinking. The Attorney-General Hulls was unambiguous in his expectations: “we will ensure that the legislation gets through in time to implement its recommendations prior to the new year” (Legislative Assembly 2007d, 4404).

During the earlier second reading debate Jasper, an Assembly member for the Nationals, had expressed frustration about the amount of parliamentary business expected to be dealt with in a short time. He noted the impact this had on the depth of debate and limitations on discussion of specific legislative details.

These days we are in a situation where five, six, seven or eight Bills are debated over the three day period of the sitting week… It is disappointing that we do not have time to deal with the general provisions of legislation in the second-reading debate and then debate the specific clauses and various amendments… (Legislative Assembly 2007b, 4005).

The ensuing parliamentary discourse was embedded with an implication from Government speakers that any insistence on proposed amendments, with the presumed concomitant delay to the passage of the Bill, was tantamount to a green light to alcohol-related anti-social behaviour on the streets. Proponents of amendments were accused of giving tacit support to “people who are drunk charging around the suburbs...” (Legislative Assembly 2007d, 4405 [Batchelor, Labor]).

Batchelor accused the Liberal opposition, with its support of amendments, of trying to wreak havoc by allowing drunks and people who are drug affected to rampage through our communities, venues, shopping centres, neighbourhoods and streets, and we are not prepared to stand for that (4405).

Attorney-General Hulls referenced media coverage of the 2007 Bill in the Herald Sun. He stated “we all know that alcohol-related violence around licensed premises should not be tolerated” (Legislative Assembly 2007d, 4404). Hulls claimed that by insisting on amendments the Liberal party in the Legislative Council wanted...

... to oppose this legislation that would indeed ban drunks and troublemakers from particular areas… The fact is that the Liberal Party

3 The Herald Sun is a daily tabloid newspaper based in Melbourne. It has the widest circulation and readership in Australia (Roy Morgan Research, 2014).
have been dragged kicking and screaming as a result of the exposure in 
today’s Herald Sun (4404)

This perspective was refuted by the Liberal party. Assembly member McIntosh 
maintained that their support for the Bill was absolute.

We were not opposing this legislation. Yes, we had concerns... However, 
the most important thing is that at the end of the day we all have to work 
together to get this important piece of legislation through, because it is 
critical (Legislative Assembly 2007d, 4404).

The explicit time pressures during the debates of the LCRA Bill 2007 led to openly 
articulated compromises around the most hotly contested amendments: judicial 
appeal following the imposition of a banning notice. Despite evident and principled 
support for a right of appeal, time pressure alone caused both Liberal and Nationals 
members to concede the amendments and agree to their removal. Liberal member 
Napthine expressed the willingness to compromise.

There are some proposals that the Liberal party has put and firmly 
believes in, but is prepared to compromise on in the interests of getting 
the legislation through... (Legislative Assembly 2007d, 4403).

Nationals member Ryan asserted his support for the proposed amendments, but 
conceded them to ensure passage of the Bill.

... as a matter of principle we think the amendments themselves are 
common sense and sensible... but again in the spirit of concessions being 
made to get this to where we all want it to go, we will not object... 
(Legislative Assembly 2007d, 4405).

Liberal member O’Brien reiterated the importance of passing the Bill before the 
sitting year ended. In doing so, he explicitly compromised a key point of principle 
regarding the right of judicial appeal to the overriding need to pass the Bill.

We are not prepared to stand in the way of the passage of this Bill 
because we want to make sure that it can be implemented in time for 
Christmas... We have indicated all along that we believe it is important 
that this legislation go through this house. For that reason we are not 
going to insist on this amendment [for a right of appeal]... (Legislative 
Assembly 2007d, 4405-6).
Compromises were made openly to enable the LCRA Bill 2007 to be passed before the end of the parliamentary year. Key principles, reflecting fundamental individual rights, were conceded as a result of time pressures. The specific effect of the compromises upon the enacted legislation, and the consequences for individual rights, is examined later in this chapter.

6.2.ii Justice Legislation Amendment (Victims of Crime & Other Matters) Bill, 2010

Time pressure was evident again in the parliamentary debates of the JLA Bill 2010. In stating the business of the house on 13 April 2010, the Minister for Energy and Resources, Batchelor, outlined the order of the day: six bills, including the JLA Bill, were to be completed by 4pm on 15 April 2010 (Legislative Assembly 2010b, 1201). While not opposed in principle, this timeline elicited concern from a Liberal respondent.

I put on record that we were profoundly concerned about the Government business program on the last occasion... In particular a number of opposition speakers...are still to speak on the Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill, and that... many members had their allocated time cut short... (Legislative Assembly 2010b, 1202 [McIntosh, Liberal]).

These concerns were echoed by other speakers. Nationals member Delahunty noted that the time permitted was insufficient to ensure appropriate debate.

I raised a concern then that I did not believe we could get through the business program in an appropriate amount of time to allow members, particularly the country members from across Victoria, the opportunity to debate on matters of importance to them... (Legislative Assembly 2010b, 1203).

Liberal member Hodgett reiterated the need to allow time to debate the various Bills properly.

I trust adequate time will be allowed for members to be able to make their contributions to the debate on these important bills (Legislative Assembly 2010b, 1203).
As well as the lack of overall time, throughout the Legislative Assembly second reading debate concern is evident regarding limitations imposed on the length of speeches. Each speaker received a reduced time allocation, which diminished the opportunity for detailed discussion of the Bill. Labor member Thomson noted the impact on what could be said about the JLA Bill 2010. “I am not going to go through the Bill in detail because I only have 10 minutes” (Legislative Assembly 2010c, 1322). Another Labor member, Richardson, prefaced comments with “… in the brief time I have available to me…” (Legislative Assembly 2010c, 1326). Liberal member Asher wanted “to use my limited time to draw something to the attention of the house…” (Legislative Assembly 2010c, 1327).

More significantly, in the context of parliamentary scrutiny, support for the JLA Bill 2010 was assured from the main opposition parties before the second reading was debated in the Legislative Council. Reflecting the deadline set for the passage of the Bill, the Liberal/Nationals coalition agreed not to oppose the legislation, despite concerns they had with other provisions in the Bill.

The Liberal-Nationals coalition has resolved they will not oppose this legislation. We are concerned about a couple of matters (Legislative Council 2010, 1811 [Rich-Phillips, Liberal]).

The prior agreement to pass the JLA Bill 2010, combined with the time pressures and specific limits imposed on individual contributions, compromised the rigour of the parliamentary debates.

A key function of Victoria’s Parliament is to scrutinise the detail of legislative proposals. While acknowledging the need for swift and responsive government, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) emphasised the importance of thorough parliamentary analysis, even for the most urgent legislative measures.

The commission recognises that there are occasions when governments must act quickly, but believes that compliance with the human rights vetting procedures stipulated in the Charter does not place a fetter upon government dealing with issues quickly and decisively... Indeed,
thorough review might be regarded as being most critical and valuable when legislation has had to be developed hastily (VEOHRC 2010, p.96).

The affect of the time pressures on the specific provisions enacted in both Bills, and the consequences for the individual rights of banning notice recipients, are considered in the next section.

6.3 Parliamentary Scrutiny: Banning Notices & Individual Rights

The speed of the passage of both the LCRA Bill 2007 and JLA Bill 2010, together with the limits upon the scope and breadth of debate, directly affected the detail of the resulting legislative provisions. The parliamentary debates of key issues relating to the individual rights of banning notice recipients are examined for each Bill.

6.3.i Liquor Control Reform Amendment Bill, 2007

The LCRA Act 2007 gave police officers a discretionary, on-the-spot power to exclude individuals from a defined area for a period not exceeding 24 hours (s148B(1,2)). Banning notices were presented to Victoria’s Parliament as a straightforward response to alcohol-related disorder, and a sensible addition to the options available to police officers on the street. Notwithstanding the validity of the stated ‘need’ to address behaviours in the NTE, a number of significant features are embedded within the banning provisions and the powers afforded to police officers. The LCRA Bill 2007 was passed despite flaws and anomalies in the process of Charter compliance, and with clear compromises resulting from limited parliamentary time to debate the provisions.

The legislation provided Victoria Police with a discretionary power that undermines individual rights and limits established procedural due process expectations. The permissible pre-emptive application of banning notices changed typical burden of proof requirements, and their immediate imposition combined to create a number of
issues of concern. Each carries the potential to limit personal freedoms and procedural due process in the implementation of banning notices. Significantly there is no right to appeal against the imposition of a banning notice, while their breach may initiate penalties and further criminal proceedings, which include fines and even imprisonment. It is reasonable to expect that each aspect of the Bill would be scrutinised carefully before enactment, particularly given the passage of the Charter Act and the mandated emphasis upon human rights compliance. The following sections examine the parliamentary debate of the four key elements of the banning legislation: pre-emptive policing; police-imposed punishment; absence of independent appeal; and breach provisions. The specific ways in which the parliamentary debates justified the enhanced police powers and the potential effect upon recipients of banning notices, in terms of underlying due process rights and protections in the administration of justice, are discussed.

6.3.i(a) Pre-Emptive

Specified offences for which a banning notice may be imposed are documented within the LCRA Act 2007. They include offences against the person, sexual offences, destroying or damaging property, trespass, offences relating to drunkenness, offensive and obscene behaviour, assault, possession of prohibited weapons and failure to leave licensed premises (LCRA Act 2007, s7 schedule 2). However, the use of banning notices is not limited to these specified offences. A ban can be imposed for more general disorderly or anti-social behaviours, as perceived by police officers. The lack of objectivity in the definition of such conduct personifies concerns expressed about the criminalisation of subjectively assessed behaviours (Garrett 2007; Van Wick 2011). Police may also issue banning notices in anticipation of a problematic, disorderly or anti-social behaviour. A ban may be imposed pre-emptively, if a police officer believes that it will be effective in preventing the commission of an offence. Crucially though, no actual offence need

4 Why an individual accused of a serious crime, such as a sexual offence, would be banned rather than arrested is unclear, but is not explored here.
necessarily have been committed. There is also no requirement in the legislation for a police officer to prove that an offence has been committed or to objectively demonstrate intent to commit an offence. Clear parallels are evident with the concerns raised in relation to pre-emptive criminalisation by, for example, Zedner (2007c), Crawford (2009), and Hallsworth and Lea (2011).

The permissible pre-emptive imposition of banning notices was acknowledged by some speakers during parliamentary debate of the LCRA Bill 2007. While foreshadowing a demand for the right of appeal against the imposition of a banning notice, the potential for pre-emptive application of the legislation was implied by one Liberal member.

I note in relation to banning notices ... it is specifically stated that there is no requirement on a police officer to then charge you with the offence that the officer used as the basis of giving you the banning notice ...there is no requirement for a police officer to follow through and charge that individual... I think that is an oversight. I think this is a very serious issue... (Legislative Assembly 2007b, 4001 [O’Brien, Liberal]).

O’Brien identified that if no follow-up is necessary by police, no evidence of an offence will be required, so no actual offence need necessarily be committed. However, there was no parliamentary discussion of the merits of this approach, nor was there consideration of the effect of such pre-emptive provisions upon established judicial principles, or that punishment typically results, post-hoc, from an actual behaviour. Despite O’Brien’s articulation of concern, in all the subsequent parliamentary debates there was no analysis of the risks of pre-emptive imposition.

In fact, in her denouncement of concerns about the consequences of banning notice imposition, one Labor member used the lack of any requirement to follow up the banning notice as a positive aspect of the Bill.

... the consequences for a person of that ban are only that ban... A police officer is not required to charge a person with the underlying offence (Legislative Assembly 2007b, 4007 [Green, Labor]).

The pre-emptive capabilities were acknowledged more explicitly by another Labor speaker, who stated that a ban “is just a precautionary measure to allow police to
control an area” (Legislative Assembly 2007c, 4072 [Thomson, Labor]). She then asserted the useful nature of this provision.

We believe this bill is a balanced response to what is occurring in and around licensed premises… It gives police the ability to take immediate action to avoid abusive situations occurring (4073).

Thomson explicitly promoted the presumption of balance within the banning notice provisions. In addition, her use of the term ‘abusive’ is apposite, and the pre-emptive nature of a ban was regarded as an inherently positive feature. The on-the-spot police power to pre-empt and therefore prevent undesirable situations was applauded by Thomson. However, she did not expand on what was meant by ‘abusive situations’.

Such diffuse terminology embodies a key criticism of the increasing scope of discretionary police powers, that may target actions that do not necessarily pass the threshold of criminality (Crawford 2003; Belina 2007; Ashworth & Zedner 2011; Crofts & Witzleb 2011). It enabled Thomson to emphasise her point powerfully, but subjectively.

The Minister for Environment and Climate Change stated what he regarded as the core purpose of the banning notice component of the LCRA Bill 2007.

... the Bill will enable police to ban troublemakers... for a period of 24 hours where police reasonably suspect that person has committed a specified offence involving violence or disorderly behaviour (Legislative Council 2007a, 3668 [Jennings, Labor]).

Council member Jennings referenced the specified offences noted in the Bill, particularly those related to drunkenness, offensive and obscene behaviours. However, he did not comment on the fact that banning notices can be issued in anticipation of behaviours leading to specified offences. Jennings also did not define more precisely what he meant by the term troublemaker. Like the phrase ‘abusive situation’ used by Labor member Thomson, troublemaker is a subjective label that conveys a range of possible behaviours, but which is difficult to measure or define objectively.
Some confusion was evident in the debate of the LCRA Bill 2007 regarding when a banning notice would be imposed. In supporting the legislation, one Legislative Council member stated that

I expect that the police will be sufficiently qualified to identify troublemakers who pose a threat as opposed to the great majority of people who are simply there to have a good night out (Legislative Council 2007b, 3885 [Drum, Nationals]).

Drum approved of the pre-emptive nature of the banning provisions in managing those who pose a threat. He also presumed that police officers would be able to single out those who are a risk to the broader community. Again, Drum did not clarify what is meant by the term ‘troublemakers’, but assumed that police officers will interpret and apply it effectively. This expectation is contrary to Van Wijck’s (2011) contention that police assessment of behaviour is inherently subjective, unstructured and lacks clarity. Across the debate of the LCRA Bill 2007, even when the pre-emptive capacity of banning notice imposition was recognised, there was very limited consideration of the potential consequences for individual rights.

6.3.i(b) Burden of Proof and Immediate Imposition

Imposition of a banning notice requires that a police officer suspects “on reasonable grounds” (LCRA Act 2007, s148B) that an offence has been committed or is likely to be committed. There is no requirement for police to objectively demonstrate intent to commit an offence. The burden of proof requires that officers “suspect that a person is committing or has committed a specified offence wholly or partly in the designated area” (LCRA Act 2007, s148B). Behaviours for which banning notices may be imposed are loosely drawn and largely subjective. They are embodied in terms such as ‘disorderly’, ‘anti-social’, ‘quarrelsome’, or as Labor Assembly member Thomson suggests, ‘abusive’. What each of these terms means in the context of objectively measured behaviours is unclear, and subject to police discretion. No proof, evidence or witnesses are required, which adds to the fluidity and subjectivity of the
behaviours that may lead to a ban. Significantly, this aspect of the banning legislation was not addressed at all in any of the parliamentary debates.

The use of the label ‘troublemakers’ by speakers such as Labor Council member Jennings and Nationals member Drum, highlights the lack of objectivity inherent in determining what type of behaviour will lead to a banning notice response. With the exception of specified offences, the vagueness of terms such as ‘troublemaker’, ‘anti-social’, ‘quarrelsome’ or ‘abusive’ was not resolved in any of the parliamentary debates. The complexity of notions of harm and offence, that their perception is dependent upon multiple contextual factors, and their relevance to the criminalisation of behaviours (Feinberg 1984, 1985; Hillyard et al. 2004; Von Hirsch & Simester 2006) was not discussed by any speaker in either House.

The only context in which the use of police discretion in the imposition of a banning notice was noted in 2007 related to concern about the effect upon vulnerable groups. Greens member Hartland raised a number of potential risks for disadvantaged groups, in which she specifically included homeless and Indigenous persons. Hartland expressed concern about police officers using banning as an alternative to laying charges, thereby avoiding the need for a higher level of evidence. She highlighted the risk that homeless people would be unable to access essential services if banned from the Melbourne CBD, or other urban centres. Hartland’s solution was an amendment that would trigger a review of the banning provisions “if any disadvantaged group is shown to be adversely affected by the bans...” (Legislative Council 2007b, 3882). However, Hartland’s concerns were not picked up by any other speaker, and her amendment was unsuccessful.

The banning notice sanction is imposed immediately and recipients are compelled to accept the notice. Anyone to whom a banning notice is to be given must provide their name and address to the requesting police officer. They must not refuse “without a reasonable excuse” (LCRA Act 2007, s148D), and must not give false or misleading details. Penalties exist for non-compliance, but what is meant by a 'reasonable excuse' is not objectively articulated in the Bill or the parliamentary debates. The
legislation also affords police officers the necessary powers to use “reasonable force” to ensure the banned person leaves the designated area. (*LCRA Act 2007*, s148H). These aspects of the banning notice provisions were not mentioned at all in any of the parliamentary debates in 2007.

### 6.3.i(c) Judicial Appeal

The most intensive debate of the LCRA Bill 2007 was in relation to the due process right of appeal against the imposition of a banning notice. The Bill permitted no clear right of judicial appeal. Only one avenue was available for a recipient to appeal the impact of a banning notice upon their freedom of movement, or its perceived validity. A written notice can be submitted to a police officer above the rank of sergeant, who may “vary or revoke a banning notice at any time” (*LCRA Act 2007*, s148E).

The failure of the Charter compliance processes to identify the absence of judicial appeal rights in the LCRA Bill 2007 was noted in Chapter Five. However, the lack of a right of appeal generated considerable parliamentary debate. Despite absolute Government support for the “substantially increased powers to address that sad but growing element of reckless alcohol-induced violence” (Legislative Assembly 2007c, 4077 [Foley, Labor]), during the second readings of the Bill in both the Legislative Assembly and Legislative Council concerns were expressed “in relation to judicial review and civil liberties” (Legislative Assembly 2007c, 4086 [Asher, Liberal]). Specific objections were raised in the Legislative Assembly, and were reiterated throughout the parliamentary debates. While offering general support to the Bill, Liberal member O’Brien noted that “it gives significant powers to... Victoria Police, but it provides inadequate supervision to ensure these powers are exercised properly” (Legislative Assembly 2007b, 3999). He went on to articulate a fundamental concern about the quasi-criminal nature of banning notices, that carry a penalty but which cannot be challenged in court.
Something like a banning notice… would go on the LEAP\textsuperscript{5} database. It is therefore quasi-criminal in nature. I am deeply disturbed by the prospect that the only method of challenge open to somebody who receives a banning notice, which is quasi-criminal in nature, is to appeal to another member of the police force …Any individual could come out of a hotel and for whatever reason catch the eye of a police officer who then believed that a banning notice would be appropriate. That individual could apply to a senior sergeant to have it revoked, but if that was unsuccessful that person would have a quasi-criminal stain on their record which could not be removed. That is absolutely unacceptable in the view of the opposition. Anybody who is challenged in this way as to their conduct should have the right to have their day in court (4000-4001)

O’Brien encapsulated a key issue with the formulation of the banning notice powers, that enable intent to be presumed and punishment to follow, but which cannot be independently reviewed. While acknowledging the practicality of issuing a 24 hour ban but then permitting an appeal against it, Nationals member Jasper urged caution “to make sure that we do not go too far in encroaching on people’s activities” (Legislative Assembly 2007b, 4005). Another Liberal speaker reiterated the concern expressed by O’Brien, and provided an overview of objections in relation to individual rights and possible enduring consequences of the imposition of a banning notice.

The aim of this Bill is laudable… however we have a number of concerns in relation to judicial review and civil liberties… Police can issue a banning notice for up to 24 hours. The banning notice can be varied only by another police officer with a rank above sergeant. There are no court appeals. So we have a situation where a police officer can issue a banning notice that is reviewable only by another police officer… given that we have been advised that this offence will appear on a person’s record and go onto the law enforcement assistance program database… that a banning notice should be reviewed by the Victorian Civil and Administrative Tribunal (Legislative Assembly 2007c, 4086 [Asher, Liberal]).

Asher issued a more general note of concern about changes to the nature of police powers inherent in the proposed legislation: “Police do need powers, but there are key areas where I think the Government has gone too far” (4087). Asher made clear

\textsuperscript{5} See Chapter 2, footnote 21.
her worry that the powers afforded to Victoria Police through the banning provisions affected individual rights in ways that are not acceptable and for which sufficient checks and balances were not in place.

Those objecting to the lack of appeal provision in the LCRA Bill 2007 put forward a number of possible solutions to ensure safeguards and enable procedural balance. The fact that details relating to recipients of bans may be stored indefinitely on the Victoria Police LEAP database prompted suggestions such as appeals to the administrative tribunal body VCAT® (Legislative Assembly 2007c, 4086 [Asher, Liberal]), or a right to demand a court-based appeal (Legislative Council 2007b, 3862 [Lovell, Liberal]) where a genuine concern exists about the appropriateness of a particular ban. Repeated attempts were made to secure amendments to enable review of banning notices via a mechanism other than another police officer.

Speakers for the Labor Government were resolute in their opposition to a right of appeal. Practical considerations were deemed to render appeals impossible. The fact that banning notices are “only for 24 hours” and carry no consequences of note for those who comply made a right of appeal “totally impractical” and unnecessary (Legislative Assembly 2007b, 4007 [Green, Labor]). The need to address an immediate concern about disorderly behaviours in the NTE was adjudged by Government members to outweigh any risk of the misuse of banning provisions by the police.

Amendments to permit judicial appeal so that a banning notice decision may be reviewed and a record potentially expunged from an individual's LEAP database entry were narrowly approved in the Legislative Council, by 20 votes to 18 (Legislative Council 2007b, 3891). Due process concern was evident during the subsequent amendment debates in the Legislative Assembly, manifested as support for the right to a court-based appeal against a banning notice. Liberal member O’Brien drew a parallel with other infringement provisions.

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6 The Victorian Civil and Administrative Tribunal (VCAT) is an independent process for dispute resolution in Victoria, comprising civil, administrative and human rights divisions.
We believe that if you can challenge a parking fine in court, you should be able to challenge a banning order in court (Legislative Assembly 2007d, 4405).

Nationals member Ryan offered a more principled rationale.

… the notion of a banning notice being issued in the manner which is contemplated by the bill is something which ought as a general principle carry a right of appeal… (Legislative Assembly 2007d, 4405).

Liberal Assembly member Clark noted the risk of not permitting an appeal against on-the-spot decisions by police officers which may be made in error.

But it is simply a question of justice, and as much as we might like to think otherwise, not all police officers act perfectly on all occasions. I am sure there are many members on the other side of the house who, in many different contexts, would support the need for and the importance of citizens having the right to apply for review and redress in instances where they believe the police have acted inappropriately (Legislative Assembly 2007d, 4409).

Parliamentarians opposing the right of judicial appeal dismissed these concerns, cited the non-criminal nature of banning notices and considered the immediate consequences of a spatial ban to be minimal for recipients. The possible disproportionate effect of banning upon the homeless or Indigenous people was disregarded. Labor Minister for Planning Madden asserted that “these are basically operational issues and were not considered as priorities in terms of the operation of this legislation” (Legislative Council 2007b, 3894). The primacy of control and public safety were upheld by proponents of the Bill, with banning notices “just a precautionary measure to allow police to control an area” (Legislative Assembly 2007c, 4072 [Thomson, Labor]). Thomson even asserted that 24 hour bans are a good provision, and it seems foolhardy to suggest that a person should be able to appeal it… One would suggest that if someone is so concerned about it, maybe they should have been banned for 24 hours (4072).

Despite principled support for a right to review banning notice imposition, amendments to permit judicial appeal were overturned in the Legislative Assembly as part of openly articulated concessions to ensure timely passage of the LCRA Bill 2007 through Parliament on the last sitting day of 2007. Liberal member Clark was
incredulous at the lack of concern for individual rights shown by Attorney-General Hulls in his opposition to appeal amendments. However, despite his support of a right of appeal, even Clark conceded the point to ensure passage of the Bill before Christmas.

… how absolutely appalling it is for the Attorney-General to be seeking to deny to citizens a right of appeal to the courts to clear their name and to have the law upheld…we have never been saying that a banning notice should not be able to take effect. The point of this amendment that we have been arguing is that a person has the right to have the issue referred to the court and determined…We have indicated all along that we believe it is important that this legislation go through the house. For that reason we are not going to insist on this amendment (Legislative Assembly 2007d, 4406).

The time pressures evident across the debates, and the continued insistence upon the need to address the problem of alcohol-related violence and disorder in the NTE superseded what, in every other context of a charge or imposition of a penalty, is the fundamental right of appeal. Pressure to pass the Bill before the end of the parliamentary year curtailed debate of the impact of banning notices upon individual rights, and insistence upon a right of appeal was conceded to ensure swift enactment of the Bill.

The failure to identify the absence of appeal rights in the 2007 Statement of Compatibility is highlighted by the rigour of subsequent parliamentary debate of the consequences for individual rights of not allowing judicial appeal of a banning notice. That the issue of appeal was identified in the parliamentary debates does suggest some diligence in the parliamentary scrutiny that took place. However, despite documented opposition to the erosion of individual rights, the evident concern was subsumed by time driven political expedience.

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7 Despite the Charter Guidelines making it clear that infringement notices, which like banning notices are not criminal charges, should be subject to a clear right of appeal, this was not addressed in the 2007 Statement with respect to the imposition of a banning notice.
6.3.i(d) Breach Proceedings

Breach proceedings may be initiated if a banning recipient is caught re-entering the area from which they are banned. Concern about the reverse onus provisions in the LCRA Bill 2007 was noted in the SARC review (SARC, 2007). However, no response from the Government was forthcoming in relation to SARC’s concerns, and the issue was not discussed or debated further in parliament. The reverse onus requirement was acknowledged in the 2007 Statement, as was the impact upon the right to be presumed innocent. However, no alternative approach was considered, and the need to ensure successful prosecution of breaches was prioritised in the 2007 Statement.

If the burden [of proof] were on the prosecution, it would be too easy to escape liability…Less restrictive means would not achieve the purpose of the provisions as effectively (Legislative Assembly 2007a, 3818 [Robinson, Labor]).

The Charter Guidelines, while requiring careful examination of any provisions which impose a reverse onus burden, note that

if it is clearly easier and more practical for an accused to prove a fact than for the prosecution to disprove it, a reverse onus provision may be justifiable” (Department of Justice 2008b, p.159).

The level of potential penalty for a reverse onus offence is weighed against the likelihood that the right to be presumed innocent has been breached (p.159). While a case can be made to support the reverse onus requirement with respect to banning notice breaches, that this aspect was not debated at all is an indication of the limited extent of parliamentary scrutiny of the banning provisions.

Although no court appeal is possible following the imposition of a banning notice, access to judicial proceedings is permitted when a recipient is accused of breaching their notice. Despite the reverse onus concerns, the breach of a banning notice is regarded as a criminal offence and full due process rights are therefore enabled (LCRA Act 2007, s148F). There is some irony that the reasons for the imposition of a

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8 Discussed in Chapter Five.
ban, which may involve perceived or actual disorderly behaviours, may only be appealed to a more senior police officer, but the fact of a breach by unlawfully entering a designated space carries full judicial and procedural protections. Parallels can be drawn with Anti-Social Behaviour Order (ASBO) proscriptions and prohibitions, breaches of which may also lead to the criminalisation of otherwise non-criminal behaviours (Crawford, 2003; Crofts & Witzleb, 2011).

### 6.3.ii Justice Legislation Amendment (Victims of Crime & Other Matters) Bill, 2010

A key feature of the 2010 JLA Bill was the extension of the permissible length of a banning notice, from 24 to 72 hours. This section examines the parliamentary debates in 2010 and whether there was any re-assessment of the due process issues arising from the original banning Bill.

In their review of the 2010 JLA Bill, SARC had raised a number of relevant and pressing concerns.9

The committee is concerned that the use of 72-hour banning notices to deter people who are repeatedly suspected of offences in a designated area may amount to punishment of suspected criminal behaviour by police officers without a charge, trial or appeal and therefore may engage the Charter’s rights with respect to criminal punishment, including a fair hearing by an independent tribunal, the presumption of innocence and the right to appeal to a court (SARC 2010b, p.13).

However, the due process procedural issues embedded within the banning provisions introduced in 2007, and identified in 2010 by SARC, were largely ignored. The second reading debates in both the Legislative Assembly and Legislative Council focused primarily on the ‘re-balancing’ discourse of community protection and fear to justify the need to extend banning notices to 72 hours. This aspect of the debate is discussed in detail later in this chapter.

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9 Discussed in Chapter Five.
Only one member, speaking for the Greens (Pennicuik), articulated any concerns during the debates about the effect of banning notices upon individual rights. In the Legislative Council, Pennicuik referenced SARC’s review of the JLA Bill 2010. As well as the increasing temporal scope of banning notices, she noted the summary and subjective way in which bans can be imposed, that requires no actual offence and no evidence to be produced. Pennicuik highlighted these significant issues for the first time in any parliamentary debate of either banning notice Bill.

It is quite capable, because of its wide construction and hence application, of unnecessarily capturing the behaviour of people who are not a threat to themselves or any other person… increasing police powers or adopting a more draconian approach… do not lead to a solution; the solution requires the creation of a more just society and a multi faceted approach to problems… the offence of disorderly conduct… is insufficiently defined in the legislation, it will be up to the individual police officer to decide who is and who is not engaging in disorderly conduct (Legislative Council 2010, 1814).

In response, a Labor member openly supported the pre-emptive nature of banning provisions, and cited the effectiveness of banning to prevent disorderly behaviour.

The banning provisions have been working very well. They are a great way of pre-empting individuals who might be drunk and disorderly and who are likely to commit a crime and removing them from an area (Legislative Council 2010, 1816 [Tee, Labor]).

Pennicuik (Greens) pressed the Government for more specific information.

On what evidence is the Government proposing to extend the number of hours, given the significant infringement it has on a person’s right of movement? (Legislative Council 2010, 1816).

The Government response was evasive and predicated upon a clear assumption that a problem of alcohol-related anti-social behaviour was prevalent in the NTE and banning was the way to address it.

The banning provisions have been working very well …The evidence has been that the banning notice has proved to be a very effective tool for diffusing a dangerous situation (Legislative Council 2010, 1817 [Tee, Labor]).

Pennicuik pushed the point again.
However, that does impinge on that person’s right and it presupposes that
the person coming back into the area has come back in bad faith
(Legislative Council 2010, 1817).

She reiterated that

in our research we were not able to find any publicly available evidence
that it is working well. Is that evidence publicly available, or will it be?
(1817).

The Government response once again was vague and equivocal.

It is working and it is making our streets safer... the evidence has been
given to us by police who have found it to be a useful tool. In terms of
the use of banning orders more generally, there are reporting mechanisms
under the Liquor Control Reform Act (Legislative Council 2010, 1817
[Tee, Labor]).

Despite repeated questions and requests from Pennicuik, no evidence was presented
to parliament about the effectiveness of banning in addressing problems in the NTE.
Claims were made that banning notices work, reflecting similar assertions in the
debate of the LCRA Bill 2007. As the findings of the Chapter Five analysis confirm,
there was insufficient justification for the limitations on Charter rights that result
from the banning notice provisions. It may not be possible for legislators to ensure in
advance that policies will deliver the desired result. However, when claiming that
policies have been effective then this should be verifiable. The only attempt to
challenge the due process issues in the JLA Bill 2010 was shut down by the
Government with the assertion of an ‘it works’ rationale. Proponents of the Bill
insisted that a problem existed in the NTE and that banning was an effective way to
address it.

Despite the principled position taken by a number of opposition members during
debate of the 2007 provisions, no opportunity was taken to re-visit the issue of
judicial appeal in 2010. The reason for this is open to speculation. The pressure of
time was, once again, evident and opposition parties had agreed to support the

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10 The formal reporting mechanisms mentioned by Tee, and the data that is published, are examined
in detail in Chapter Seven in relation to the post-enactment scrutiny of the banning provisions.
Government business within the very tight timeframe required. The failure to debate the issue of judicial appeal, for which there was such support in 2007, indicates a lack of rigour in the 2010 parliamentary debates. The provisions introduced in the \textit{LCRA Act 2007} appear to have been accepted. A number of speakers assumed the success of banning. However, even though the banning provisions had been in operation for over two years, no empirical proof of their effectiveness was provided in response to repeated requests. The \textit{JLA Act 2010} built upon the flawed rationale and incomplete parliamentary scrutiny of the \textit{LCRA Act 2007}, without sufficient consideration of the consequences of either Bill upon individual rights and principles underpinning the provision of justice.

6.4 Parliamentary Scrutiny: Underpinning Presumptions

The parliamentary debates of Victoria’s banning notice provisions were compromised by time pressures and concessions. A thematic examination of the debates in 2007 and 2010 has noted the failure to adequately address the significant effect of banning notices upon the individual rights of recipients. Within the parliamentary discourse of both Bills a number of underpinning presumptions are evident, each of which informed and directed the debates and the resulting legislation. In the following sections four key themes are discussed. They highlight a clear drive to ‘do something’ about alcohol-related disorder in the NTE, the promotion of fear and a consequential need to protect the broader community, an embedded notion of ‘them’ and ‘us’ in relation to banning, and a conflation of intent and punishment. Each theme, considered in relation to the parliamentary debates of both Bills, addresses the conception of balance that was evident in the rationale for the banning notice provisions.

6.4.i The Drive to ‘Do Something’

Throughout the parliamentary debates of the LCRA Bill 2007 and JLA Bill 2010, across political perspectives, there was an assumption that a problem existed in the
NTE that must to be addressed. Reflecting the general sentiment in 2007, Labor Assembly member Thomson summarised the concerns and the consequential need to do something.

We also recognise that the levels of abuse around the inappropriate use of alcohol are increasing in and around some licensed venues, and we need to act on it (Legislative Assembly 2007c, 4072).

Similarly representative of parliamentary concerns in 2010, Labor Council member Mikakos articulated the same problems and associated need for a response.

I support any measures that aim to reduce alcohol-fuelled violence and crime… it is important that these sorts of behaviours in public are not tolerated and that the police are armed with appropriate means to respond to them (Legislative Council 2010, 1816).

The parliamentary discourse in both 2007 and 2010 was embedded with a presumed need for community protection against undesirable behaviours in the NTE, with the banning provisions presented as the necessary and appropriate response. That alcohol-fuelled disorder and anti-social behaviour occurs in the NTE is not disputed in this thesis. However, the extent of the problem, the way that it was conveyed across the parliamentary debates, and the effect this had upon establishing a hierarchy of rights implicit in the desired response, highlights concerns about the level of scrutiny in 2007 and 2010, and the priorities that resulted.

Across the parliamentary debates of the LCRA Bill 2007, five speakers made reference to Victoria Police crime statistics or similar data regarding alcohol-related behaviours in the NTE to support the need for the banning provisions. Liberal Assembly member O’Brien noted a 21.4% increase in assaults recorded in the Melbourne local government area (which includes the Melbourne CBD) during the 2006-07 financial year (Legislative Assembly 2007b, 3998). Labor Assembly member Green stated that crime in Victoria had reduced by 23.5% since 2001, but... regrettably police statistics show that assaults committed inside licensed premises and on the streets and footpaths outside are on the increase (Legislative Assembly 2007b, 4006).

Labor Council member Scheffer agreed and stated that during 2005-06 Victoria Police statistics recorded 29,000 assaults, “a significant number of which were
contributed to by excessive alcohol consumption and occurred in and around licensed premises,” and that there were “high numbers of offences in open spaces or areas near licensed premises” (Legislative Council 2007b, 3887). Scheffer also directly referenced the 2006 Victorian Parliament Drugs and Crime Prevention Committee (DCPC) inquiry into strategies to reduce harmful alcohol consumption. He used selected statistics and findings from the DCPC report to justify his support for the 2007 Bill, which he contended addressed “a cluster of real and serious issues which have been exhaustively researched” (Legislative Council 2007b, 3888).

While some attempt was made by these speakers to quantify the risks posed by disorderly behaviour in the NTE, detailed analysis of Victoria Police crime statistics suggests that the speakers applied convenient snapshot data, which lacked context and presented a misleading view of relevant crime rates (Victoria Police 2003, 2004, 2005, 2006, 2007). For example, the 21.4% increase in assaults noted by O’Brien included domestic assaults, which increased at a higher rate than the overall assault category between 2005-07, and which accounted for 36-37% of all assaults during this period. The statistics cited and alluded to in relation to assaults at licensed premises, by Green and Scheffer, are similarly misleading. In the period 2003-06, Victoria Police crime statistics confirm that assaults at licensed premises decreased by 37%, from 2279 to 1429 per year. The claims of a significant number of assaults in licensed premises overlooks the prevailing downward trend. In the reporting year 2006-07, the figure for assaults in licensed premises did increase, by 7% to 1535. But this was still significantly lower than the numbers recorded in 2003 (2279) and 2004 (2144).

Scheffer claimed that offence rates were increasing, and that there were high numbers around licensed premises. Victoria Police crime statistics for key offence categories that are relevant to the NTE, behaviour in public and regulated public order, do not support Scheffer’s assertions (Victoria Police 2005, 2006, 2007, 2008). The behaviour in public offences recorded on the ‘street/footpath’, which includes the areas around licensed premises, steadily decreased between 2005-08, to a level
below the 2001 figure. The number of such offences dropped by 19% in 2006 and a further 15% in 2007 (reducing from 2594 offences in 2005 to 1796 in 2007). Similarly, regulated public order offences taking place on the ‘street/footpath’ declined by 15% in 2006 and 10% in 2007 (from 1037 offences in 2005 to 793 in 2007). Both offence categories recorded at licensed premises do show some increase over the period. However, numbers are extremely low, and the trend was downwards during 2007. For behaviour in public offences 140 incidents were recorded across the whole State of Victoria in 2005, 147 in 2006 and 114 in 2007. For regulated public order offences 149 were recorded in 2005, 180 in 2006 and 178 in 2007. This data does not support the claim of “high numbers of offences” made by Scheffer.

In addition to a selective use of statistics, other speakers embedded their comments with assumptions that were not supported with any data or evidence. Nationals Assembly member Northe asserted that “the Bill will obviously address the rise of violence and assaults around licensed venues” (Legislative Assembly 2007c, 4070), but offered no specific data. Labor member Thomson agreed and observed “we also recognised that the levels of abuse around the inappropriate use of alcohol are increasing in and around some licensed venues” (Legislative Assembly 2007c, 4072). Nationals Council member Drum made a similarly assumption-based claim regarding “these increased trends of anti-social and violent behaviour” (Legislative Council 2007b, 3884). Such generalised claims were not evidence-based, and failed to quantify the nature of the problem in the NTE about which ‘something must be done’. Significantly, no direct relationship was made between the problems articulated and banning notices as a solution. The DCPC report, cited by Scheffer, was unequivocal in its expectation that any legislative provisions must be based upon empirical evidence (DCPC 2006). Such evidence was absent or deficient in the debates of the LCRA Bill 2007.

Demonstrating the varied application of data within the 2007 debates, speakers applied crime statistics to highlight the success of other mechanisms to reduce alcohol-related disorder. For example, Liberal Council member Lovell praised the
impact of lockout schemes in Ballarat, Victoria, where licensed venues must not admit new patrons after an agreed time. She claimed a 39.85% annual reduction in assaults in Central Ballarat, and a 47.54% fall in assaults in licensed premises (Legislative Council 2007b, 3863). Another two speakers offered contextual data derived from research into alcohol consumption and associated health consequences. However accurate the data, it did not necessarily relate specifically to the NTE and inferences were drawn to justify the proposed banning provisions. For example, Greens member Hartland noted that since 1999 there had been a 132% increase in the number of intoxicated 20-29 year olds admitted to hospital emergency rooms (Legislative Council 2007b, 3867). This statistic may be stark but there was no clear link to behaviours in the NTE. Liberal member Wooldridge had already stated that 50% of alcohol purchases were made in bottle shops, rather than at licensed venues (Legislative Assembly 2007c, 4074). Although limited, the research data cited in the parliamentary debates in 2007 lacked context, specificity and its application was embedded with unsubstantiated assumptions.

The same problems of disorder in the NTE were claimed to support the need for the JLA Bill 2010, as the quotation from Labor Council member Mikakos demonstrates. No evidence, quantification or data was presented in any of the debates in 2010 to justify extending the permissible length of banning notices. That a continuing need to address alcohol-related disorder in the NTE was perceived in 2010, despite the banning provisions being in place for over two years, itself questions the presumed effectiveness of banning notices. No evidence of the success or failure of banning as a mechanism to deal with disorder is put forward during the debates in 2010. The Statement of Compatibility noted only that “police have used the banning system effectively since its inception” (Legislative Assembly 2010a, 1132). Yet the efficacy and deterrent effect of banning, the Statement claimed, would be enhanced by extending the permissible length of a ban to 72 hours. The success of banning as a mechanism to deal with disorder is not addressed explicitly in this thesis. However, the continued assertion that more needed to be done, two years after the LCRA Act 2007, suggests that banning may not have been as effective as expected.
6.4.ii Fear, Emotion and Community Protection

Throughout the parliamentary debates of the LCRA Bill 2007 and JLA Bill 2010 legitimising and coercive strategies were used to build fear and to justify the proposed banning notice measures (Chilton 2004). The discourse emphasised the seriousness of alcohol-related problems in the NTE, which validated the legislative response to address the problem that had been presented. The drive to ensure community protection in the face of a clear and present danger was repeated across all political perspectives in both 2007 and 2010. Liberal member O’Brien explicitly applied the language of fear in his depiction of the issues facing the NTE.

In a number of trouble spots throughout Victoria drunken hoons pose genuine threats to the property and physical safety of those who live nearby… the abuse of alcohol…[creates] a climate of fear for innocent people wishing to enjoy themselves responsibly (Legislative Assembly 2007b, 3998).

Risks, both specific and general, were cited as an emotive vehicle to justify support for banning in the face of largely implied dangers. Typifying the technique, Labor Assembly member Thomson linked an assumption of violence and associated fear with the legislative response that would ensure community safety.

We are not trying to be a wowser state or trying to ensure that people cannot enjoy the occasional drink, but we want to ensure that people are safe and not fearful of abuse when they go to licensed premises; that is what this legislation is about - it is about minimising abuse in and around the consumption of alcohol (Legislative Assembly 2007c, 4072).

Requests for an amendment permitting judicial appeal were countered by the Labor Minister Robinson with an entirely hypothetical response. Rather than offering evidence or research data, he used a fictional scenario to refute the need for an appeal process.

You can just imagine it: you could have Alphonso doing all sorts of antisocial things in Chapel Street. Under that earlier provision a police officer would come up and try to give him a banning notice. Alphonso

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11 This is presumed to be a reference to prominent gangland figure Alphonse Gangitano, a noted frequenter of the the NTE in Melbourne’s CBD and later murdered as part of Victoria’s gangland turf wars. A controversial TV series was in well-publicised production at the time of these parliamentary debates.
would say, 'Hold on, I've got my lawyer here. I want you to withdraw the banning notice. We will see you in the Magistrates' Court tomorrow, and we will sort out the propriety of the banning order which is meant to apply now. We will sort that out in two or three weeks time'... It would have been a lawyer's picnic (Legislative Assembly 2007d, 4406 [Robinson, Labor]).

The previous section noted that some data and evidence was used during the parliamentary debate of the LCRA Bill 2007 to support the concerns presented. In his assertion of “this plague” of alcohol-related violence creating a “climate of fear for innocent people” and a “battle” for the State, Liberal member O’Brien cited Victoria Police crime statistics regarding rates of assaults (Legislative Assembly 2007b, 3998). However, the data was not specific to the NTE. Labor member Green presumed an increase in assaults inside licensed premises, but offered no actual figures (Legislative Assembly 2007b, 4007). Some attempt to quantify the perceived risk is acknowledged, but across the debates the provision of evidence was secondary to the presumed state of crisis. Layers of emotion were added to cement a sense of risk, using terms such as ‘plague’ and ‘battle’. The legitimising and coercive strategies (Chilton 2004) asserted a moral authority to ‘do something’ with the corollary that any opposition was not moral.

Discursive structures were used to create a specific social representation (Van Dijk 1993). Basic emotions were invoked, including fear, security and protectiveness, particularly of family and the vulnerable. The discourse embodied approaches such as “fear systems”, “emotion programs” and “kin-protection” (Hart et al. 2005, p. 191). In both 2007 and 2010, the case for banning was grounded in a moral position that was difficult to challenge. Labor Assembly member Green used parental concern for the safety of their children, and implied a clear physical risk.

I, like every parent in this state, want my children to be able to enjoy Victoria’s vibrant culture without having a concern that they may be hurt whilst enjoying that culture (Legislative Assembly 2007b, 4007).

Labor member Howard also specifically used concern about the safety of children to justify support for the LCRA Bill 2007. The term children implies vulnerability and
dependence. It builds emotion and blurs the image of those who actually participate in the NTE. While they are all technically children, they are also mostly adults.

Our community wants to know that our children are able to be out at night and to feel confident that they will come home safe and well, and this bill increases that sense of confidence (Legislative Assembly 2007c, 4075).

Despite the rhetoric, anecdotes and hyperbole, objective analysis of the issues that banning notices are designed to address was not evident within the debates for either the 2007 or 2010 Bills. Justifications for banning were built upon implication and presumption, with limited use of data, much of which lacked context and specificity. The absence of clear facts and any alternative perspective created a manipulative situation, epitomised by reference across the debates to individual tragic cases. Labor member Green typified this approach.

Other members have referred to the awful case of young James Macready-Bryan,12 who has been left with terrible brain damage following a brutal assault outside one of Melbourne’s nightspots last year. I have also heard about the recent experience of …Scott Dinnage, who was king-hit outside a licensed premises in another part of Melbourne (Legislative Assembly 2007b, 4007).

Liberal member O’Brien also cited the case of James Macready-Bryan and of Shannon McCormack, who was killed trying to break up a fight in Melbourne CBD in 2006 (Legislative Assembly 2007b, 3998). Such personal tragedies were used to illuminate the issue of alcohol-related disorder in the NTE, and to enhance the emotional response.13 Individual cases, however sad, are not necessarily sufficient evidence of a significant problem. In the light of the Charter Act compliance requirements to empirically justify any limitation of Charter rights, and the extension of the banning provisions in 2010, the lack of objective information regarding the issues facing the NTE is problematic. The justification for the banning provisions reflected an all-embracing rationale of fear and a consequential need for community

12 In October 2006, while celebrating his 20th birthday, James was violently assaulted. He was left with permanent brain damage and is unable to walk or talk.

13 In the context of media reporting of crime, Sacco (1995, p.144) refers to the particular “dramatic value” of focusing upon individual cases. However atypical, their public effect can be considerable.
protection. The dominance of this discourse extended beyond the specific debate into the concrete provisions of the enacted legislation.

Advocates of the banning notice legislation emphasised the need to ensure community safety. Implied and assumed within this rhetoric is that banning works. The 2007 Statement of Compatibility prioritised public protection against the problems caused by alcohol-related disorder.

The Bill establishes two schemes directed at reducing alcohol-related violence or disorder. One enables immediate action to be taken by police officers, through the giving of notices banning persons from designated areas… [banning notices] are aimed at protecting public order and the rights and freedoms of others (Legislative Assembly 2007a, 3818).

The 2007 Statement presumed the effect of banning notices, “to deter alcohol-related violence in and around licensed venues” (Legislative Assembly 2007a, 3822), but failed to provide any evidence to support either the nature of the problem or the suitability of banning as a response. The assumptions were not political party specific. Liberal member Napthine agreed with the presumed effectiveness of the banning notice provisions.

These powers will ensure that we have an effective and workable response to the issues of alcohol and antisocial behaviour (Legislative Assembly 2007c, 4070).

Labor member Foley succinctly stated the purpose of the banning notice provisions.

Essentially it seeks to make our streets safer (Legislative Assembly 2007c, 4077).

Banning notices may remove ‘troublemakers’ from designated areas, but Foley’s assertion does not acknowledge the potential for displacement to areas beyond the designated zone.

The same focus upon community safety was used to justify the extension of banning notices to 72 hours in 2010. In the 2010 Statement of Compatibility, Attorney-General Hulls cited the International Covenant on Civil and Political Rights (ICCPR) which
… expressly recognises that the right [to move freely] may be subject to restrictions that are necessary to protect public order, public health or morals or the rights and freedoms of others (Legislative Assembly 2010a, 1131).

Hulls directly linked the presumed problems in the NTE, community protection and banning notices.

The amendment is intended to increase the deterrent effect of banning notices, reduce the incidence of alcohol-related violence and disorder and, consequently, enhance public safety (1132).

However, Hulls did not provide any evidence to support the effectiveness of banning notices in protecting public order and the rights of others. Indeed, in the 2010 Statement he noted that

… there have been a number of people to whom police have had to give a banning notice on multiple occasions... its [banning] efficacy can be enhanced through enabling police, in appropriate circumstances, to give notices of a significantly longer duration (1132)

Hulls’ contention raises two points of relevance. Firstly, rather than demonstrating the effectiveness of banning notices, the need to extend their length suggests that banning powers may not necessarily have been effective. Secondly, the number of multiple banning notices issued in the first two years of the legislation, for which data had been published when the 2010 Statement was tabled, was low. During the two years ending 30 June 2008 and 30 June 2009, 1512 individuals received banning notices. Of these, only 34 (2% of the total) received multiple notices (Chief Commissioner 2008; 2009).14 Significantly, whether extending banning notices to 72 hours would mitigate the need for multiple orders is not discernible from the published data. No banning notice specific data is recorded, so it is not known whether multiple orders were issued during a 72 hour period, or whether they were issued weeks apart. However, such a low incidence of multiple order imposition points to political expedience as the driver for the asserted need to extend the length of banning notices. Data from the following three years indicates that the change to

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14 Although it is not clear how Hulls defined ‘multiple orders,’ the analysis in this section presumes ‘multiple’ to mean ‘more than one.’
72 hours had little effect on the number of multiple banning notices imposed. Of 3639 banning notice recipients recorded between years ending 30 June 2010 and 30 June 2012, 126 (or 3.5%) received multiple orders. While still a low number, the claimed improved deterrent effect of longer banning notices is not evident as the percentage of multiple order recipients increased. That this was not addressed during parliamentary debates in 2010, and has not been explored since, is a key finding of this thesis. The published banning notice data is examined further in Chapter Seven.

The assumption that banning works was deeply embedded in the parliamentary debate of the JLA Bill 2010 but no evidence was offered to support the requirement to extend the banning notice powers. There was only one exchange, in the Legislative Council on 6 May 2010, during which the use and effectiveness of banning was questioned. Green member Pennicuik repeatedly requested evidence to justify the extension of the banning notice powers. Three times the Government response insisted that banning was working and making streets safer, but offered no proof of how this was determined or measured. That the same claims about the problems in the NTE were made in 2010 as in 2007, questions the effectiveness of banning. However, this paradox was not resolved in the parliamentary debates.

The failure to substantiate the effectiveness of banning notices, or to provide evidence to justify the extension of the banning powers in 2010 is in direct contravention of the Charter Act and its Guidelines (Department of Justice 2008b). The clear framework that Golder and Williams (2007) contend is essential to enable effective parliamentary scrutiny of the human rights implications of legislative proposals was in place in Victoria. However, it was not applied effectively to the banning provisions. There was no consideration of proportionality or whether the ends of presumed community protections justified the means that eroded the individual rights of banning notice recipients.
6.4.iii Notion of ‘Them’ and ‘Us’

The parliamentary debates of the LCRA Bill 2007 and JLA Bill 2010 made clear that the overriding purpose of banning notices was to protect the community. The primacy of control and public safety was upheld, with banning “just a precautionary measure to allow police to control an area” (Legislative Assembly 2007c, 4072 [Thomson, Labour]). This perspective builds upon a persuasive discourse to legitimise a situation where the rights of individuals are conceded to the rights of the broader community. Implied is an assumption that the rights of those from whom the community needs to be protected are inherently lower. Both the 2007 and 2010 Statements of Compatibility referenced the rights of the community, despite the effect of the banning provisions upon the individual rights of recipients. The 2007 Statement noted that banning notices “are aimed at protecting public order and the rights and freedoms of others” (Legislative Assembly 2007a, 3818). The 2010 Statement similarly highlighted “the importance of protecting public order and the rights and freedoms of others” (Legislative Assembly 2010a, 1132).

This rhetoric subordinated the rights of individuals to the greater good of the perceived needs of the community. This is a clear illustration of Waldron’s (2003) ‘few/most’ balancing dichotomy, whereby addressing the needs of one side (the most) does not necessarily justify taking away the rights of the other (the few). Extending the balance metaphor, the individuals likely to be affected by the banning legislation were perceived differently to the community at large, and embodied notions of them and us. Parliamentarians presented themselves, their families and the majority of their constituents as the ‘us’ who deserved protection from the problem causing other, or ‘them’. Alcohol-related problems in the NTE were expressly attributed to ‘them’, referred to variously as ‘troublemakers’, ‘hoons’, ‘morons’, ‘thugs’ and ‘dingbats’. Liberal Assembly member O’Brien differentiated between them and us in his depiction of problems in the NTE.

In a number of trouble spots throughout Victoria drunken hoons pose genuine threats to the property and physical safety of those who live nearby (Legislative Assembly 2007b, 3998).
Labor Minister Robinson also demonstrated the them/us divide when he asked Liberal members if they “are going to continue to back thugs and criminals against decent, law-abiding Victorians” (Legislative Assembly 2007d, 4403). Robinson clarified the need to protect the good people against the behaviours of the bad.

… to move some way towards the desired protections for those honest, law-abiding, decent Victorians against hooligans and the anti-social behaviour in nightclub precincts (4406).

‘Troublemaker’ was the term used most frequently across the parliamentary debates to describe those causing problems in the NTE. As a rhetorical device it highlighted those who behave in an undesirable way, but did not offer specificity or an objective assessment of behaviour which warrants the imposition of a discretionary on-the-spot penalty. Troublemaker is a term accessible by most people, but is a vague, non-criminal label to describe those for whom the quasi criminal banning notices were intended.

Examples have already been documented of scenarios and hypothetical situations whereby the problematic ‘other’ placed the needs, safety and rights of the predominant community in jeopardy. Labor Minister Batchelor epitomised the hyperbole.

This is serious. You ask people who live near these venues and whose streets are affected by people who are drunk charging around the suburbs… (Legislative Assembly 2007d, 4405).

Batchelor’s comment highlights the misleading and arguably manipulative nature of much of the rhetoric justifying the banning provision. The use of terms such ‘suburb’ and ‘neighbourhood’ suggest that alcohol-related violence is an imminent and serious risk in residential areas. Yet entertainment precincts and designated areas are not typically located in suburban residential districts. There is also an embedded assumption that the troublemaking ‘other’ do not reside in these ‘suburbs,’ further reinforcing the differentiation between ‘them’ and ‘us’.

It is a reasonable expectation that the community should be free to enjoy themselves without fear or risk. How this freedom is effected creates a dichotomy, when in doing
so undermines the freedom and rights of individuals. The discourse evident across the parliamentary debates presupposed and reinforced a belief that banning notices are an essential response to issues in the NTE. The resulting limitations on individual rights were justified in the broader interests of the community. This brings into question the place of the affected individuals within that community (Waldron 2003). The undesirable minority become marginalised from both the process of debate and the consequences of the enacted legislation. In the case of banning notices the arguments were built upon assumption-laden rhetoric by those who perceived themselves to be members of the ‘us’ group. The underlying attitude and response, with its resulting inequality and the silencing of the ‘other’, remained unchallenged. The parliamentary debates of the banning notice Bills embodied the paradoxical disjunction that we all have rights but some deserve more rights than others.

6.4.iv Conflation of Intent and Punishment

Victoria’s banning notices dilute due process safeguards and weaken the separation of powers, through the coalescence of intent and punishment. The way in which the banning provisions were framed, and the limitations evident across their parliamentary scrutiny, conflates the notions of pre-emption, intent and punishment. Banning notices may be imposed following a discretionary assessment by a police officer of a potential future behaviour. The sanction carries a tangible limitation upon personal freedom, and an enduring record against a recipient’s name. Implied throughout the banning legislation is the bundling up of more traditional responsive policing with anticipatory, pre-emptive controls and powers. Justifications of the 'interests of the greater good' and the need for 'public protection' were used repeatedly across the parliamentary debates. The view was presented across the discourse that, as banning notices are not criminal offences, they are not punishments.

The assertion that a banning notice is not a punishment is debatable. Banning notices are quasi-criminal in nature. They may be imposed as a consequence of an actual or
potential behaviour, and place a measurable restriction upon recipients. Details of banning notices are also entered into Victoria's LEAP database, as an aid to enforcement, data tracking and the more complex consequences of multiple banning notice imposition. The impact and enduring electronic footprint of a banning notice is tangible, and there is no mechanism to remove it from an individual recipient’s LEAP record. Significantly, breaching a banning notice, regardless of the basis of its original imposition, can lead recipients into the realms of criminal sanctions. Non-payment of initial financial penalties may lead to more far-reaching repercussions through established judicial processes.15

In supporting the LCRA Bill 2007, one Labor member stated “anybody… who is clearly out to cause violence... can be ordered not to re-enter for 24 hours” (Legislative Assembly 2007c, 4075 [Howard, Labour]). How the intent to cause violence is to be assessed by police officers was not discussed and was not evident in any of the parliamentary debates. Assembly member Howard’s layered rhetoric combined a reduction in the threshold for those targeted by the banning provisions, to include ‘anybody’, with a subjectively measured presumption of intent. Howard’s comment raises the question of whether intent, however clear it may be, should be sufficient grounds for initiation of a police-imposed control. Again this perspective was absent from parliamentary debates in 2007 and 2010. Issues relating to the vagueness of the language and subjectivity of the interpretation of the behaviours to be controlled are noted earlier in this chapter. When added to the discretionary police power to determine intent, the resulting concerns increase further. A banning notice penalty may be based upon a subjectively measured presumption of intent. However, no evidence need be presented and the recipient has no opportunity to judicially challenge the validity of the on-the-spot decision by a police officer to impose a banning notice. Zedner (2007c) argues such conflations to

15 The ultimate sanction is imprisonment, in the event persistent non-compliance with the requirement to pay the penalty imposed. Under the Infringements Act 2006, “The Court may order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount” (s160(1)). A banning notice breach may lead to a 20 penalty unit fine (see Chapter 2, footnote 10).
be both morally and legally questionable. Neither imperative was adequately debated in 2007 or 2010.

In 2010, the JLA Bill extended the on-the-spot banning notice to a maximum of 72 hours. Attorney-General Hulls was unequivocal in his view that banning notices are not a punishment.

...the purpose of banning notices is not to punish persons for ‘suspected’ offences. Instead, they are designed to protect the community against alcohol-related violence and disorder, and to enhance the freedoms and rights of community members, such as the rights to life, privacy, liberty and security of the person and rights in respect of property. As such, I do not believe they should be regarded as punishment of a person, notwithstanding any deterrent effect they may have. Moreover, since banning notices per se do not amount to a person being charged with a criminal offence or being a party to a civil proceeding, they do not engage the Charter right to a fair hearing (SARC 2010b, p.14-15).

As their purpose is to protect, Hulls contended that banning notices should not be regarded as a punishment. In itself this is an interesting perspective on the notion of banishment and exclusion. Its specific relevance is highlighted when the precedent already set with respect to 24 hour bans was used by Hulls to justify the extension of the banning period to 72 hours, but with no supporting evidence despite over two years of operation. Hulls asserted that the potential impact of the increase to 72 hours was not significantly or qualitatively different from that possible under the existing 24 hour model. His formal response to SARC was sent after Royal Assent of the JLA Act 2010, therefore undermining the effectiveness of parliamentary scrutiny and accountability.

Hulls’ assertions meant that someone could be excluded from a potentially large geographical area for 72 hours, for an assumed pre-emptive reason, for which no evidence need be produced, but for which significant consequences may be invoked in the event of non-compliance. Hulls maintained that this scenario should not be regarded as a punishment or breach of human rights, as it had not been regarded as such before. That the period of banishment had been tripled was not deemed relevant by Hulls, as banning notices had already been approved on the overriding principle
of protection of the public. Hulls’ position justified the application of pre-emptive provisions which may carry prohibitive consequences, to support the basic right of the community to be safe (Finkelstein 2003; Oberdiek 2009). The contrasting perspective, summarised by Duff (2011), is that presumed intent and attendant pre-emptive prohibitions should only be used in the most serious circumstances. The extent to which the behaviours that may lead to a banning notice may pass this threshold is unclear, given the permitted subjective basis of their imposition. The potential consequences of way in which the banning provisions are framed, particularly in terms of how much further such measures could be extended, were noted by only one speaker in the Legislative Council (Legislative Council 2010, 1813 [Pennicuik, Greens]). Her questions were not answered and her concerns were dismissed.

There was a notable absence of parliamentary scrutiny of Hulls’ stated position that a banning notice is not a punishment.16 There was also no meaningful consideration of any broader, longer term ramifications of the 2010 extension of the existing banning powers. The risks of continued ‘net-widening’ (Crawford, 2009) for individuals and the dilution of underpinning judicial principles, which were noted during the review of the JLA Bill 2010 by SARC (2010a), were ignored by the Victorian Parliament.

6.5 Chapter Conclusion

The analysis undertaken for this chapter confirms that the passage of both the LCRA Bill 2007 and JLA Bill 2010 lacked rigorous parliamentary debate. Time constraints and political concessions limited discussion of the way in which the banning provisions undermine key individual rights, and compromised the debates of both Bills. Speech lengths were shortened and pressure exerted upon members to support the Bills, despite principled opposition and valid concerns. Parliamentary workloads, when balanced against the number of sitting days, create time pressures. In 2007, 74

16 This is explored further in the interviews with Victorian Magistrates, documented in Chapter Seven.
Bills passed both Houses during the 48 parliamentary sitting days. In 2010, 80 Bills were passed in 42 sitting days (Parliament of Victoria, 2014). The impact of the limited parliamentary time on the passage of the banning provisions is a key finding of this thesis. Parliament is required to scrutinise legislation, to enforce the *Charter Act* compliance requirements, and to ensure accountability for and on behalf of Victorians. None of these functions should be curtailed by what can be perceived as arbitrarily imposed timelines.

Limited parliamentary debate time and pressure to pass the legislation by a set date, led to compromises, particularly in 2007. While the speed of enactment of both Bills confounds Waiton's (2008) contention of the ‘nonchalant drift of polices through Parliament’, the substance of the debates confirms his fundamental concern that parliaments fail to adequately consider the effect of policies upon individual rights. The progress of both banning notice Bills demonstrate an unwavering determination to deal with the stated problem of alcohol-related disorder in the NTE. Assertions of political necessity and community protection are used across the debates to justify compromises within the banning provisions that limit long standing due process rights, such as judicial appeal. Despite the requirements of the *Charter Act* to ensure the protection of individual rights, the parliamentary processes applied to the LCRA Bill 2007 and JLA Bill 2010 exemplify concerns identified by Feldman (2002) and Evans and Evans (2011) about the volume of analysis required for effective parliamentary scrutiny of legislation, and the limited capacity of parliament to protect individual rights.

In expressing his support for the overall objectives of the LCRA Bill 2007, and his assertion of its expected effectiveness in promoting community safety and tackling the issues of alcohol-related anti-social behaviour, one Labor member acknowledged the extent of the changes proposed. “It is important that we appreciate the breadth and the scope of this legislation...” (Legislative Assembly 2007c, 4069 [Lupton, Labor]). However, the actual breadth and scope of the legislation was not fully addressed by the Victorian Parliament. In the 2007 and 2010 debates key
consequences for individual rights and established procedural protections, resulting from the imposition or breach of a banning notice, were overlooked, denied or conceded to the interests of political expedience.

The significance of expedience is reinforced by the fierce Labor opposition to the Liberal/Nationals *Summary Offences and Sentencing Amendment Act 2014*. The Bill empowered Victoria Police to issue pre-emptive move-on orders in anticipation of a possible obstruction or a reasonable apprehension of future violence in a public place. Labor member Wynne called the Bill “extraordinarily dangerous” and highlighted in particular the potential “to inflict very severe harm on the most marginalised in our community - people who live their lives in the public domain” (Legislative Assembly 2014, 489-90). Such concerns are equally applicable to the banning notice provisions, yet none were noted by the Labor proponents in 2007 or 2010.  

The failure of the Charter compliance process to justify empirically the dilution of individual rights that result from banning notices, was compounded by shortcomings in the evidence presented during the parliamentary debates to support the need for the provisions. Banning notices afford police officers the discretionary power to determine what an individual is likely to do, and to impose a pre-emptive penalty. Any assessment of the perceived intended behaviour is entirely subjective, and not open to independent scrutiny. Across the 2007 and 2010 parliamentary debates descriptors and rhetorical devices ensured that the language applied to both the likely recipients of banning notices and those in need of protection was vague, but accessible and emotionally charged.

In the early stages of parliamentary scrutiny of the LCRA Bill 2007, the extensive new discretionary police powers were acknowledged. However, despite appreciation

17 In 2015, the re-elected Labor government amended the 2014 Act. The Statement of Compatibility for the *Summary Offences Amendment (Move-on Laws) Act 2015* asserted that “the amendments made by the bill provide a more appropriate balance between the use of move-on powers to maintain public order and safety, and the protection of the rights and freedoms of all Victorians recognised under the Charter” (Legislative Assembly 2015, 174 [Attorney-General Pakula]).
of the increased scope of police powers, and expression of some concern about the
determination of due process, and expression of some concern about the
right of judicial appeal, no other due process considerations were discussed. The way
in which the legislation passed through the Victorian Parliament, the nature of the
debate and the detail of the final provisions are significant issues. The identification
of the need for a right of appeal against the imposition of a ban, and some disquiet
about the possible effect of the legislation upon vulnerable groups were
acknowledged in the 2007 debates. They demonstrate the capacity of the Victorian
Parliament to identify issues missed by the Charter compliance process. Although
when parliamentarians did pose questions about the specifics of the proposed
banning provisions, no reference was made to any omissions in the 2007 Statement.
Concerns identified by SARC were acknowledged by only one speaker (Pennicuik)
during the debate of the JLA Bill 2010. However, across the debates for both Bills
there was minimal consideration of the potential consequences of banning notices
upon due process, or the apparent lack of supervision and accountability in their
implementation. The pressure of time and a seemingly incontestable belief in the
existence of a problem about which ‘something must be done’ (Ashworth 2006b;
Crawford 2013), rendered parliamentary scrutiny of both the LCRA Bill 2007 and
JLA Bill 2010 limited and ineffective.

The picture painted in the parliamentary debates was of disorder in the NTE,
embedded with an underlying notion of fear. Any political opposition to either the
principle or specifics of banning was presented by proponents of the Bills as
tantamount to supporting drunken disorder. Across the debates examples abound of
individuals who have suffered a violent assault, of locations that experience
problematic levels of alcohol-related issues and of hypothetical situations from
which protection is required. These presumptions underpinning the introduction of
banning notices are not unique. They epitomise what Ashworth (2006b) highlighted
as symbolic responses to high profile issues about which a perception prevails that
something must be done, regardless of the extent of the actual problem, and how
appropriate or effective the response may be. Bronitt’s (2008) contention that the
upholding of individual rights is framed increasingly as a political choice rather than

a legal necessity is also confirmed by the findings in this chapter. The passage of the banning notice Bills demonstrate a failure to heed the advice of Waldron (2003) and Zedner (2007a, 2007b), that careful scrutiny of legislation is essential to ensure absolute clarity of the balance between the means and the ends.
Chapter Seven

Post-enactment Scrutiny of Victoria’s Banning Notice Provisions

Analysis of Ongoing Oversight & Accountability
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Chapter 7: Analysis of Ongoing Oversight & Accountability 203
7 Introduction

A detailed analysis of the pre-enactment scrutiny of the police-imposed banning notice components of the Liquor Control Reform Amendment Act 2007 (‘LCRA Act/ Bill 2007’) and the Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Act 2010 (‘JLA Act/Bill 2010’) has highlighted the time pressures, unsubstantiated assumptions, analytical shortcomings and politically expedient priorities that secured their parliamentary passage. Despite a justifying rhetoric that advocated the need to re-balance the administration of justice in the night-time economy (NTE), there was little balance evident in the parliamentary examination of the provisions. This chapter considers the post-enactment scrutiny of the imposition of discretionary, pre-emptive police-imposed bans, and of their consequences for individual rights. During the parliamentary debates of the banning notice Bills a number of claims were put forward to substantiate their need, and expectations were set regarding their ongoing scrutiny. The extent to which these claims and expectations have been revisited and re-assessed, since the enactment and extension of the provisions, is examined in this chapter.

Three key strands of post-enactment scrutiny are explored. The first part of the chapter analyses the first five years of formal Victoria Police banning notice data (2007-12). Compliance with the legislated requirements of the LCRA Act 2007 has been assessed to consider the extent to which the published data has enabled meaningful scrutiny of the use of the discretionary police power to ban. The second part explores media coverage of the banning notice provisions between 2007 and 2012. The analysis examines how the legislation has been addressed by the media, and considers whether this has enabled purposeful public scrutiny of banning notices and their effect upon the individual rights of recipients.

---

1 Reporting requirements did not change under the JLA Act 2010.
The third part of this chapter acknowledges judicial oversight and statutory interpretation as key tenets of the scrutiny and accountability of legislative provisions (Rares 2013). Despite the longstanding significance of an independent judiciary for the separation of powers and the assurance of individual rights, there has been no judicial review of the legality of Victoria’s banning legislation or any aspect of its application. In particular, no provision for independent appeal of individual notices was included in the LCRA Act 2007 or JLA Act 2010. In the absence of any formal judicial consideration of the legitimacy of the banning legislation or the discretionary imposition of individual banning notices, interviews were conducted with a sample of Victorian Magistrates (n=12). Their perspectives were sought on the due process and procedural implications of police-imposed banning notices, whether a right of appeal should be available, and potential broader consequences of the enactment of the banning notices powers. In addition to the police-imposed banning provisions the LCRA Act 2007 also introduced court-imposed exclusion orders, which are reported with the banning notice data published by Victoria Police. Analysis of this data is used to supplement the interview research findings.

7.1 Published Banning Notice Data

Under the Charter Act 2006 all public authorities, including Victoria Police, are “required to act compatibly with the Charter in their conduct” (Department of Justice 2008b, p.7). During parliamentary debates of the LCRA Bill 2007, it was agreed that Victoria Police must publish annual banning notice statistics (Legislative Assembly 2007c, 4067-87; Legislative Council 2007b, 3861-899). This data was presented as a vehicle for the public scrutiny of the appropriate use of the banning provisions, the behaviours for which notices were imposed and, in particular, any disproportionate effect upon defined demographic groups. An amendment to trigger a review of the legislation if certain groups were found to be adversely affected was rejected in the
Legislative Assembly (Legislative Assembly 2007d, 4401-4412). The publication of recorded data was regarded as sufficient to ensure the correct use of banning notices. The LCRA Act 2007 (s148R) stipulated that an Annual Report for each financial year must be provided to Parliament by the Chief Commissioner of Victoria Police. Reports must include

- the number of banning notices imposed each year
- the number of people to whom orders have been given
- the number of multiple orders imposed each year (where a person has received more than one order)
- the “suspected specified offences in respect of which banning notices were given” (LCRA Act 2007, s148R(1)a(iv)) each year
- the designated areas where such offences were committed
- the ages of banning notice recipients
- indigenous status of banning notice recipients
- number of banning notices issued in each designated area
- number of charges in relation to breaches of banning orders, results of breach charges, and number of breaches for which no charges were laid (LCRA Act 2007, s148R).

Liberal Council member Lovell expected that the published data would facilitate public scrutiny of the way in which the banning provisions were used by Victoria Police.

… any of the figures in the report indicating that particular groups are the subject of banning... orders should be the subject of public debate (Legislative Council 2007b, 3894).

Compliance with the reporting requirements of the LCRA Act 2007 (s148R), and the ongoing scrutiny of the published data has been assessed by analysing the first five Annual Reports covering the period 2007-12 (Chief Commissioner 2008, 2009, 2010, 2011, 2012).

---

2  Discussed in Chapter Six, this related in particular to Indigenous and homeless Victorians.
3  Ending 30 June.
2010, 2011, 2012). No sampling was undertaken and no significance was inferred within or across a broader population. Data is published only at category level, such as age range or Indigenous status, rather than by individual banning notice. This constrained the complexity of the analysis as patterns were examinable only within each of the data categories. No cross-tabulation or other multi-variate analysis was possible. It was not known, for example, which age group received their bans in which designated area, or whether Indigenous recipients were more likely to receive a banning notice for a particular offence type. As it was not possible to report associations, relationships or correlations between or within the data, no tests of significance were required. Analysis and discussion throughout this section is supplemented by the use of additional published data, such as Victoria Police crime statistics.

The detailed examination of the banning data indicated six key findings. These are documented in the following sections and discussed in relation to the post-enactment public scrutiny of the banning provisions. The first section considers how widely the banning provisions have been used. Secondly, the way in which the Indigenous status of recipients has been recorded is examined. The findings are considered in light of concerns expressed during parliamentary debates in 2007 about the potentially disproportionate imposition and selective enforcement of banning notices. The third section notes key data that is not reported, and explores how this limits public scrutiny of the use of banning notices. In the fourth section, data relating to alleged breaches of banning notices is examined. The fifth section considers the trend in the number of multiple banning notices issued to individual recipients, given the claims used in 2010 (and noted in Chapter Six) to justify the extension of banning notices to 72 hours. Finally, the implications of the limitations in the published data are considered in terms of the justifications used for the creation of new designated areas.

---

4 The Annual Reports include a summary of the data for the previous year. A number of minor differences are evident in the data published in the final three Annual Reports. Where differences exist, the data published in the original report has been used in the analysis.
7.1.i Key Findings

7.1.i(a) Number of Banning Notices Issued

Since the passage of the LCRA Act in December 2007, the use of banning notices increased and then fluctuated. Figure 7.1 illustrates the number of banning notices issued in each of the first five years of the operation of the legislation.

Figure 7.1: Banning notices issued each year, 2008-12

The trend initially rose, from 129 notices in the first (part) year, to a peak of 1868 in 2009-10. Numbers dropped significantly in 2010-11, reducing by more than half to 850 banning notices. The final year of data recorded an increase in the imposition of banning notices, with 1091 issued in 2011-12. The published data includes a breakdown for each designated area in which banning notices were imposed. Table 7.1 documents the number of notices imposed in each area as a percentage of the overall annual total and the actual number (in brackets).5

---

5 The designated areas are listed in the order in which they were declared.
The figures suggest that the upward trend in 2011-12 reflected continued growth in the number of designated areas, rather than an increase in the imposition of notices across each area. Most of the designated areas experienced a steady increase in banning notices imposed during the first two or three years of their designation. This was typically followed by a significant drop. Melbourne rose to a peak of 1639 notices (88% of the annual total) in 2009-10, then rates fell away sharply to 681 (80% of the total) in 2010-11 and to 667 (61% of the total) in 2011-12. Ballarat similarly revealed steady growth over the first three years, to a peak of 64 banning notices (8% of the total issued) in 2010-11. Bendigo dropped from its peak of 32 in 2009-10 to no notices issued in 2011-12. There are exceptions to this general trend. Prahran, Frankston and Port Phillip all show initial growth and decline, but jumped significantly during 2011-12 (Prahran from 18 to 88 (2% to 8% of the total), Frankston from 6 to 25 (1% to 2% of the total), Port Phillip from 14 to 28 (2% to 3% of the total).

As the number of designated areas increased, the proportion of banning notices issued in the Melbourne CBD generally declined (from 94% in 2007-08 to 61% in 2011-12), and those in the regional and other metropolitan areas grew. It is a reasonable statistical explanation that as more areas are able to impose banning notices, their distribution will spread, and the proportion in any one area will reduce. However, it is notable that during the period analysed a number of designated areas recorded either very few or no banning notices at all. Knox, despite being designated in 2008, recorded no banning notices. During the 2011-12 reporting year Bendigo recorded none and Yarra only one.
The location of each designated area divides broadly between metropolitan/suburban Melbourne and regional Victorian towns. The areas are listed in table 7.2 according to the number of banning notices imposed between 2008-12.

Table 7.1: Number of banning notices and % of total each year by designated area

<table>
<thead>
<tr>
<th>Area</th>
<th>Start Date</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melbourne</td>
<td>Dec 2007</td>
<td>94%</td>
<td>84%</td>
<td>88%</td>
<td>80%</td>
<td>61%</td>
<td>4305</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(121)</td>
<td>(1197)</td>
<td>(1639)</td>
<td>(681)</td>
<td>(667)</td>
<td></td>
</tr>
<tr>
<td>Prahran</td>
<td>Dec 2007</td>
<td>6%</td>
<td>6%</td>
<td>3%</td>
<td>2%</td>
<td>8%</td>
<td>255</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(8)</td>
<td>(88)</td>
<td>(53)</td>
<td>(18)</td>
<td>(88)</td>
<td></td>
</tr>
<tr>
<td>Ballarat</td>
<td>Aug 2008</td>
<td>-</td>
<td>1%</td>
<td>3%</td>
<td>8%</td>
<td>1%</td>
<td>156</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(18)</td>
<td>(60)</td>
<td>(64)</td>
<td>(14)</td>
<td>(14)</td>
<td></td>
</tr>
<tr>
<td>Geelong</td>
<td>Aug 2008</td>
<td>-</td>
<td>1%</td>
<td>0.3%</td>
<td>2%</td>
<td>1%</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(15)</td>
<td>(5)</td>
<td>(15)</td>
<td>(6)</td>
<td>(6)</td>
<td></td>
</tr>
<tr>
<td>Port Phillip / St. Kilda</td>
<td>Aug 2008</td>
<td>-</td>
<td>2%</td>
<td>1%</td>
<td>2%</td>
<td>3%</td>
<td>77</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(22)</td>
<td>(13)</td>
<td>(14)</td>
<td>(28)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Warnambool</td>
<td>Aug 2008</td>
<td>-</td>
<td>1%</td>
<td>0%</td>
<td>2%</td>
<td>0%</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(9)</td>
<td>(1)</td>
<td>(17)</td>
<td>(3)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yarra</td>
<td>Aug 2008</td>
<td>-</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td>0%</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(10)</td>
<td>(24)</td>
<td>(7)</td>
<td>(1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bendigo</td>
<td>Sep 2008</td>
<td>-</td>
<td>1%</td>
<td>2%</td>
<td>1%</td>
<td>0%</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(20)</td>
<td>(32)</td>
<td>(8)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Knox</td>
<td>Sep 2008</td>
<td>-</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LaTrobe / Traralgon</td>
<td>Oct 2008</td>
<td>-</td>
<td>3%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td>79</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(45)</td>
<td>(21)</td>
<td>(5)</td>
<td>(8)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Frankston</td>
<td>Mar 2009</td>
<td>-</td>
<td>0%</td>
<td>1%</td>
<td>1%</td>
<td>2%</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2)</td>
<td>(11)</td>
<td>(6)</td>
<td>(25)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shepparton</td>
<td>Mar 2010</td>
<td>-</td>
<td>0.5%</td>
<td>2%</td>
<td>0%</td>
<td>20%</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(9)</td>
<td>(15)</td>
<td></td>
<td>(194)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dandenong</td>
<td>Apr 2011</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0%</td>
<td>2%</td>
<td>214</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(214)</td>
<td>(23)</td>
<td></td>
</tr>
<tr>
<td>Docklands</td>
<td>May 2011</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0%</td>
<td>2%</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(23)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>129</td>
<td>1426</td>
<td>1868</td>
<td>850</td>
<td>1091</td>
<td>5364</td>
</tr>
</tbody>
</table>

*(due to rounding, percentages may not add up to 100%)*
Table 7.2: Number of banning notices in metropolitan/suburban and regional designated areas

<table>
<thead>
<tr>
<th>Metropolitan/Suburban Areas</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melbourne</td>
<td>121</td>
<td>1197</td>
<td>1639</td>
<td>681</td>
<td>667</td>
<td>4305</td>
</tr>
<tr>
<td>Prahran</td>
<td>8</td>
<td>88</td>
<td>53</td>
<td>18</td>
<td>88</td>
<td>255</td>
</tr>
<tr>
<td>Dandenong</td>
<td></td>
<td>-</td>
<td>-</td>
<td>0</td>
<td>214</td>
<td>214</td>
</tr>
<tr>
<td>Port Phillip / St. Kilda</td>
<td></td>
<td>22</td>
<td>13</td>
<td>14</td>
<td>28</td>
<td>77</td>
</tr>
<tr>
<td>Frankston</td>
<td></td>
<td>2</td>
<td>11</td>
<td>6</td>
<td>25</td>
<td>44</td>
</tr>
<tr>
<td>Yarra</td>
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<td>10</td>
<td>24</td>
<td>7</td>
<td>1</td>
<td>42</td>
</tr>
<tr>
<td>Docklands</td>
<td></td>
<td>-</td>
<td>-</td>
<td>0</td>
<td>23</td>
<td>23</td>
</tr>
<tr>
<td>Knox</td>
<td></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>129</td>
<td>1319</td>
<td>1740</td>
<td>726</td>
<td>1046</td>
<td>4960</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regional Areas</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ballarat</td>
<td></td>
<td>18</td>
<td>60</td>
<td>64</td>
<td>14</td>
<td>156</td>
</tr>
<tr>
<td>LaTrobe / Traralgon</td>
<td></td>
<td>45</td>
<td>21</td>
<td>5</td>
<td>8</td>
<td>79</td>
</tr>
<tr>
<td>Bendigo</td>
<td></td>
<td>20</td>
<td>32</td>
<td>8</td>
<td>0</td>
<td>60</td>
</tr>
<tr>
<td>Geelong</td>
<td></td>
<td>15</td>
<td>5</td>
<td>15</td>
<td>6</td>
<td>41</td>
</tr>
<tr>
<td>Shepparton</td>
<td></td>
<td>9</td>
<td>15</td>
<td>14</td>
<td>-</td>
<td>38</td>
</tr>
<tr>
<td>Warnambool</td>
<td></td>
<td>9</td>
<td>1</td>
<td>17</td>
<td>3</td>
<td>30</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0</td>
<td>107</td>
<td>128</td>
<td>124</td>
<td>45</td>
<td>404</td>
</tr>
<tr>
<td><strong>Overall Totals</strong></td>
<td>129</td>
<td>1426</td>
<td>1868</td>
<td>850</td>
<td>1091</td>
<td>5364</td>
</tr>
</tbody>
</table>

Banning notices have been used significantly more in metropolitan/suburban than in regional entertainment districts. Of the 5364 banning notices imposed between 2008-2012, 4960 (92%) were recorded in metropolitan/suburban areas. Melbourne CBD accounted for 87% of the total metropolitan/suburban banning notices. From only one year of data Dandenong comprised 4% of the overall total, but accounted for 20% in the 2012 reporting period. In the regional areas, 39% of the banning notices were imposed in Ballarat. Across the remaining designated areas the numbers of notices imposed each year were relatively low. That numbers were so low is an interesting result. For example, despite being the second most populous city in Victoria, with over 140,000 inhabitants (ABS 2013), a maximum of 15 notices were
imposed in Geelong in a whole year. Given the justifications which must be put forward to secure designated area status, and parliamentary claims of a behavioural crisis in the NTE necessitating the banning provisions, it is surprising that in some areas the banning notice powers have been used so sparingly, and not at all in Knox.

Fluctuations in the data make it difficult to discern any meaningful findings regarding the general deterrent effect of banning notices. That the peaks and troughs across the designated areas occur in different years suggests that the influence of more general state government policy priorities or the change of state government, may have had only limited impact upon the pattern of banning notice use within individual designated areas. However, trends that are evident in the data can only be examined at a high level, which limits the analysis that is possible. In particular, as the dates on which banning notices were imposed are not reported, the published data does not enable sufficient analysis to link imposition patterns with particular operational enforcement initiatives or ‘hot spot’ activities. The possible individual deterrent effect is considered in section 7.1.1(e), in relation to recipients of multiple banning notices.

The use of banning notices has fluctuated, over time and place, but the data confirms that they are used. In the first five years a total of 5364 banning notices were issued. This elevates debate and consequential concern about their effect to be more than just conceptual or theoretical. Banning notices have been used widely, with a tangible effect on recipients. This justifies an exploration of their broader consequences for due process and the erosion of individual rights.

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6 These are outlined in Chapter Two.

7 In November 2010, the Liberal/Nationals Coalition replaced the Labor party.

8 Precise reasons for the fluctuating use of banning notices are outside of the scope of this thesis. Explanations may include changes in operational and policy priorities, an expansion in the options available to police officers, such as move-on powers and an increasing range of infringement provisions, and the possible success of banning notices in changing the behaviours of recipients.
7.1.i(b) Vulnerability, Indigeneity and Banning

During parliamentary debates prior to the implementation of the LCRA Bill 2007, Green Party Council Member Hartland expressed concern about the potential consequences of banning provisions for disadvantaged groups, in which she specifically included homeless and Indigenous persons (Legislative Council 2007b, 3882). It is not possible to discern from the published data how many recipients of banning notices were homeless, as no data is recorded about the personal circumstances of banning notice recipients. Despite the inclusion of ‘no fixed place of abode’ as an option on the banning notice form (see Appendix B), this data is not recorded centrally. The effect of the discretionary police power to ban upon the homeless is therefore unknown. It is also not known how many other vulnerable recipients, such as people with mental health issues, have been affected or how appropriately the banning provisions have been used.

The LCRA Act 2007 set a clear expectation that data will be reported regarding the Indigenous status of recipients of banning notices: “whether any of the persons to whom banning notices were given during that year were of Koori origin” (LCRA Act 2007, s148R(1,a,vii)). This requirement reflects longstanding concerns about racially discriminatory policing practices. Research into US, UK and Australian policing has explored the way in which discretionary police powers, such as to move-on and stop/search, have been used disproportionately against certain racial groups. This thesis does not seek to extend the existing research into issues of discriminatory policing. The focus of the analysis in this section is whether the ongoing scrutiny of the banning provisions has been sufficient to enable meaningful monitoring of any undue impact of banning notices upon the individual rights and liberties of Indigenous Victorians. The published data recording the Indigenous status of banning notice recipients is summarised in table 7.3.

9 Koori refers to people of Indigenous descent in Victoria and parts of New South Wales.

Table 7.3: Banning notices issued per year, by Indigenous and non-Indigenous recipients; % of total (and actual numbers) each year

<table>
<thead>
<tr>
<th>Year Ending</th>
<th>Total Bans</th>
<th>Indigenous % (actual)</th>
<th>Non-Indigenous % (actual)</th>
<th>Unknown % (actual)</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 June 2008</td>
<td>129</td>
<td>5% (7)</td>
<td>94% (121)</td>
<td>0</td>
</tr>
<tr>
<td>30 June 2009</td>
<td>1426</td>
<td>3% (40)</td>
<td>83% (1182)</td>
<td>14% (204)</td>
</tr>
<tr>
<td>30 June 2010</td>
<td>1868</td>
<td>3% (60)</td>
<td>82% (1535)</td>
<td>15% (273)</td>
</tr>
<tr>
<td>30 June 2011</td>
<td>850</td>
<td>3% (29)</td>
<td>50% (427)</td>
<td>46% (394)</td>
</tr>
<tr>
<td>30 June 2012</td>
<td>1091</td>
<td>3% (31)</td>
<td>62% (681)</td>
<td>35% (379)</td>
</tr>
<tr>
<td></td>
<td>5364</td>
<td>3.1% (167)</td>
<td>73.6% (3946)</td>
<td>23.3% (1250)</td>
</tr>
</tbody>
</table>

(due to rounding, percentages may not add up to 100%)11

Three Indigenous status categories are included in the published banning notice data: Indigenous,12 non-Indigenous or unknown.13 The percentage of banning notices given to recipients recorded as being Indigenous remained stable over the five years analysed at 3.1% of the total number each year. However, this is notably higher than the Indigenous percentage of the resident population of Victoria. Australian Bureau of Statistics (ABS) data sets the figure at 0.6% in 2006, rising slightly to 0.7% in 2011 (ABS 2006, 2011). While the actual numbers of banning notices given to Indigenous recipients may be low, it is clear the relative percentage when compared with the resident population of Victoria is disproportionately high. Over the same five year period for which the banning notice data has been analysed, the proportion of alleged offenders categorised in the Victoria Police Crime Statistics as Aboriginal/Torres Strait Islander appearance was 2.5%.14 The percentage of banning notices

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11 The actual numbers for 2008 do not add up to the total. There was one instance of a multiple banning notice, whose recipient is only recorded once in these figures. Subsequent reports include the relevant data for each notice issued.

12 The banning notice form includes the options ‘Aboriginal’, ‘Torres Strait Islander’ or ‘Both’ to describe the origin of Indigenous recipients (see Appendix B). These are conflated into the reporting category ‘Indigenous.’

13 The published data includes two line items: ‘unknown’ and ‘unspecified.’ These have been conflated for the purposes of this analysis as they both reflect an ‘unknown’ Indigenous status.

14 This data includes individuals who were apprehended but never charged and is “based on the subjective assessment of the attending police” (Victoria Police 2008, p.7). Between reporting periods 2007-08 and 2011-12 of 333,609 alleged offenders, 8,335 were recorded as being of Aboriginal/Torres Strait Islander appearance (Victoria Police 2008, 2009, 2010, 2011, 2012).
recorded as being given to Indigenous recipients is even higher than the over-representation that is also evident in the Victoria Police crime data more generally.

Across the five year period studied, there were marked changes in the relative percentages for each of the Indigenous status categories, depicted in figure 7.2.

*Figure 7.2: Indigenous status of banning notice recipients, as % of total issued each year*

![Bar chart showing percentage of Indigenous, Non-indigenous, and Unknown status recipients over five years](chart.png)

In contrast to the stable proportion recorded as Indigenous, the percentage of banning notices given to recipients of non-Indigenous status declined significantly. In the first reporting year 2007-08, 94% of banning notice recipients were recorded as non-Indigenous. This dropped to 50% in 2010-11, and averaged 74% over the five years analysed. When added to the disproportionate number of bans imposed upon Indigenous recipients as a whole, a significant issue is evident. The risk of adverse consequences for specific groups was noted during parliamentary debates of the banning provisions in 2007. The published data was offered as a mechanism to monitor this. However, despite the issues that are identifiable in the data, neither the legislation or the manner of its implementation have been re-visited. The impact of banning notices upon the Indigenous population of Victoria has been subject to no public or subsequent parliamentary scrutiny.
The reliability of the published data is affected by a lack of clarity about how the Indigenous status of banning notice recipients has been determined. The first Annual Report publishing banning notice data articulated the process to be followed.

Koori identification status was based upon the existence of at least one instance of self identification recorded against the person (ie. an answer of either Aboriginal, Torres Strait Islander, or Both Aboriginal and Torres Strait Islander to the question: are you of Aboriginal and/or Torres Strait Islander origin?) (Chief Commissioner, 2008).

However, subsequent Annual Reports did not contain this procedural note. It is not known whether the classifications noted in the published data were derived by recipient self-report or from assumptions made by issuing police officers. Patterns in the data are indicative of an increasing use of assumption-based categorisation, similar to the subjective assessment of racial appearance from which the Victoria Police Crime Statistics data is derived (Victoria Police 2008, p.7). The use of assumption is most apparent in the steady increase in the number of banning notice recipients whose Indigenous status was recorded as unknown, which rose from 14% of the total in 2008-09 to a peak of 46% in 2010-11, and averaged 23% over the five years. Observation and assumption are the most likely sources of an ‘unknown’ assessment. This not only creates clear potential for error if simple visual appearance is the basis of the categorisation, the use of ‘unknown’ or ‘unspecified’ enables the disproportionate use of banning notices for Indigenous Victorians to be hidden in the data. It is notable that in the first annual report (2007-08), in which the ‘unknown’ and ‘unspecified’ categories were not used, 5% of banning notice recipients were recorded as Indigenous: more than eight times higher than the Indigenous percentage of the Victorian population in 2006 (which was 0.6% (ABS 2006)).

The lack of accurate data regarding the Indigenous status of banning notice recipients is a significant finding. Despite the expectations of accountability, reflected in the LCRA Act 2007 requirement to publish banning notice data, the proportion of banning notice recipients who are of Indigenous origin is simply not known. It is possible that the number of banning notices given to Indigenous recipients is higher than the already disproportionate figures recorded in the published data. Public
examination and scrutiny of the operation of the legislation, and the particular impact of the discretionary police power to ban upon the Indigenous population, appears to be compromised. In the context of a notable body of research into discriminatory policing of Indigenous Australians and subsequent admissions of racial profiling by Victoria Police (2013), the failure to accurately record the Indigenous status of recipients of banning notices is a serious oversight. That this issue has not been identified, was not discussed during the extension of the banning provisions in 2010, and has never been revisited in parliament, reinforces concern about the absence of effective scrutiny and accountability of Victoria’s banning provisions.

The parliamentary debates in 2007 acknowledged the risk that banning notices could disproportionately affect specific groups, and included a data publication requirement in the LCRA Act 2007. However, the precise consequences of banning for vulnerable recipients, such as Indigenous Victorians and the homeless, is unknown and has not been the subject of any ongoing scrutiny.

7.1.i(c) Missing Banning Notice Data

Analysis of the published banning notice data has identified a notable omission. In all but the first Annual Report, the specified offences for which banning notices have been imposed were not published. The reports for the periods 2008-09 and 2009-10 both stated that “the suspected offence data was not captured during the reporting period on electronic databases” (Chief Commissioner 2009, p.1; 2010, p.1). The Annual Reports for the periods 2010-11 and 2011-12 amended the explanation and noted that


16 A report by Victoria Police in 2013 admitted racial profiling by police officers. This case did not relate to the profiling of Indigenous Victorians, but it highlighted racially discriminatory practices within Victoria Police. In 2010, six Australian men pursued a civil case in Melbourne’s Federal Court, claiming racial discrimination in Flemington and North Melbourne between 2005 and 2009. The case was settled out of court by Victoria Police. As part of the settlement, admissions were made. A full inquiry into public relations and training was conducted (Grossman et al. 2013; Victoria Police 2013).
… this data is not readily retrievable, given the number of banning notices issued. Each notice would have to be individually reviewed and the resources to undertake that level of manual data extraction are not presently available (Chief Commissioner 2011, p.1; 2012, p.1).

It is unclear why, despite the legislated requirement, this aspect of the data is too problematic to collate, when the recipient age group, Indigenous status and designated area location for each individual notice have been published. The failure to provide the offence data significantly limits public examination of the way in which designated areas are declared (discussed in section 7.1.i(f)). In addition, and pertinent to the issues explored in this thesis, is the lack of oversight of the behaviours for which banning notices are imposed. This is particularly evident where police officers may issue a pre-emptive ban in anticipation of disorder or a loosely defined expectation of ‘trouble’. If the reasons for the imposition of individual bans are not recorded, it is not known how or why the banning notice powers are being used. When added to deficiencies in the recording of the Indigenous status of banning recipients, this prevents full accountability and precludes meaningful scrutiny of these discretionary police powers.

7.1.i(c) Banning Notice Breaches

The number of charges in relation to banning notice breaches, the results of any breach proceedings, and the number of breaches for which no charges are laid are required to be reported each year (LCRA Act 2007, s148F). None were reported in the first reporting period 2007-08. A simple count of breach charges and convictions was published in the 2008-09 report. The method of reporting changed for the 2009-10 period, and reflected the use of a number of police-imposed penalty notices in response to banning breaches. Implicit in this reporting change was a move away from court-based breach proceedings. The published data suggests that from 2009 the discretionary summary police power to issue a banning notice was increasingly enforced via another discretionary summary police power to issue an infringement
notice in response to perceived breaches. Unlike the original ban, penalty notices do at least afford the recipient the option of an appeal. The published breach data is summarised in table 7.4.

Table 7.4: Number of events recorded in relation to breaches of banning notice provisions

<table>
<thead>
<tr>
<th>Action</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charged</td>
<td>-</td>
<td>4</td>
<td>7</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Convicted</td>
<td>-</td>
<td>4</td>
<td>6</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Arrest</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>Arrest not authorised</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>Summons</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Penalty Notice</td>
<td>-</td>
<td>-</td>
<td>19</td>
<td>13</td>
<td>32</td>
</tr>
</tbody>
</table>

When compared with the number of banning notices issued each year, the number of breaches recorded was low. The introduction of penalty notices coincided with more breach activity over the final three reporting periods, despite a steady reduction in the overall number of banning notices being issued (from a peak of 1868 in 2009-10 to 1091 in 2011-12). However, no information has been published about any of the alleged breaches. There is also no data recording the number of banning notice recipients who exercised their limited right to seek a review of their banning notice by a more senior police officer (LCRA Act 2007, s148E). The breach data illustrates the potential for consequences of banning beyond the short term physical exclusion of individuals from specified designated areas. Although the number is low, it is possible that recipients of banning notices, which may have been imposed pre-emptively, without any offence being committed and with no right of judicial appeal, have been subject to breach proceedings and conviction.

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17 The specific penalty notices applied are not recorded in the data. However, they are presumed to reflect the additional police powers introduced in the Summary Offences & Control of Weapons Acts Amendment Act, 2009. This includes move-on notices, which can be issued pre-emptively, on-the-spot and specify non-return for up to 24 hours (s3(3)). Breaches can lead to a further infringement notice. Infringement notice penalties for alcohol related offences were also increased (s4 & s5), and the infringement offence of 'disorderly conduct' (s6) was created.
7.1.i(e) Multiple Banning Notice Recipients

The claims made by Attorney-General Hulls in 2010 to support the extension of banning notices to 72 hours are documented in Chapter Six. In the Statement of Compatibility for the JLA Bill 2010, Hulls linked the fact that individuals had been issued with multiple bans with justifications for extending the permissible length of individual banning notices.

… there have been a number of people to whom police have had to give a banning notice on multiple occasions… its efficacy can be enhanced through enabling police, in appropriate circumstances, to give notices of a significantly longer duration (Legislative Assembly 2010a, 1132).

The published banning notice data reports the number of multiple bans imposed during each reporting period.\(^\text{18}\) Table 7.5 documents the figures for the five years analysed for this thesis.

\begin{center}
\textbf{Table 7.5: Multiple banning notices issued each reporting year, 2008-12}
\end{center}

\begin{center}
\begin{tabular}{|l|c|c|c|c|c|}
\hline
\hline
\text{Number of unique banning notice recipients} & 128 & 1384 & 1803 & 831 & 1005 \\
\hline
\text{Number of multiple notices issued} & 1 & 33 & 54 & 19 & 86 \\
\hline
\end{tabular}
\end{center}

In the first two years of the banning legislation, for which data had been published when the 2010 Statement was tabled by Hulls, banning notices were given to 1512 individuals, of whom 34 (or 2.2\%) received more than one notice (Chief Commissioner 2008, 2009).\(^\text{19}\) While supporting Hulls’ claims of multiple order impositions, the actual number issued was low. The figures are not indicative of a need to extend the duration of banning notices to prevent their multiple imposition. This data was available to be scrutinised but was not referenced during the 2010 parliamentary debates. By contrast, of the 3639 individual banning notice recipients

\(^{18}\) See Chapter Six, footnote 14.

\(^{19}\) The published data for the first two reporting periods only specified the number of multiple notices. Later reports included a breakdown for individuals receiving 2, 3, 4 and more than five notices.
recorded between years ending 30 June 2010 and 30 June 2012, 159 (or 4.4%) received more than one order. While still a low absolute number, the percentage of multiple order recipients had doubled from 2.2% over the first two reporting periods (2007-08 and 2008-09). The data for the final three reporting periods enables a more detailed analysis of multiple order imposition. In 2009-10, there were 8 recipients of more than two banning notices (0.43% of the 1868 imposed). This figure rose to 16 in 2011-12 (1.5% of the 1091 notices imposed).

If extending the permissible length of a ban was an effective deterrent, as claimed by Hulls, the proportion of multiple order recipients (whether this is regarded as more than one or more than two notices) should not have increased. The enhanced effect of longer banning notices, used to justify their extension to 72 hours, does not appear to be evident. Yet there has been no subsequent parliamentary or public consideration of the use of 72 hour banning notices or their effectiveness when compared with 24 hour bans. This lack of oversight of police practice was highlighted in Chapter Five. Analysis undertaken for this research found that Victoria Police in the Melbourne CBD were issuing banning notices for 72 hours as a matter of course, rather than in the ‘appropriate circumstances’ referenced in the 2010 Statement. The findings prompted pre-patrol briefings for the Safe Streets Task Force to be amended to reiterate expectations for the imposition of banning notices. As no information is published regarding the length of notices that are imposed, the effect of this change cannot be examined publicly.

7.1.l(f) Designated Areas

A pre-requisite for the imposition of banning notices is the designation of declared areas in which they will apply. The steady increase in the number of designated areas that has occurred since 2007 (documented in table 7.1), reflects an assumption that banning notices control alcohol-related problems. However, the threshold for the

20 The LCRA Act 2007 outlines the requirements for the declaration of a designated area, which are explained in Chapter Two, Section 2.1.
declaration of a designated area is fluid and not objectively defined. No guidelines are evident in the banning notice legislation, parliamentary debates or subsequent Victorian Commission for Gambling and Liquor Regulation (VCGLR) documentation relating to designated areas. There are no firm or measurable rules that must be applied before a district can be declared a designated area, beyond the legislated requirement that the VCGLR “believes” that alcohol-related violence and/or disorder has occurred in the vicinity of licensed premises within a particular area, and that a designated area will be an effective response (LCRA Act 2007, s147(1)).

Data and reasons in support of designation are presented to the VCGLR by affected stakeholders, such as Victoria Police and local councils. The cases put forward for designation are not typically publicly available and how the VCGLR effects its decision remains unclear.21

The declaration of designated areas presumes the effectiveness of banning notices in controlling alcohol-related disorder in the NTE. By not publishing the reasons for the imposition of banning notices (noted in section 7.1.i(c)) meaningful cross-tabulation with Victoria Police Crime Statistics is limited and any causal linkage is difficult to substantiate. It is not known, for example, how many of the 1639 banning notices issued in the Melbourne CBD in 2009-10 were for reasons of alcohol-related violence and how many were a subjectively assessed pre-emptive police response to a potential nuisance. The difference is significant when seeking to understand and scrutinise the application of the discretionary police power to ban, the parliamentary justifications for which focused upon what were presented as tangible issues of alcohol-related disorder.

Statements accompanying the declaration of designated areas typically make reference to generic concerns. A government media release following the declaration of Dandenong (in Outer Eastern Melbourne), explained that the designation was “at

21 This thesis has not tested the rationale for each designated area declaration, or assessed the effectiveness of the banning provisions. Although it was noted in Chapter Six that parliamentary justifications to designate the Melbourne CBD and Chapel Street/Prahran areas in 2007 were largely anecdotal, or supported with vague or selectively applied crime data, it is not known if further evidence was presented to the then Director of Liquor Licensing prior to their declaration.
the request of local police concerned with violence and anti-social behaviour in the area” (O’Brien 2011a). Similarly, the media release that accompanied the declaration of Melbourne’s Docklands stated

The ability to issue banning notices within Docklands will give police the power to act quickly to prevent anti-social behaviour before it happens… These measures will deliver improved safety for the precinct's growing number of residents, workers and visitors and help licensees better manage their venues (O’Brien 2011b).

However, the absence of published data recording the offences for which banning notices were subsequently imposed hinders ongoing analysis of the actual way in which the banning provisions were used. It is acknowledged that the offences for which banning notices were imposed would not necessarily provide a detailed view of ongoing issues in each designated area, but this data would enable some assessment of whether the use of banning notices in each area targeted the issues for which they were intended.

In addition to the gaps identified in the published data, there appears to be an incompatibility between the needs that are claimed prior to designation and the operational policing experience. Designated areas have been declared to cover the key entertainment precincts and hubs within Victoria’s main towns and cities. The data analysis noted the low number of banning notices issued in some designated areas. In Knox no bans were imposed at all between designation in September 2008 and June 2012. Given the arguments that must be put forward to secure designated area status, it is surprising that the discretionary power to ban has not been used more widely.

Designated area declarations place great emphasis upon crime prevention in the interests of the greater public safety. The rhetoric reflects the techniques employed during parliamentary debates of the LCRA Bill 2007 and JLA Bill 2010, and is emotive, vague and couched in terms to generate fear. In announcing Dandenong a designated area, the Minister for Consumer Affairs hailed the extension of “new laws
to deal with drunken, loutish and threatening behaviour” (O’Brien 2011a). Banning provisions were presented as a proactive mechanism to ensure community safety.

… rather than wait for something to happen, banning notices can be used to defuse situations and remove troublemakers from harmful situations (O’Brien 2011a).

The 2011 designated area declaration in Docklands continued the rhetoric.

… people doing the right thing should be able to enjoy the sport and nightlife on offer in the Docklands without their fun being spoiled by a few louts (O’Brien 2011b).

However, without the legislated banning notice data, public scrutiny of the way in which the discretionary police power to ban is being used is limited. The claims made to justify the designation of new areas cannot be tested, and are not publicly examinable.

7.1.ii Summary

The way in which banning notice data has been published limits meaningful scrutiny of the banning notice provisions and of the need to ‘re-balance’ the provision of justice in the NTE, that is implicit in both the legislation and the declaration of designated areas. Gaps in the data hinder analysis of the way in which the banning provisions have been used. It is unclear why the mandatory requirement to publish the offence for which banning notices are imposed has repeatedly not been met. This is a key failing which prevents examination of assumptions made by the Victorian Parliament, Victoria Police and the VCGLR about the need, purpose, functioning and effectiveness of the banning notice provisions. Similarly, the lack of detail in the published data inhibits meaningful and comparative analysis of the use of banning. Ongoing assessment of how banning notices are being used would be informed by the inclusion of measurable baselines and points of comparison, such as dates, times, specific locations and behaviours. Such data should be recordable with little problem, as these details are required to be documented on the banning notices.
imposed (see Appendix B). Inclusion in the annual statistics would carry no issues of confidentiality, as recipient names would not be required.

The publication of data relating to the imposition of banning notices was a clearly stated requirement of the LCRA Act 2007 (s148R), regarded as essential to facilitate public scrutiny and to ensure that no specific demographic group is affected disproportionately. The way in which the data has been published, in particular the uncertainty about the Indigenous status of recipients and the lack of offence specific data, raises fundamental concerns. Effective public scrutiny of the use of the discretionary police power to ban is both necessary and a legislative requirement. The banning provisions have been justified in parliament and within designated area applications as essential to ‘re-balance’ community protection in the NTE. However, the data that should enable objective examination of their use falls short of mandated expectations. Significantly, despite the banning notice data being formally tabled each year, the findings and deficiencies noted in this analysis have not been explored by Victoria’s Parliament.

7.2 Media Scrutiny

The media can be instrumental in constructing a social agenda which then directs and reinforces the need for legislative change (Hall et al. 1978; McCombs 2004; Altheide 2006; Beale 2006; DCPC22 2001a, 2010; Jones & Wolfe 2010; Silverman 2012).23 The depiction of issues in the media influences public perception of crime and criminal justice policy. Media coverage can also serve as a check upon decisions made by policy makers, policing behaviours, and criminal justice processes (Surette 2015). In their submission to the National Human Rights Consultation,24 the

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22 Victorian Parliament Drugs and Crime Prevention Committee.

23 As this thesis has not evaluated the need for or effectiveness of banning notices, the contribution of Victoria’s media to the development of the provisions is not documented in this chapter.

24 In 2009, the Federal Attorney-General (McClelland) appointed an independent committee to undertake an extensive consultation on human rights in Australia.
Australian Human Rights Commission (AHRC) (2009) noted the significance of a robust media in the assurance of rights and freedoms. To extend the examination of the scrutiny of Victoria’s banning provisions since their enactment in 2007, an analysis of the media coverage of the implementation of the banning provisions was undertaken. The analysis considered in particular whether the discretionary police powers that are embedded within the banning provisions, or the consequences for due process procedural protections and individual rights, have been subject to media-driven public scrutiny.

It is acknowledged that media coverage does not necessarily provide an accurate reflection of specific issues and events. The preference for episodic reporting of crime can dilute consideration of broader issues. This can build public fear, demonise individuals and create a perception that crime emanates from personal choice and is best countered with harsh deterrents (Beale 2006; Mason 2007; Cheliotis 2010; Drake 2011). Disproportionate media coverage of particular behaviours, and an emphasis upon specific incidents were highlighted by the DCPC (2001a, 2010) as a risk to objective policy development. However, the media remains a key influence upon public perceptions and a primary source of public scrutiny (Gelb 2006; Roberts & Indermaur 2009). A “robust media” (AHRC 2009, p.2) should act as an essential check on government powers by ensuring public awareness of key issues.

The research scope was limited to Victoria’s online newspapers \( n = 55 \) and reflected the approach adopted by the DCPC in their detailed inquiries (2001a, 2010). While the DCPC studies focused specifically on two state-wide newspapers, *The Age* and

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25 A DCPC (2001a) report mapping official crime statistics against the way in which crime is depicted in the print media (specifically *The Age* and the *Herald Sun*), noted a clear disparity between the most prevalent offences recorded and those receiving most media coverage. For example, reports of crimes against the person accounted for 44.9% of all crime-related articles across both newspapers, but only 7.1% of recorded crime in the Melbourne CBD (DCPC 2001a, p. 106-7). A later DCPC (2010) report produced similar findings, and noted significant anomalies in the reporting of assaults over a six month period in 2009. In particular, 62% of articles in the *Herald Sun* referenced licensed premises in their reporting of assaults, the location of only 17% of recorded assaults. Alcohol was also discussed more frequently than it was flagged in police statistics (DCPC 2010, p.40).
the *Herald Sun*, this study incorporated the 55 Victorian newspapers that are accessible via the online repository Newsbank, listed in Chapter Four, table 4.4.26

Fifty of the titles are local publications, and five have a state-wide circulation. An ‘any text’ key word search was undertaken for the period 2007-12.27 The search identified every article that referenced banning notices, in any context, and covered the various ways in which the banning provisions can be referred. The specific terms used were: ‘banning’ ‘banning notice’ ‘banning order’ ‘ban troublemaker’ ‘24 hour ban’ ‘72 hour ban.’ Newsbank returned articles that contained any of the search terms, as full or partial matches. As a result, reference to any type of banning created a match, and the search returned a total of 6413 articles across the six year period between 2007-12.28 Each article retrieved was accepted for analysis only if it specifically referenced the banning notice provisions relevant to this thesis. Of the 6413 articles, 185 met the criteria.

The results of the media analysis first examine the number of articles returned, and the proportion published in local and state-wide newspapers. The primary purpose of each relevant article is then explored. The extent of media acknowledgement of the due process issues embedded within the banning provisions is considered, and key assumptions contained within the articles are also assessed.

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26 Additional print media sources exist beyond those utilised by Newsbank, in addition to a wealth of online media. Newsbank is sufficiently representative to reveal trends and detail in the coverage.

27 This enables examination of the media coverage of the first five years of the provisions, similar to the period covered in the banning notice data analysis. The data is reported by fiscal year, whereas the media coverage is documented by calendar year.

28 Due to the broad search terms used, the majority of the articles retrieved related to other types of banning that were prominent in the media. Examples include sunbeds, smoking, smacking, puppy farms, live cattle exports, fracking and using mobile phones while driving. These articles were excluded from the analysis.
7.2.ii Key Findings

7.2.ii(a) Number and Source of Articles

The number of individual articles that specifically referenced the banning notice provisions was 185. Table 7.6 documents the total number returned, how the articles divided between state and local newspapers, and how the numbers for each changed over the six year period.

Most of the relevant media articles were published in 2008 and 2009 (122, or 66% of the sample), directly after the banning provisions were first introduced. A similar pattern of coverage across the calendar years is evident in state and local newspapers. The overall number of relevant articles in local newspapers was higher, and the peak coverage occurred in 2008 rather than 2009. There are more local than state newspapers (50 local and 5 state), and this provides a reasonable explanation for the greater level of coverage. Any differences relating to article focus are discussed in the next section.

Table 7.6: Total banning notice specific articles, and by state and local newspapers, 2007-12

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Articles</th>
<th>State Paper</th>
<th>Local Paper</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>23</td>
<td>12</td>
<td>11</td>
</tr>
<tr>
<td>2008</td>
<td>73</td>
<td>18</td>
<td>55</td>
</tr>
<tr>
<td>2009</td>
<td>49</td>
<td>22</td>
<td>27</td>
</tr>
<tr>
<td>2010</td>
<td>18</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>2011</td>
<td>20</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>2012</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>185</td>
<td>71 (38%)</td>
<td>114 (62%)</td>
</tr>
</tbody>
</table>

* Calendar year

7.2.ii(b) Primary Purpose of Articles

The content of each relevant article was further analysed to discern its primary purpose. Following preliminary analysis of the articles, five categories were
established against which to capture the core focus. Each is defined in table 7.7, with the identifier used in the subsequent analysis also noted. If an article could fit into more than one category its primary purpose was determined. For example, an article that focused upon concerns about behaviours in the NTE, but which included a reference to banning notice data within a particular area or timeframe, was categorised under ‘Concern’. This decision was made subjectively following a reading of each article. The results of the detailed analyses of each article are contained in table 7.8.

Table 7.7: Media content analysis categories and identifiers

<table>
<thead>
<tr>
<th>Core Focus</th>
<th>Description</th>
<th>Identifier</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imposition of the Legislation and/or a Specific Relevant Strategy</td>
<td>Primary focus upon the imposition (potential or actual) of the banning notice legislation. Including reporting the declaration of designated areas, and how the provisions relate specifically to strategic plans addressing issues in the NTE.</td>
<td>Imposition</td>
</tr>
<tr>
<td>Specific Events</td>
<td>Reporting details of particular dates, events, initiatives or police operations in relation to the NTE, and in which the banning provisions are referenced</td>
<td>Event</td>
</tr>
<tr>
<td>General Concern</td>
<td>Documenting general concern about behaviour in the NTE, including discussion of the banning provisions. Generally more editorial expressions of concern regarding the NTE and banning provisions.</td>
<td>Concern</td>
</tr>
<tr>
<td>Data</td>
<td>Primarily reporting published data relating to the banning provisions</td>
<td>Data</td>
</tr>
<tr>
<td>Judicial Concern/Legal Challenge</td>
<td>Relating to judicial (rather than political or personal) discussion of banning issues, and specific court cases or legal challenges.</td>
<td>Legal</td>
</tr>
</tbody>
</table>
Table 7.8: Primary purpose of banning specific articles, 2007-12

<table>
<thead>
<tr>
<th>Year</th>
<th>Imposition</th>
<th>Event</th>
<th>Concern</th>
<th>Data</th>
<th>Legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>17</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>23</td>
</tr>
<tr>
<td>2008</td>
<td>57</td>
<td>2</td>
<td>7</td>
<td>7</td>
<td>0</td>
<td>73</td>
</tr>
<tr>
<td>2009</td>
<td>20</td>
<td>3</td>
<td>13</td>
<td>11</td>
<td>2</td>
<td>49</td>
</tr>
<tr>
<td>2010</td>
<td>5</td>
<td>0</td>
<td>2</td>
<td>11</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>2011</td>
<td>13</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>20</td>
</tr>
<tr>
<td>2012</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>112</td>
<td>9</td>
<td>27</td>
<td>33</td>
<td>4</td>
<td>185</td>
</tr>
</tbody>
</table>

(Percentages are subject to rounding)

The most common article focus over the six year period related to the ‘Imposition’ of the banning legislation, comprising 112 (or 61%) of the 185 articles. This coverage was at its peak in the immediate aftermath of the enactment of the LCRA Act 2007. Of the 112 articles, 57 (or 51%) were published in 2008. Articles reporting banning notice ‘Data’ and general ‘Concern’ about behaviours in the NTE received similar levels of coverage; comprising 33 (or 18%) and 27 (or 15%) of the 185 articles. The final two categories, regarding specific ‘Events’ and police initiatives (9, or 5%), and ‘Legal’ or judicially focused discussion of banning issues (4, or 2%), were the least common article focus.

The analysis of the primary purpose of each article considered whether there was any difference in the coverage in state-wide newspapers when compared with local publications. Tables 7.9 and 7.10 reveal a similar distribution between each primary purpose.
Table 7.9: Primary purpose of banning specific articles retrieved from local newspapers, 2007-12

<table>
<thead>
<tr>
<th>Year</th>
<th>Imposition</th>
<th>Event</th>
<th>Concern</th>
<th>Data</th>
<th>Legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>9</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>2008</td>
<td>49</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>55</td>
</tr>
<tr>
<td>2009</td>
<td>12</td>
<td>3</td>
<td>7</td>
<td>4</td>
<td>1</td>
<td>27</td>
</tr>
<tr>
<td>2010</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>7</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>2011</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>2012</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>79 (69%)</td>
<td>6 (5%)</td>
<td>10 (9%)</td>
<td>17 (15%)</td>
<td>1 (1%)</td>
<td>114 (100%)</td>
</tr>
</tbody>
</table>

(percentages are subject to rounding)

Table 7.10: Primary purpose of banning specific articles retrieved from state-wide newspapers, 2007-12

<table>
<thead>
<tr>
<th>Year</th>
<th>Imposition</th>
<th>Event</th>
<th>Concern</th>
<th>Data</th>
<th>Legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>8</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>2008</td>
<td>8</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>2009</td>
<td>8</td>
<td>0</td>
<td>6</td>
<td>7</td>
<td>1</td>
<td>22</td>
</tr>
<tr>
<td>2010</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>2011</td>
<td>7</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>2012</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>33 (46%)</td>
<td>2 (3%)</td>
<td>18 (25%)</td>
<td>16 (23%)</td>
<td>3 (4%)</td>
<td>71 (100%)</td>
</tr>
</tbody>
</table>

(percentages are subject to rounding)

The ‘Imposition’ category predominates across both newspaper types, although it is higher in local publications (69% compared with 46%). There are also proportionately more ‘Concern’ and ‘Data’ articles evident in the state-wide newspapers (25% and 23% of articles compared with 9% and 15% in the local papers). Overall, the proportions in each category are closer in the state-wide publications. A possible explanation for the higher proportion of ‘Imposition’ articles in local newspapers over the first three years analysed is their reporting of banning as the provisions were implemented in their areas. Between 2007 and the end of 2009,
11 designated areas were created across Victoria (documented in table 7.1 in the first section of this chapter), each of which were reported in their local newspapers. For example, prior to the designation of Geelong, the local paper ran a series of articles highlighting plans to introduce banning:

‘Plan to outlaw drunks in CBD’ (Geelong Advertiser, 26 April 2008)

‘MP pushes for CBD drunk ban’ (Geelong Advertiser, 24 May 2008)

‘Police bid to ban thugs’ (Geelong Advertiser, 14 June 2008)

The Geelong Advertiser then published five more articles in August 2008, following the declaration of Geelong as a designated area.

The higher number and overall proportion of ‘Concern’ articles in the state-wide publications aligns with their focus upon broader issues of public and political concern. Typical examples included:

‘This is Melbourne at night: ‘alcohol-fuelled anarchy’ - Special Report - The Violent CBD’ (The Age, 23 February 20008)

‘Binge-buster cops: Police chiefs unite in push for alcohol reforms’

(Herald Sun, 28 May 2008)

With the exception of the ‘Imposition’ and ‘Concern’ categories, there are no other significant findings from the consideration of state-wide and local/regional publications. The remainder of the analysis in this section is based upon all 185 articles returned.

The primary focus of each relevant article as a proportion of the total number of articles changed for each year examined, and is illustrated in figure 7.3. As the number of articles declined from the peak of 73 in 2008, an increasing emphasis
upon ‘Data’ specific articles was evident in 2009 and 2010. However, actual numbers remained low. The 100% ‘Event’ focus in 2012 refers to only two articles.

Figure 7.3: Primary purpose of banning specific articles as a % of the total, 2007-12

Across all publications, the articles in the ‘Imposition’ category primarily reported the declaration of new designated areas and the use of banning notices as a generally welcomed mechanism to address issues in the NTE. Example headlines included:

‘Bans on drunks, thugs to spread’  (Sunday Herald Sun, 20 April 2008)

‘Drunks face ban. Police target late-night hotspots’  
(Port Philip Leader, 11 August 2008)

‘Police welcome Knox O-zone ban powers’  
(Knox Leader, 30 September 2008)
The irony of the headline in the Knox Leader is noted, as the analysis of published banning notice data revealed that no bans were imposed in Knox between 2008-12.

Published banning notice ‘Data’ was the focus of 33 (18%) of the 185 articles. However, each article limited the reporting of the data to straightforward numbers of notices imposed. A typical example was published in the Dandenong Leader, under the headline ‘Get out of town - 74 notices ban CBD troublemakers’ (7 December 2011). The article noted the general location of the bans, the age range of recipients and the potential consequences of their breach. There was no analysis or discussion of the data in this or any of the 33 articles. For example, there was no consideration of issues relating to the effect of banning notices upon Indigenous Victorians, or of any limitations in the published data. Despite the expectations expressed during parliamentary debates of the LCRA Bill 2007, the published data was not a vehicle for the public scrutiny of the imposition and consequences of the banning provisions.

Of the 27 articles (15%) that discussed general ‘Concern’ in relation to the NTE and alcohol-related behaviours, and which specifically referenced banning notices, there was no consideration of any issues relating to the banning provisions themselves. Banning notices were regarded as a proactive tool to target the causes of the general concern. For example, under the headline ‘Booze is a stain on our reputation - City must lose drink culture’ the Chief Commissioner of Victoria Police, Simon Overland, wrote in the Herald Sun in 2011.

New laws have complemented a more visible and active presence. We ban troublemakers from licensed precincts… The evidence suggests that these and other initiatives are starting to work… (Herald Sun, 15 February 2011)

All of the articles addressing general ‘Concern’ about alcohol-related issues in the NTE extended the parliamentary assumption that banning notices were a necessary and appropriate response, without offering supporting evidence.

There was some overlap between articles that discussed the ‘Imposition’ of the banning provisions and those addressing particular ‘Events’ and police initiatives.
Where overlaps occurred, the ‘Imposition’ category predominated. Only 9 articles across the six year period focused primarily upon ‘Events’ and operational activities. Following the passage of the LCRA Act 2007, the Geelong Advertiser reported that “Police will conduct a crackdown on licensed premises across Victoria this summer” (19 December 2007). Once again the article contained an underlying rationale that a problem existed in the NTE that must be addressed. The same article reported Assistant Commissioner Gary Jamieson’s assertion that “our aim is to ensure people are safe when they go out.”

Across the six year period between 2007-12, only four articles addressed ‘Legal’ considerations or judicial concerns related to the banning provisions. In 2009 two articles were categorised as ‘Legal’. The first, in the Knox Leader (4 August 2009), reported the aftermath of a serious assault. Banning was referenced in passing in the context of legal powers to manage issues in the NTE. The second, in The Age (22 August 2009), discussed the concerns of a Victorian Judge in relation to a number of serious assaults in the NTE. Again, banning was included in the range of possible responses. Each of the two articles mentioned banning notices but did not discuss the banning provisions. The remaining two articles in the ‘Legal’ category are among only four of the 185 analysed that considered the due process consequences of the banning provisions. They are discussed in more detail below.

7.2.ii(c) Consideration of Individual Due Process Rights

Detailed analysis of the 185 articles revealed very little scrutiny of the 2007 and 2010 legislative provisions themselves, the increased discretionary powers afforded to police, or their potential effect upon individual rights. Only four of the 185 articles addressed the due process issues embedded within the LCRA Act 2007 and JLA Act 2010. The four articles were all published in state-wide newspapers, in the Herald Sun on 6 and 7 December 2007, and in The Sunday Age on 31 July 2011 and 16 October 2011.
The first two of these articles contained a general discussion of the perceived need for and purpose of the banning provisions. They were published in the Herald Sun alongside the passage of the initial legislation through the Victorian Parliament on 6 and 7 December 2007. Their primary focus was the ‘Imposition’ of the banning provisions. The headlines for each are indicative of their tone and criticism of the proposed amendments that initially risked delaying the passage of the LCRA Act 2007, but which were subsequently conceded.

‘BOOZE BUST: Libs sink laws to make our streets safer’
(Herald Sun, 6 December 2007)

‘Booze bans in after Libs wilt’
(Herald Sun, 7 December 2007)

The only due process consideration noted in these articles related to the right of judicial appeal of a banning notice. Extracts illustrate the assumptions upon which the articles were based. The first cited the Police Minister, Bob Cameron, and his objection to the right of judicial appeal against a banning notice, which he justified by the additional time it would take to complete the necessary paperwork.

Laws to make Melbourne streets safer from drunks over the summer party season have been scuttled by political in-fighting... They would have given the police the power to... ban trouble-makers from entertainment precincts... ‘What (these amendments) mean to the operational policeman is that if someone is creating some sort of trouble and police think it’s time for them to go home and watch a DVD, if it’s going to be the subject of a court matter they (the police) are going to have to make notes. At two or three in the morning, when we want police to be out on the street, they’re going to be taking notes. It becomes entirely unworkable’ [Bob Cameron, Police Minister]  (Herald Sun, 6 December 2007).

In the second article, the underlying principle of appeal was again overlooked. Instead, the focus was the perceived Opposition support for ‘drunks’ that the article

29 These articles are referenced in Chapter Six in relation to the time pressures to pass the LCRA Bill 2007.

30 The key amendments related to the provision of a banning notice appeal mechanism. This is discussed in Chapter Six.
contended was implied by their proposed amendment for a right of appeal. The article prioritised fear and the dangers of the New Year period in relation to alcohol-related disorder.

Victoria will have tough new laws banning drunks and trouble-makers before New Year’s Eve… the laws would now be implemented in time for the busy and dangerous New Year period… The Opposition parties wanted amendments allowing drunks... the right to appeal against bans... The move threatened to stall the new laws until after the party season, the rowdiest time of the year in trouble spots… (Herald Sun, 7 December 2007).

Liberal spokesperson O’Brien’s support for the right of judicial appeal against a banning notice was quoted in the article.

Mr Ryan [Deputy Leader of the Opposition] and Liberal spokesman Michael O’Brien told Parliament they had reluctantly decided to drop the amendments in the interests of having the laws passed in time for summer. Mr O’Brien said the laws meant people could appeal against a parking ticket but not against a 24 hour police ban that was recorded forever in the police database. ‘Our amendments were basically a chance to clear your name, as it’s a pretty serious slur on your reputation’ Mr O’Brien said (Herald Sun, 7 December 2007).

However, O’Brien’s statement is placed in an article which was overwhelmingly unsupportive of his view, and critical of any consideration of the rights of banning notice recipients, portrayed as “drunks,” if this caused the passage of the legislation to be delayed. The headline ‘Booze bans in after Libs wilt’ and reference to a “humiliating backdown” by the Liberal Party demonstrate the article’s ridicule of O’Brien’s concern.

The remaining two articles that noted the individual rights of recipients were published in The Sunday Age in 2011. Each reported the case of a 21 year old woman banned for a year from every pub, bottle shop and licensed restaurant in the city of Swan Hill, Victoria, under separate Liquor Accord provisions of the LCRA Act 2007
(s146A-D). Liquor Accords enable licensees, Victoria Police, local councils and other community members to address local issues of alcohol-related disorder (VCGLR 2012). Swan Hill is not a designated area, but under their Liquor Accord a Banned Person Register was introduced in January 2008. On 31 July 2011, the first article carried the headline ‘Lawyers challenge public alcohol ban powers’. It outlined a pending Supreme Court challenge to police powers under Liquor Accords. On 16 October 2011, the second article, ‘Police back down over pub bans’, detailed the decision by Victoria Police to drop the 12 month ban against the 21 year old.

The legal challenge in the Swan Hill case related to the legality of the police powers under Liquor Accord provisions, rather than the merits of the individual Liquor Accord ban, or of banning notices more generally. The LCRA Act 2007 does not permit the right of independent review of a police decision to impose a banning notice. However, the banning notice provisions could potentially be subject to a similar challenge under administrative law. To date, no challenge has been made.

The most significant media comment with respect to the themes considered in this thesis was published in the 16 October 2011 article, and was made by Mark Woods from the Law Institute of Victoria.

It’s kangaroo justice… The person who makes the complaint against someone makes the decision to exclude them without their reasons or their evidence being tested (The Sunday Age, 16 October 2011).

This is the only example in any of the 185 articles analysed of a clear connection being made between individual rights and the use of on-the-spot, discretionary police powers to punish. Significantly, this comment was made not in relation to the more expansive banning notice powers of the LCRA Act 2007, but with respect to the separate and more limited Liquor Accord provisions, which do not exclude recipients from public spaces. Banning notices were mentioned within each of the Swan Hill

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31 Outlined in Chapter Two, the Liquor Accord banning powers do not relate to public spaces and their specific impact upon the right to move freely is much more limited. However, Liquor Accord banning records and related barring order records (under provisions in the Justice Legislation Amendment Act 2011), are not available for examination. The VCGLR confirmed that no data is retained or available for public scrutiny (personal email, 27 June 2014). The implications of such a lack of oversight may be explored through a separate research study.
articles in the context of police powers to ban. No direct reference was made in either article to due process issues or the lack of judicial oversight of the banning notice provisions. The reach and potential due process impact of banning notices is much wider than bans imposed under Liquor Accords, but has been subject to no meaningful media scrutiny.

7.2.ii(d) Key Assumptions

Across the 185 articles, where a perspective was evident, both the tone and focus presumed a problem of disorderly behaviour in the NTE and the necessity of banning as a solution. The media coverage reflected the parliamentary assumptions, rhetoric and hyperbole in relation to the LCRA Bill 2007 and JLA Bill 2010. Loosely framed, vaguely defined pejorative descriptors were applied to the problematic elements from whom the banning provisions would protect the law-abiding majority. Common terms included ‘thugs,’ ‘louts,’ ‘drunks,’ ‘troublemakers,’ ‘yobbos,’ and ‘boozers.’

The detail of the articles also reflected the parliamentary discourse. In particular, no empirical or research evidence was presented in the media articles in support of either the need for the banning provisions or their presumed effectiveness to address issues in the NTE. Anecdotes and specific incidents were again used to frame and generalise the issues. For example, the cases of Shannon McCormack, who died after being assaulted in Melbourne’s Southbank, and John Hucker, who was in a coma after a ‘schoolies’ incident in Lorne on Victoria’s Surf Coast, were cited by the *Herald Sun* on 6 December 2007 as evidence of the serious problem that must be addressed. While not in any way diminishing the tragedy of each case, they do not prove a more general issue of alcohol-related disorder in the NTE. Sacco (1995) noted the particularly dramatic value of reporting atypical incidents, and the potential

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32 Explored in Chapter Six.

33 Schoolies take place following the end of year 12 exams, when students typically spend a period of time away from home to mark the completion of their formal schooling.
for public issues to be created out of individual experiences. In 2010, the DCPC urged more specific caution about the representativeness of media coverage.

... print media reporting does not reflect general recorded crime trends, but instead is focused predominantly on specific incidents of assault which later generate a disproportionate number of print media items (DCPC 2010, p.40).

One finding of the media analysis casts some doubt upon the presumptions evident across the parliamentary debates of the banning provisions. Local media coverage in Geelong, shortly after the declaration of a designated area in the CBD, hailed banning as a significant new power which would have a marked impact upon alcohol-related disorder.

New powers enabling police to ban drunken troublemakers from Geelong’s city centre are expected to have a greater impact than in Melbourne. Geelong police Chief Inspector Wayne Carson said ban notices... were more likely to deter alcohol-fuelled violence in a smaller community. ‘I think it’s going to work here better than in Melbourne because it’s a smaller area and it will be easier to recognise offenders…’ (Geelong Advertiser, 6 August 2008).

Another article in the same month, presumed that banning notices would be effective in dealing with alcohol-related disorder in Geelong.

Tough new laws targeting grog-fuelled yobbos should be more successful in Geelong than they were in Melbourne, Geelong MP Ian Tresize says (Geelong Advertiser, 14 August 2008).

However, analysis of the imposition of banning provisions in Geelong, using the published data examined earlier in this chapter, does not bear out these expectations. Between 2008-12 only 41 banning notices were recorded for the Geelong CBD. No more than 15 were issued in any one reporting year (2009 and 2011). A possible reason for this lack of use of the banning provisions was noted in the Geelong Advertiser in early 2010.

A Geelong Police Sergeant has labelled a Brumby Government system to reduce drunk and anti-social behaviour as cumbersome and ineffective ... ‘We’ve found them (the police-only banning notices) to be cumbersome and ineffective because we would ban them (party-goers)
but the pubs and clubs would not know about it. Because the bans are only for 24 hours, the pubs need to know straight away (Geelong Advertiser, 25 January 2010).

Despite this limited acknowledgment that banning was not necessarily an effective way to control alcohol-related disorder in the NTE, the majority of media coverage continued to reinforce the presumption that banning worked. This is exemplified in the following example from the Herald Sun published after the extension of the banning provisions in 2010.

As alcohol-fuelled violence and anti-social behaviour increased, so did the number of bans dished out by police... a spokesman [for Victoria Police] said banning notices were a ‘terrific tool’ for police because they could defuse a potential situation before it occurred (Herald Sun, 8 October 2010).

It is noted from the published banning notice data, that for the reporting period during which this comment was made the number of banning notices issued declined sharply from 1868 in the period ending 30 June 2010, to 850 the following year despite the number of designated areas continuing to increase. This suggests that the image depicted in the media may not be a completely accurate representation of events in the NTE.

7.2.iii Summary

The media coverage of the banning provisions was overwhelmingly supportive of the discretionary police power to ban. The articles repeated many of the assumptions that were evident across the parliamentary debates, about the problem of alcohol-related disorder in the NTE, and the presumed effectiveness of banning as a response. The focus upon specific behaviours and individual events typified the episodic nature of the media coverage of crime (Cheliotis 2010; Surette 2015). There was no acknowledgment or consideration of any underlying societal issues or of the potential consequences of police-imposed banning notices for recipients. In particular, there was no analysis of the erosion of individual rights or procedural protections. The language used across the articles embodied the ‘them/us’
perspective evident in the parliamentary debates of the banning Bills (Van Dijk 1993; Waldron 2003; Chilton 2004; Burnside 2006). The media coverage was similarly based upon fear of the ‘dangerous other’ (Simon 2007; Drake 2011) engaging in alcohol-related disorder, who were demonised and presumed to deserve all they get (Altheide 2006; Beale 2006; Mason 2007). Hall et al. (1978) observed the power of the media and those in positions of influence (like parliamentarians) to frame and reinforce issues of public concern.

Hall et al.’s (1978) contention that media depictions reflect the reality perceived through the eyes of those in power, resonates across the newspaper coverage of the banning provisions. The analysis highlights an inherently parliamentary and police perspective (Sacco 1995). The discretionary police-imposed banning notice is reported but its need, effectiveness or consequential erosion of individual rights is not questioned. There was no meaningful media-driven public critique of the problem that banning was expected to address, or of the effectiveness of the provisions. The analysis augments key findings across a body of sustained research into media reporting of crime and criminal justice policy (for example, Kidd-Hewitt 1995; Sacco 1995; Chibnall 2001; Lowry, Nio & Leitner 2003; Jones & Wolfe 2010; Silverman 2012; Surette 2015). In particular, that the media can distort public perceptions of crime, with a one-dimensional view that is predicated upon fear and the need for harsh responses, without sufficient consideration of potential broader consequences, or underlying issues.

As well as no effective scrutiny of the powers contained within the banning provisions, there was no media analysis of the published banning notice data. Despite the expectations expressed during parliamentary debates of the LCRA Bill 2007, the

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35 See Chapter Six.

36 Hall et al. (1978) documented the ‘crisis’ of young, black, male muggers in the UK, which led to far reaching legislative and operational policing responses.

37 It is recognised that this media analysis is limited to consideration of the public scrutiny of the banning provisions. The broader literature is referenced in acknowledgement of the context within which the analysis sits.
published data was not a vehicle for the public scrutiny of the use of the banning provisions. Not only has the data not been published fully, or considered in parliament, but there was no media examination beyond simple statements of numbers of bans issued. It is clear that neither published data nor media coverage has effected any meaningful public scrutiny of the police power to ban. This lack of accountability has been exacerbated by the absence of judicial oversight of the banning notice provisions. This is discussed in the final part of this chapter.

7.3 Judicial Oversight and Public Scrutiny


> When a matter in court highlights significant human rights concerns with existing legislation, Parliament is able to legislate an appropriate response. This reflects the dialogue model promoted by the Charter (2012, p.27).

VEOHRC also asserted the importance of judicial oversight to ensure decisions made by public authorities, such as Victoria Police, are fully accountable.

> Courts and tribunals play a crucial role in the Charter’s human rights protection framework. They are a mechanism where Victorians can hold government and public authorities to account for conduct that infringes their rights (2012, p.30).

Judicial oversight therefore includes both statutory interpretation of legislation and review of individual penalties imposed, to ensure Charter compliance and ongoing accountability across the criminal justice system. However, human rights issues embedded within the *LCRA Act 2007, JLA Act 2010* and the banning notice
imposition processes have not been examined by the Victorian judicial system. There are no court data, legal pronouncements or case law regarding the banning notice powers. The banning notice provisions have been operating since late 2007 without any judicial review of their compliance with the *Charter Act* or their specific application by Victoria Police.

Judicial appeals of other police-imposed penalties, including breach proceedings for banning notices, are typically the responsibility of the Magistracy.\textsuperscript{38} To consider the significant gap in the legitimate public scrutiny of the banning provisions, their consequences and implications have been explored through interviews with Victorian Magistrates (*n*=12). This research sought their perspective on the absence of judicial and, therefore, ongoing public scrutiny of the banning notice provisions.

Twelve interviews were conducted with Magistrates across Victoria. The exploratory interviews used a guiding script and open-ended question schedule to establish from the Magistrates:

- their perceptions of police-imposed discretionary justice
- their views and experiences of the banning provisions; both imposing them\textsuperscript{39} and dealing with breaches of police-imposed notices
- their thoughts on the judicial review of banning notices and how such a review could be conducted, given the immediate nature of the imposition of a ban.

The objective of each interview was to gather a personal view of these themes. There are no claims made regarding the scientific rigour underpinning the interviews, or of the generalisability or representativeness of the results.\textsuperscript{40} Any perspectives offered relate only to the interview participants and no broader assumptions are made or inferences drawn.

\textsuperscript{38} Legislative provisions, and their compliance with the *Charter Act*, are reviewed at Supreme Court level.

\textsuperscript{39} Under the *LCRA Act 2007* (s148I), Magistrates may issue an order for up to 12 months, which may apply to a whole designated area, to all or specific licensed premises within the area (s148I(2)(4)(5)).

\textsuperscript{40} The research benefits and limitations are considered in detail in Chapter Four.
In addition to the location of each Magistrate, core demographic details for each participant were captured. Of the twelve interview participants, two were female and ten were male. Seven of the Magistrates were located in regional Magistrates’ Courts and five in metropolitan courts. The period of time spent as a Magistrate spanned a range of 22 years, with a mean of nine years.

Each interview was audio recorded and subsequently transcribed. The research output has been anonymised and pseudonyms applied. No participant is identifiable, and the pseudonyms do not note the sex or judicial experience of each respondent. The only identifier used is to discern whether the participant was based in a regional court \( (n=7) \) or in a metropolitan court \( (n=5) \) at the time of the interview. The pseudonyms are sequential: MagReg01 to MagReg07, and MagMet01 to MagMet05. The numbers were applied randomly to each interviewee.

Too few female Magistrates were interviewed to discern any difference when compared with male Magistrates. Although the pseudonyms differentiate between metropolitan and regional Magistrates, the analysis revealed no underlying differences with respect to the location or relative experience of Magistrates.

Findings from the interviews are discussed in the following section. The interview output is related, where appropriate, to claims made during parliamentary debates of the LCRA Bill 2007 and JLA Bill 2010, and additional published data has been used to supplement the analysis. Five key themes are evident. They include the use of discretionary police powers and the consequences for due process, the lack of a right independent appeal of banning notices, the value of extending the banning notice period to 72 hours, and consideration of whether banning is a punishment. The final theme examines the use of court-imposed exclusion orders. The Annual Reports in which the banning notice data is published also record the imposition of court-imposed exclusion orders. The data for court-imposed bans has been examined for each reporting year between 2007-12 (Chief Commissioner 2008, 2009, 2010, 2011,
2012), and is discussed in relation to the interview findings and police-imposed banning notices.

### 7.3.i Key Findings

The identification of Magistrates who were willing to talk specifically about the banning provisions and the issues they embody was a significant research challenge. A number of Magistrates responded positively to initial enquiries. However, approximately half of the respondents subsequently declined to be interviewed, stating they had no direct knowledge of the banning provisions, and felt unable to provide relevant information or perspectives. This feedback was a significant finding in itself. It highlighted, for the sample contacted, a notable absence of judicial awareness of the issues embedded within the banning provisions, as well as the lack of judicial oversight of banning per se. One participant, who agreed to be interviewed, conceded that the volume of legislation made it difficult to be aware of every development, and admitted having no prior knowledge of the police powers that were introduced in the *LCRA Act 2007*. The Magistrate then reflected upon the implication of their admission in the context of public scrutiny and judicial oversight.

To tell you the truth, I didn’t even know it [police banning powers] existed until I got your request [to be interviewed] and that’s damning in itself (MagReg05).

The following sections examine the key themes, and includes verbatim quotations from the interview participants. Relevant contextual notes are included within the quotations in square brackets. No inference should be drawn from the order in which quotations are included within each section.

### 7.3.i(a) Discretionary Police Powers & Consequences for Due Process

Magistrates were asked to reflect on the increase in administrative justice and police exercised discretionary powers in recent years, such as the growing range of
infringement provisions, move-on powers\textsuperscript{41} and banning notices. Ten of the twelve participants expressed disquiet about discretionary police powers to ban people from public areas. Common concerns related to the effect of banning notices on due process protections, and accountability of the police use of banning.

In an unequivocal expression of concern about police-imposed discretionary powers, MagReg03 stated.

I thinks it’s an intrusion on the effective administration of the criminal justice system... I just think it’s appallingly excessive (MagReg03).

MagMet02 noted that discretionary summary justice risked reducing accountability of police decision-making.

Potentially. There would have to be, within that [discretionary police powers], a lack of accountability (MagMet02).

Within a lengthy consideration of how discretionary police powers to punish are opaque to public scrutiny and of their impact upon the individual rights of recipients, MagReg05 outlined the risks of over-zealous and arbitrary application of banning notices.

… those sorts of powers, arbitrary powers, are becoming more remote in terms of public scrutiny. At least if a person goes through the court the public has a chance to come and look, and understand what’s happened. Whereas an incident might be dealt with on the scene by a police officer… it’s out of the view of the public. It’s not under public scrutiny. I suppose that’s the reservation I have. It means that we all have to trust that people of good faith are operating these powers and exercising these powers... If they are exercised zealously to the very letter, I can see there could be some human rights infringed and that would concern me... I suppose that we just need to hasten slowly in the powers that we exercise arbitrarily. If you look at the entirety of the power, banning someone from an area is a fairly significant power. What concerns me is if it is exercised in a situation where both parties are in a state of heightened emotion... whether that power is exercised in the cool light of day or is an emotional response to the situation (MagReg05).

\textsuperscript{41} Introduced under Victoria’s \textit{Summary Offences and Control of Weapons Acts Amendment Act 2009}. See Appendix A for a summary of provisions relevant to alcohol-related disorder in the NTE.
Adding to a general concern about discretionary police powers, MagMet01 noted the risks that banning notices may be imposed inappropriately and the potential consequences for police legitimacy.

I think it [banning notice imposition] is open to abuse and has been abused. Individual police officers are able to go back at the end of the night and say ‘it’s been a good night because I’ve issued ten notices’; but five of them may have been without merit or basis. I’m not saying that happens across the board, but I think it does happen... If it is abused then this affects the perception of justice by individuals, the respect that they have; which can affect the relationship they have with police in other areas and on other occasions (MagMet01).

With an explicit reference to notions of balance in the administration of justice, MagMet01 noted

… on a cost/benefit balancing exercise, in terms of public safety and law and order, it [a banning notice] may be justified, but there is the potential for abuse there (MagMet01).

In this brief observation MagMet01 identified community protection as one of the key parliamentary drivers for the banning notice provisions. Of significance is the acknowledgement that the banning legislation may enable individual rights to be abused.

A link between the due process protections of individual recipients, and the vulnerability this creates in the appropriate imposition of bans was also perceived by MagReg01.

Obviously there is [impact upon due process protections]... Without there being any judicial scrutiny we have to rely on the good conscience and morality of the police officers that impose it [banning notice] (MagReg01).

The possibility that a banning notice may be imposed incorrectly was acknowledged by MagMet05.

It may be unfortunate that someone is sucked into that vortex who is innocent (MagMet05).
While conceding no knowledge of actual abuses of banning notice powers, MagReg02 noted the risks within a police-imposed power that is not subject to judicial scrutiny.

Absolutely. That’s inherent in the nature of the provisions. It’s even more removed from judicial scrutiny because its short term... It places enormous responsibility on the police and if you have relatively junior police with these powers it might be a cause for concern. Anecdotally I’ve not heard of any abuse of the process but it would clearly be open to abuse (MagReg02).

Across this sample of Magistrates notable concern was expressed about the potential for abuse and the inappropriate application of discretionary police powers. These were perceptions and no Magistrates offered specific examples to verify their concerns. These findings, combined with the absence of judicial oversight and the lack of public scrutiny of police decisions to impose banning notices, reinforce documented concern about police-imposed discretionary justice (Spooner 2001; Zedner 2005; Walsh & Taylor 2006, 2007; Beckett & Herbert 2010a). The potential for arbitrary, discriminatory and abusive application of banning powers, consequential inequalities in the provision of criminal justice (McMahon & Roberts 2008; Crofts & Mitchell 2011; Crofts & Witzleb 2011), and perceptions of police legitimacy (Tyler 1990; 2006), were made clear by MagMet01. The concerns expressed by these Magistrates embodied Waldron’s assertion that state power “is always and endemically liable to abuse” (2003, p.205).

Two interview participants preferred not to offer an analysis of the banning provisions. MagMet03 had no personal knowledge of inappropriate use of the discretionary police power to ban and shared an expectation that Victoria Police would use banning correctly.

… you assume those powers are being exercised appropriately and in accordance with the law. I’ve got no reason to think, from my experience, that that hasn’t been the case (MagMet03).

MagReg04 noted that it was a parliamentary decision to enact the banning notice powers. No comment was offered regarding any potential consequences.
It’s something that’s been legislated and the power has been given to the police. If that’s what the Parliament has decided then the Parliament can do it (MagReg04).

The *Charter Act* expressly permits judicial review of legislative provisions for Charter compliance. The importance of judicial oversight to ensure that government and public authorities are held to account “for conduct that infringed rights” was asserted by VEOHRC (2012, p.30). MagReg04’s unquestioning acceptance of the parliamentary decision to introduce police-imposed banning notices is a notable finding in the context of judicial oversight and public scrutiny. However, this perspective was offered by only one interview participant.

### 7.3.i(b) The Right of Judicial Appeal

Judicial appeal of Victoria’s banning provisions refers specifically to the right of a banning notice recipient to challenge a police decision to impose a ban. Other appeal options are acknowledged. For example, the Supreme Court is empowered to examine the legality of legislation and/or its compliance with the *Charter Act*, or a local council could seek to appeal a VCGLR decision to declare a designated area in their locality. However, there has been no legal challenge to VCGLR decisions in relation to Victoria’s banning notice powers, and no judicial review of the discretionary police power to ban or of any potential consequences for the individual rights of banning notice recipients.

The judicial appeal amendment that was a rejected during the parliamentary debates of the LCRA Bill 2007, would have given banning notice recipients the right to seek an independent review of an on-the-spot police decision to impose a ban. Recipients of infringement notices can have the decision to impose the penalty reviewed in court. Individuals who receive a banning notice are not afforded this option. Similar provisions in Queensland expressly permit the right of independent

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42 The initiation of a Supreme Court review in 2011 was referenced during the media analysis, in relation to a challenge to police powers introduced under the Swan Hill Liquor Accord.

43 Discussed in Chapter Six.
review by the Queensland Civil and Administrative Tribunal (QCAT) of a police decision to impose a banning notice (Safe Night Out Legislation Amendment Act 2014, s602P). The remit of the Victorian Civil and Administrative Tribunal (VCAT) does not extend to consideration of Victoria Police banning notice decisions.  

The interview participants were asked to consider the significance of the absence of a right of court-based appeal against the imposition of a police-imposed banning notice, and how this could affect meaningful scrutiny of these provisions. They were also asked whether recipients should have the opportunity to seek a judicial or independent appeal of a police decision to issue a banning notice.

None of the Magistrates interviewed opposed a notional right of appeal. MagReg03 was unequivocal and stated that “absolutely” a right of appeal should exist. MagReg05 linked the right of appeal to other types of infringement penalty, and directly referenced the pre-emptive nature of banning notices as a reason why appeal provisions were necessary.

... if you can appeal against an infringement for speeding, I would have thought where your freedom to move has been impinged, I think that should be subject to review. Especially in the pre-emptive or anticipatory sense, then that should be able to be challenged I would have thought (MagReg05).

That banning notices limit individual rights and the possibility that police officers may impose a ban mistakenly, were offered by two Magistrates as justifications for the right of appeal.

I think that there is a sound argument that that should be the case. The whole question of transparency and rights are important, and in that sense the court should have or be thought of as a potential avenue of appeal for those sorts of restrictions (MagMet03).

The police, just as we do, make mistakes. Given that it [banning notice] restricts the movement of people and their ability to associate, there should be an appeal process (MagMet02).

44 This was confirmed in correspondence with VCAT (personal email, 20 April 2015).
Another due process issue was noted by MagMet06. The immediate nature of the banning notice penalty was cited as the key reason why it should be subject to review.

Because the order is imposed immediately, you would have to have some built in capacity to have a right of review within a very short time (MagMet06).

A more general perspective was provided by MagMet01 who articulated support for the court-based appeal of banning notices. No specific reasoning or rationale was offered.

Generally speaking, yes. I feel that you should be able to have that issue [banning notice] brought before a court if you have any grievance about it (MagMet01).

The consequences for police legitimacy were again raised by MagMet01. Recipients of infringement penalties were perceived to be reluctant to challenge them in court, preferring to pay and move on. However, despite appearing to accept the penalty: “they’ve still got that grievance sitting there; about the police and that injustice” (MagMet01).

There were two primary objections to a right of appeal against the imposition of a banning notice presented during parliamentary debates of the LCRA Bill 2007. Firstly, that an appeal was impractical, would delay the implementation of the punishment, and therefore reduce the ability of Victoria Police to control alcohol-related disorder in the NTE. Secondly, that an appeal would require police officers to complete additional paperwork, to document evidence and record witnesses (Legislative Assembly 2007b, 2007c, 2007d; Legislative Council 2007b, 2007c).

The interview participants were asked to consider how an independent review of a banning notice decision could be facilitated, given the context in which banning notices are imposed. Despite acknowledgment of the complexity of enabling an appeal for a penalty that must be imposed immediately for it to have the desired effect, there continued to be general support for the principle of independent review. A number of Magistrates offered potential solutions to balance the operational needs
of police officers with the rights of individuals. Some interviewees were absolute in their thinking, while others allowed their thoughts to evolve as the interview progressed.

MagReg01 was the most fluid and initially acknowledged the absence of judicial scrutiny and the potential impact upon due process, but hoped that an appeal would not be necessary. MagReg01 noted that the effect of a banning notice would be reduced if its imposition could be delayed by an appeal process. As the interview progressed, MagReg01 considered what their own response may be to the imposition of a ban that could not be reviewed. This led to a change of mind and the conclusion that a right of appeal should be available, followed by detailed discussion of how such an appeal could be enabled.

Suggestions for appeal mechanisms ranged from an immediate review to more retrospective solutions. MagReg03 supported banning notice recipients being able to seek an immediate review by a Magistrate upon receipt of a banning notice.

There should be a finite period during which the recipient of one of those orders can make an urgent application to the court for the order to be set aside (MagReg03).

Two Magistrates offered specific ideas for the implementation of an immediate appeal. MagReg01 suggested a variation of search warrant procedures, calling upon on-call Magistrates if required.

I suppose one way would be similar to a search warrant; where a police officer provides a sworn affidavit and requests that this banning order be made for 24 hours, and we have Magistrates on-call all night. So that could be one way to scrutinise it (MagReg01).

MagReg05 also proposed using on-call judicial officers, and noted the expected low number of reviews that would be necessary.

It [the ban] might happen at night when a court is not available, but there is always access to a judicial officer and the after hours service. If there’s an ability to put a written appeal in for a stay of that order, pending the prosecution of an appeal against it the next day. I can’t see any unfairness in that… I can’t imagine that these orders would be imposed in such numbers that it would bring the court to its knees… so I can’t see why it
shouldn’t be possible to have an ability to appeal against it [the ban] (MagReg05).

This perception of a limited number of potential reviews is reflected in the findings of the data analysis earlier in this chapter, in relation to the relatively low number of banning notices issued. Table 7.1 confirms that with the exception of Dandenong in 2011-12 and the Melbourne CBD, no designated area recorded more than 100 banning notices in a reporting period. The highest number of notices imposed in one designated area was 1639, in the Melbourne CBD in 2009-10. When compared to the number of infringement penalties imposed, which do carry a right of appeal, the banning notice numbers are significantly lower. Since 2007-08 approximately 8% of infringement recipients have exercised their right of internal review, which must be conducted by someone independent to the original decision (Attorney General, Victoria 2012, p.17). In 2011-12, of the 4.79 million infringement notices issued across all agencies in Victoria, 399,000 sought a review. Approximately 38,000, or 0.79% of all notices issued, were resolved in court (Attorney General, Victoria 2012, p.16). Of the 1091 banning notices issued in 2011-12 (table 7.1), if the 8% average is applied, the number of reviews would have been 87. As MagReg05 suggested, this is not likely to “bring the court to its knees.”

MagReg05 also felt that a more immediate review was preferable, given the impact of a banning notice upon the recipient.

I think if there was some decent reason why the ban shouldn’t be imposed or was imposed unfairly, I think there should be a right of redress other than appealing after the event (MagReg05).

The option of a retrospective court appeal, that could lead to a banning notice being expunged from the recipient’s LEAP database record, was put forward by two Magistrates. MagMet02 preferred “a retrospective appeal to clear the person’s record.” A more detailed explanation was offered by MagReg01.

Thinking about the appeal process.... how would I feel if it happened to me?.....So thinking on it now, I think that there could be some appeal. On whether the police were acting appropriately or on the right information; and there could be some declaratory relief. Declaring that the ban was
imposed improperly and it being voided and nullified. Your name is cleared, but the effect would still have happened, you would have been prevented from access. But any breach proceedings would be null and void (MagReg01).

While fully supportive of the principle of judicial appeal, MagReg05 provided some insight into possible changes to the way in which banning notices could be imposed, to mitigate the need for an appeal in the first place.

Maybe the power ought to be exercised by a Sergeant who is at the scene, on-the-spot, not the person involved in the altercation... Maybe it’s a check and a balance that makes the power exercisable under some control rather that by the person involved because of emotional connection... It should be a third party...it should be a Sergeant or someone above the rank of the person involved having the power to impose the order rather than that person...We’re talking about a continuum of likes and dislikes that is considerable among the Police Force. What one person likes or accepts, another might think is reprehensible; one might impose an order and one might not. It’s arbitrary even by nature (MagReg05).

MagReg05 acknowledged having no prior knowledge of the police-imposed banning notice powers, but the perspective is highly relevant. The way in which the *LCRA Act 2007* is framed facilitates the specific concerns of MagReg05 regarding the subjective and arbitrary nature of what constitutes a ‘need’ for a banning notice, and which have been noted across this thesis. The pre-emptive capacity of the banning provisions which may be imposed for behaviours that are not objectively assessed, combine with the absence of independent review to significantly undermine the due process protections of banning notice recipients.

### 7.3.i(d) The Extension of the Banning Provisions to 72 hours

The interview participants were asked to consider the 2010 increase in the permitted length of a banning notice from 24 to 72 hours, and to reflect upon the necessity of imposing bans for longer periods of time. This aspect of the banning provisions received less attention from most participants. No Magistrate declared their support for the extension to 72 hours, but there were three clearly critical responses. Two
Magistrates, MagMet02 and MagReg06, questioned the effectiveness of the increase. Another noted that longer bans were not likely to address problematic behaviours.

… there’s not much point to that really… For me that’s not really going to achieve a great deal in terms of addressing behaviours (MagMet03).

The extension to 72 hours was considered by MagMet02 in the context of typical drinking patterns. A three day ban was not believed to reflect the usual weekend to weekend nature of alcohol consumption in the NTE.

As a concept [72 hour police-imposed banning notices], I don’t think it is effective at all. I don’t understand what three days results in… people don’t drink on a three day cycle. It’s weekend to weekend; three days is not going to have much impact at all (MagMet02).

MagReg05 regarded 72 hours as a long time: “…it seems a long time to me to order someone away from an area…” However, no opinion was offered of the likely effectiveness of such a ban.

During discussion of the extension of banning notices to 72 hours, both MagMet02 and MagReg06 expressed doubt about the enforceability of banning notices, and their effectiveness as a mechanism to control alcohol-related disorder. MagMet02 perceived that bans were not taken particularly seriously and that they are easy to breach.

If you just keep your head down and head back into the city, the police don’t stop and search anybody. I really don’t know that people are that scared anyway (MagMet02).

MagReg06 questioned both the rationale for the imposition of a banning notice, and the effectiveness of ban enforcement activities.

Typically, limited thought is given to their imposition. They can be an effective option, but enforcement is an issue; both how likely it is and how thorough it is (MagReg06).

Another Magistrate, MagMet01, noted that banning notices “are not enforceable unless they [someone breaching a ban] are caught”. Addressed in the context of the extension of banning notices to 72 hours, the majority of the Magistrates chose not to
comment on their effectiveness, citing lack of knowledge as the primary reason for their unwillingness to speculate.

7.3.i(e) Banning as a Punishment or for Community Protection?

The quasi-criminal status of banning notices has created significant grey areas for their compliance with the *Charter Act.* Following the SARC review of the JLA Bill in 2010, the Attorney-General Hulls stated unequivocally that banning notices were not a form of punishment (SARC 2010b, p.14-15). The Magistrates were asked to consider how banning notices should be regarded. Four terms were offered, but not defined, that could describe the purpose of banning notices: a method of control, risk mitigation, community protection and punishment. Magistrates were also encouraged to consider any alternative depictions. This discussion elicited the most varied responses across the interviews.

Opinion was divided regarding the primary function of banning notices. Punishment was stated by six Magistrates (half of the sample) as being a core purpose or result of a banning notice. Within the responses that considered banning notices to be a punishment, the strength of feeling ranged from absolute to more complex, multi-dimensional perspectives. The strongest belief that banning notices are a punishment was offered by MagReg04, who considered them to be “… a significant sanction and a punishment.” MagReg01 agreed and categorised banning notices as “primarily punishment.”

Other participants balanced the punishment aspect with other factors. MagReg05 combined punishment with a method of controlling problematic behaviours.

I suppose I can see it [a banning notices] would be imposed as a way of controlling behaviour, but I think there is a punishment aspect to it (MagReg05).

A similar view was provided by MagMet03, who noted the deterrent effect for both recipients and for the broader community.

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*45 Discussed in Chapter Five.*
I think there are elements of deterrence, but the question of punishment is in there as well…those conditions [of a banning notice] do have a punitive effect... (MagMet03).

Strong opinions were also articulated that disagreed with banning notices being viewed as a punishment. MagMet02 focused on their protective purpose and dismissed the punishment perspective: “Protect the public. I don’t see it as a punishment, no.” MagReg03 agreed with the protective priority of banning notices, and regarded them as primarily a way of protecting the wider community from drunken violence, usually on Saturday nights (MagReg03).

Continuing their consideration of the balancing agenda, MagMet01 felt that a banning notice is not a significant penalty and categorised them as a mechanism to protect the community enjoying the NTE.

My primary focus would be on public safety. I would prefer to leave the punitive aspect. I think to most people not being able to go to a particular area or premises is not a significant penalty.... Particularly in places like Melbourne I think there’s a public safety drive more than a punitive element. I would hope that there is no punitive element to it because that should be subject to judicial oversight - it should all be focused on public safety (MagMet01).

There was some agreement with the assumptions and claims made by Hulls in his defence of the provisions following SARC review in 2010. However, half of the sample considered that banning notices are a form of punishment. These perspectives support the contention of this thesis that the dilution of core procedural protections within the banning notice legislation does enable a punishment to be imposed without regard to fundamental due process and judicial protections.

An interesting corollary to the interview findings relates to the notion of deterrence and its relationship to the banning provisions. Deterrence embodies complex constructions of behavioural and sentencing theory and practice (for example, Von Hirsch et al. 1999; Nagin & Pogarsky 2001; Tonry 2008). However, the deterrent effect typically relies upon the certainty and severity of punishment. Hulls does not
make clear how a longer ban constitutes a deterrent if banning notices are not intrinsically to be regarded as a punishment.

7.3.i(f) Experiences of Banning and Exclusion

None of the Magistrates interviewed had conducted breach proceedings of a police-imposed banning notice. Most had included a banning component as a condition of bail. MagReg05 discussed how banning is applied to bail, citing the examples of family violence and persistent theft which may lead to exclusion from stated locations for the duration of the bail period. Despite bail hearings affording due process rights to defendants, MagReg05 offered a highly pertinent perspective.

The way I look at it here has to be a good reason. You are infringing on someone’s human rights. You have to make sure there is no draconian aspect to it (MagRed05).

In addition to the police-imposed discretionary banning powers, the LCRA Act 2007 introduced court-imposed exclusion orders. Applying to the same designated areas as the police issued banning notices, an exclusion order may be imposed if an offender is found guilty of a specified offence committed within a designated area, is not sentenced to more than 12 months in prison for the offence and where the order “may be an effective and reasonable means of preventing the commission by the offender of further offences in the designated area” (LCRA Act 2007, s148I(1)). Exclusion orders are issued post prosecution, and their imposition is subject to full due process protections.

Across the parliamentary debates of the LCRA Bill 2007 there was a presumption that banning notices are an effective mechanism to control and reduce alcohol-related anti-social behaviour and disorder in the NTE. If the principle of banning an offender from a designated area is accepted as being effective, it is reasonable to assume that exclusion orders will be an option applied proactively by the courts. Table 7.11 details the number of exclusion orders issued during the first five years, and offers a
comparison with the number of police-imposed banning notices imposed over the same period.\footnote{As the exclusion order is given post conviction, unlike a banning notice, the behaviour may not have occurred during the reporting year for which it is recorded.}

Table 7.11: Number of court-issued exclusion orders compared with police-imposed banning notices

<table>
<thead>
<tr>
<th>Reporting Year</th>
<th>Police Issued Bans</th>
<th>Court Issued Exclusions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>129</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>1426</td>
<td>0*</td>
</tr>
<tr>
<td>2010</td>
<td>1868</td>
<td>32</td>
</tr>
<tr>
<td>2011</td>
<td>850</td>
<td>73</td>
</tr>
<tr>
<td>2012</td>
<td>1091</td>
<td>65</td>
</tr>
<tr>
<td>Total</td>
<td>5364</td>
<td>170</td>
</tr>
</tbody>
</table>

*“There was not a data collection plan ... during the reporting period... Since October 2009 a collection plan has been in place” (Chief Commissioner, 2009).

The number of exclusion orders imposed across the whole of Victoria is significantly lower than the number of police-imposed banning notices for each of the five years analysed. The highest number of exclusion orders imposed in a reporting year was 73 in 2010-11, compared with a peak of 1868 banning notices in 2009-10.

Five interview participants had imposed an exclusion order. One Magistrate, confirming the evidence from the published data, observed that “they’re not very common at all” (MagMet01). MagReg04 had excluded an offender from a designated area for the full 12 months. MagMet03, MagMet02 and MagReg01 all recalled imposing one or two exclusion orders, but could not remember specific details. MagMet01 had imposed an exclusion order that applied to a limited set of licensed venues and not to the whole designated area. MagMet01 expressed concern about limiting the freedom of movement of the recipient, and perceived the offending behaviour to be related to these venues, creating no need to ban more generally. MagMet01 observed that
if a person has a problem with alcohol and alcohol-fuelled violence if you ban them from a particular location there’s nothing to stop them relocating that problematic behaviour to another location (MagMet01).

This concern with the potential for displacement was not evident at all across any of the parliamentary debates or media coverage in relation to the police-imposed banning notice provisions.

That such a low number of exclusion orders have been imposed by the courts questions the presumed need to ban that was asserted across the parliamentary debates. This was borne out by the personal experiences offered by Magistrates during the interviews. If banning was believed to be an effective method to control alcohol-related disorder, as justifications for the police-imposed banning powers repeatedly claimed, then Magistrates should have a greater awareness of the benefits of banning and be actively seeking to impose exclusion orders. The published data, the anecdotal evidence of the Magistrates interviewed, and the number of Magistrates who chose not to participate in the research due to their admitted lack of knowledge of banning, suggest a low level of both awareness and use of such exclusionary orders. If the repeated claims of the effectiveness of banning are correct, the broader scope of court-imposed orders should facilitate even more community protection and proactive control of disorderly behaviours.

### 7.3.ii Summary

The limited scope of the published banning notice data and the restricted media coverage of banning notices contributes to the lack of accountability and ongoing scrutiny of the banning provisions. These limitations, the issues to which they lead, and specific problematic components of the banning notice legislation were identified by the Magistrates interviewed for this study. Significantly, the discretionary police power to impose banning notices was a source of concern among the interviewees. When combined with the lack of appeal provisions, this created a perceived risk of the abuse of police powers and the discriminatory imposition of
banning notices, all within a context of diminished due process and procedural protections. Without effective judicial oversight of the banning notice provisions, the implications for police legitimacy and for the protection of individual due process rights are considerable. The perspectives offered by this sample of Magistrates differed significantly from the assumptions and expectations that predominated during the parliamentary debates of the banning notice Bills. Two participants, MagMet03 and MagReg04, preferred not to question the parliamentary decision to introduce police-imposed banning powers. Although both later disagreed with specific details of the provisions and their parliamentary justification. MagMet03 supported the right to appeal a police decision to impose a ban, and MagReg04 strongly believed that banning notices are a significant punishment.

The change of perspective evident in MagReg01’s views regarding a right of appeal, demonstrated the value of setting aside a ‘them/us’ (Waldron 2003) conception when considering the issue of banning. The initial view that an appeal would not be necessary reflected an admission that the interviewee had no empathy for the potential recipient. It was only when MagReg01 envisaged themselves as the recipient that the right of appeal gained significance. Adopting a more personalised perspective across the parliamentary debates could similarly affect analysis of such measures in relation to individual rights.

Across the interview participants the level of direct knowledge and experience of the police-imposed banning powers was limited. With such a low level of judicial awareness, lack of published data and limited media coverage, ensuring ongoing scrutiny that is sufficient to verify the appropriate and accountable application of discretionary police powers to ban is highly problematic. Some differences were evident in the perspectives offered, but the interview research highlighted a number of core concerns about the use of banning notices and the potential for abuses of discretionary police powers. With no review mechanism, the way in which banning decisions are made is completely opaque, and directly undermines the fundamental principle of the separation of powers (Zedner 2005; Hadfield, Lister & Traynor
2009), and the expectation that penalties imposed summarily must be fully accountable (Ashworth & Zedner 2008, 2011, 2012).

### 7.4 Chapter Conclusion

The findings documented in Chapters Five and Six reveal deficiencies with the processes of Charter compliance and parliamentary scrutiny of the banning notice provisions contained in the *LCRA Act 2007* and *JLA Act 2010*. The erosion of due process rights is a source of notable criminological concern (Zedner 2005; Ashworth 2006a; Ashworth & Zedner 2008). The analysis in this chapter confirms that, despite their tangible consequences for individual rights, there has been very little post-enactment scrutiny of the application of banning notices. Limitations in the published banning notice data are evident. Not only is the data insufficiently detailed to enable meaningful analysis, but mandated requirements were missing. The data recording the Indigenous status of banning notice recipients was flawed and did not enable accurate assessment of the impact of banning upon Indigenous Victorians. No information was published at all regarding the behaviours and offences for which banning notices were imposed. This is in direct contravention of the reporting requirements contained in the *LCRA Act 2007*. The data does not enable effective scrutiny of the use of police-imposed banning powers. Furthermore, the published data has not been subject to parliamentary analysis, despite expectations noted in 2007 that the data would ensure public scrutiny and appropriate use of the banning notice provisions. The deficiencies in the data have not been noted and the impact upon Indigenous recipients in particular has not been investigated. This is despite the opportunity presented by the extension of the banning notice powers under the JLA Bill 2010. Clear requests by the Green party member Pennicuik for data and evidence relating to the implementation of banning notices were ignored. No consideration of the published data was evident during parliamentary debates of the JLA Bill 2010, or since.

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47 Discussed in Chapter Six.
There has been considerable media coverage of the imposition and use of banning notices, and of associated issues relating to the NTE. However, only four of the 185 articles examined made any reference to due process issues embedded within the LCRA Act 2007 and JLA Act 2010. There has been no meaningful media analysis of the broader consequences of the provisions, of their impact upon individual rights or the potential misuse of discretionary police powers to ban. This aspect of the public scrutiny of the legislation has been non-existent.

There has also been no judicial oversight of the way in which individual notices have been imposed and no opportunity for the banning provisions, or their consequential erosion of the due process rights of individual recipients, to be legally reviewed. The interview research with Magistrates reiterated fundamental concerns about the banning notice powers. Specifically, the potential for discretionary police powers to be abused and the clear implications for due process protections were highlighted by a majority of respondents. Among the Magistrates interviewed, there was evident support for the principle of the right of judicial appeal against a banning notice and some criticism of the extension of the banning period to 72 hours. There was some disagreement about the primary purpose of a banning notice, but Attorney-General Hulls’ assertion that a banning notice is not a punishment was refuted by half of the participants. As well as lacking conceptual logic in relation to deterrence without the risk of punishment, the absence of consensus about the purpose and therefore the impact of banning, deepens concern about the limited scrutiny of parliamentary justifications for the introduction of the banning provisions. Analysis of court-imposed exclusion orders issued during the first five years of the LCRA Act 2007 suggested that banning was not a high priority measure among Magistrates. This contrasts with parliamentary expectations that banning was an essential mechanism to address alcohol-related disorderly behaviours, and ensure public safety. Significantly, there has been no objective analysis of the specific effectiveness of banning in relation to issues in the NTE.
The ongoing parliamentary and media failure to examine the formally published banning notice data, media indifference to the effect of banning upon individual rights, and an absence of independent oversight, combine with judicial concern about the risks and expansion of discretionary police powers to punish. The findings in this chapter compound the issues emanating from the shortcomings identified in the parliamentary scrutiny of the banning Bills. They confirm Crawford’s (2009) concern about the lack of meaningful analysis of discretionary police powers. There has been no effective scrutiny of banning as a matter of police practice, public debate or jurisprudence. Balance is not evident in the imposition, scrutiny or enduring impact of banning notices.
Chapter Eight

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8 Introduction

Victoria’s banning provisions were introduced to address concerns about alcohol-related disorder in and around licensed premises. Banning notices typify a move in recent decades towards discretionary, on-the-spot, pre-emptive police powers to punish, particularly in relation to issues of public order (see Chapter Two). The way in which banning notices are framed challenges the principle of the separation of powers, undermines longstanding expectations of due process in the administration of justice, and subordinates the individual rights of those accused of unacceptable behaviours (whether actual or potential) to the presumed rights of the community to feel safe.

To date there has been no analysis of either the enactment or the human rights consequences of Victoria’s banning provisions. This thesis has addressed an empirical and conceptual gap in the consideration and implementation of the police power to issue on-the-spot banning notices. The first two research questions examined the application of Victoria’s Charter of Human Rights and Responsibilities Act 2006 (‘Charter Act’) compliance processes, and the parliamentary debates of the banning Bills. The third question explored the ongoing monitoring of the use of discretionary police-imposed banning notices. The first three sections of this chapter discuss the key findings for each research question. In the final section the broader consequences and conceptual relevance of the research is considered, with reference to the notion of balance and its appropriateness to the administration of justice in the night-time economy (NTE). Research limitations are acknowledged and potential avenues of future study are noted.
8.1 Charter Act: Conceptualisation v. Operationalisation

The passage of Victoria’s Charter Act formalised the state government commitment to uphold civil and political rights. The Charter provides a framework for the consideration of rights-based issues within legislative proposals, and to promote accountable decision-making by public bodies. Any provision which proposes or causes a limitation of Charter protected rights should be acknowledged openly and justified fully within a Statement of Compatibility. The first four-year review of the Charter Act reaffirmed the importance of the effective scrutiny of legislative proposals (State Government of Victoria 2011, 2012; SARC 2011). Statements of Compatibility should ensure “human rights analysis is a transparent process” and provide all relevant information in a single document that is “readily accessible to both Parliament and the general public” (State Government of Victoria 2012, p.21). This reiteration of the need for comprehensive information, mirrors Williams’ (2007b) expectation that the Charter should increase government accountability for the assurance of individual rights. The operational requirements within the Charter Act also reinforce the notion that policy proposals, legislative development, statutory provisions and the actions of public bodies will be compatible with the human rights that the Charter protects. However, the analysis documented in Chapter Five highlighted a disparity between compliance expectations and their application to the banning provisions.

Detailed examination of the Charter Act compliance procedures for the Liquor Control Reform Amendment Act 2007 (‘LCRA Act 2007’)\(^1\) and the Justice Legislation Amendment ( Victims of Crime Assistance & Other Matters) Act 2010 (‘JLA Act 2010’)\(^2\) revealed limitations, flaws and omissions in relation to significant individual rights and the due process consequences of the provisions. Neither Statement of Compatibility (‘2007 Statement’ or ‘2010 Statement’) complied with the Charter requirement to include empirical evidence to justify the acknowledged limitation of

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1. Which introduced 24 hour police-imposed banning notices.
2. Which extended the permissible length of a ban to 72 hours.
the right to move freely, the rights to privacy and reputation, liberty and security, and
the presumption of innocence (as part of the rights in relation to criminal
proceedings). The relevance of banning to the Charter right to a fair trial was not
considered at all in either Statement.

The Statements also failed to justify the need for discretionary, pre-emptive police
powers to ban, or the efficacy of banning as a solution to behavioural issues in the
NTE. A sufficiently significant problem of alcohol-related disorder was presumed,
and banning notices regarded as an essential response. Despite the requirements of
the Charter Act 2006 (s7(2)), no alternative provisions were considered in the 2007
or 2010 Statements. A broadly stated need for collective security and the preservation
of public order was the only justification offered for the qualified acknowledgement
of the limitation of Charter rights. Material to validate the proposed limitations may
have been referenced during the initial ‘cabinet in confidence’ impact assessment.
However, the Charter Act presumes an open, transparent and public dialogue. Any
evidence or relevant data used during the early policy analysis should have been
made available to parliament. The reason why it was not is unknown, but the 2007
and 2010 Statements did not ensure comprehensive consideration of the banning
Bills.

The cross-party analysis undertaken by the Scrutiny of Acts and Regulations
Committee (SARC) also failed to effect adequate consideration of the way in which
banning notices undermine individual rights and due process protections. In 2007
and 2010 SARC documented concerns that banning notices may infringe freedom of
movement, liberty and the presumption of innocence, and may be inherently punitive
rather than preventative. However, these issues were side-stepped by the
government, addressed inadequately and/or too late. The remit, authority and
capacity of SARC to influence Charter compliance was rendered ineffective by
Ministerial responses either not being provided, or delivered too late to meaningfully
determine the formulation of the legislative provisions.
Human rights are not inviolable but the Charter Act makes clear that policy and practice across government departments and public bodies must ensure than any limitations upon Charter protected rights are empirically justified (Charter Act 2006, s7(2); Golder & Williams, 2007). The application of the Charter Act to the banning notice Bills epitomises concern about the purpose of formalising human rights in Charters: if they can be overlooked or ignored through equivocal or unchecked processes of legislative compliance (Ashworth & Redmayne 2010). The passage of the banning provisions highlight how the consideration of human rights in relation to the criminal law and crime control can be subject to political manipulation. In the case of banning, this led to the expansion of liquor control regulations and the inclusion of criminal consequences for the breach of police-imposed penalties which implicitly and explicitly undermine the due process rights of recipients.

The operationalisation of Victoria’s Charter Act reflects a parliamentary scrutiny model. Consideration of human rights should be embedded across the whole legislative process, rather than relying upon post-hoc assurances of compliance through mechanisms such as judicial challenges for alleged Charter Act breaches (Hiebert 1998, 2005; Feldman 2002, 2004; Debeljak 2011; VEOHRC 2012). This examination of Charter Act processes in relation to the banning Bills adds to a range of research which has explored the link between human rights treaties and the rights of citizens (for example, Franck 1995; Hathaway 2002, 2007; Landman 2004; Neumayer 2005; Gearty 2009; Hafner-Burton & Tsutsui 2007; Simmons 2009; Cole 2013). Victoria’s Charter was expected to ensure that statutory provisions are consistent with human rights (Williams 2006, 2007a, 2007b; Rodgers 2012). The Charter’s operational principles are consistent with the human rights that the Charter Act seeks to formalise and protect. However, exemplifying the ‘law in books law in action’ doctrine (Pound, 1920; Halperin, 2011), the strength of any Charter and its ability to both protect and enforce rights is determined by more than the words in the Act. Effective compliance is fundamental. Despite the clear procedures that underpin Victoria’s Charter Act, this thesis has identified how, in the case of the banning legislation, key Charter rights were circumvented, rendered ineffective or simply
The perceived political urgency of the reforms led to the erosion of individual rights in the (unsubstantiated and generally unquestioned) name of law and order. The disparity between the conceptualisation and the operationalisation of Charter compliance led to tangible consequential deficiencies in the scrutiny of the individual rights, and due process protections that were limited by the banning notice legislation.

The analysis of the banning notice Bills supports criticisms levelled against parliamentary scrutiny committees in general, and SARC in particular, of a limited capacity to ensure balanced and effective policy analysis. Feldman (2002), Gans (2009), Santow (2010), Evans and Evans (2011), and Rares (2013) contend that scrutiny committees lack authority and sufficient time to secure a meaningful influence upon legislative outcomes. Evans and Evans (2011) argue that parliamentarians do not possess the necessary skills to effectively identify human rights implications of policy proposals. The SARC response to the JLA Bill 2010 does provide a counter to Evans and Evans’ view. SARC identified significant concerns regarding the due process implications of the banning notice provisions that were not included in the 2010 Statement. However, SARC’s analysis did not change the legislative outcome. The ministerial response was evasive and documented in an Alert Digest that was published after passage of the *JLA Act 2010*.

Limitations embedded within the Charter processes and the supporting Guidelines were acknowledged by the Department of Justice employees interviewed for this thesis. There was no evidence found that the embryonic nature of Charter compliance procedures compromised the capacity of policy officers to undertake a thorough and accurate human rights assessment of the banning Bills. However, the interviewees conceded that the impact assessment process is not necessarily objective. Contrary to

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3 Similar findings were documented by Hall et al. (1978) regarding the assertions of a crisis which necessitated a tough legislative and operational policing response. With the media fanning a sense of crisis, the political response is framed as being crucial to the safety and well-being of the community (ranging from a perspective of national security with respect to current counter terrorism laws, to the local-level safety of patrons enjoying the Victorian NTE). Any opposition is positioned as political weakness, negligence, apathy or even support for those responsible for the ‘crisis’. 

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Williams’ (2006) expectation that the Charter enables human rights to be balanced against each other and against the need to protect the public from crime, in the development of the banning notice provisions the latter clearly took priority. The perceived need for the protection of the community was presented in the Statements and the limited government responses to SARC as being absolute. The findings of this thesis align with Zedner's (2007a) concerns that blunt assertions of human rights compatibility limits any effective challenge. This disjoint is typified by the unsubstantiated claims made by Attorney-General Hulls in response to SARC’s review of the 2010 JLA Bill: that banning is a protective and deterrent measure rather than a punishment, thereby rendering the right to a fair hearing irrelevant.

The Charter Guidelines emphasise that government must “balance individual rights against each other as well as against other competing interests” (Department of Justice 2008b, p.3). However, rather than balancing the provision of justice, deficiencies in the mandated scrutiny of the human rights implications of the banning notice provisions enabled the individual rights of recipients to be subordinated to an unsubstantiated claim that banning would address a politically-driven demand for public protection. The formal human rights policy that is embodied in the Charter Act was disconnected from substantive practice and the consequences for individual rights of discretionary police-imposed banning notices were impervious to meaningful scrutiny.

8.2 Political Expedience and Marginalising the ‘Other’

The second research question extended analysis of the pre-enactment scrutiny of the banning provisions, to examine the parliamentary debates of the 2007 and 2010 Bills. This section considers the way in which the debates constrained meaningful

4 Zedner’s (2007a) comments referred to the legitimation of Control Orders in the UK, but are equally applicable to Victoria’s banning provisions.

5 The key issues relating to individual rights and due process were introduced in the LCRA Bill 2007. The debates of the JLA Bill 2010 did not revisit the underlying due process concerns.
discussion of the effect of the banning provisions upon key individual rights, emphasised the notion of ‘them/us’ to justify the erosion of rights, and further compromised the parliamentary scrutiny of both Bills.

Despite assertions by Victoria’s Equal Opportunities and Human Rights Commission (VEOHRC) (2010, p.96), that critical analysis must be conducted thoroughly even for the most urgent legislative provisions, time pressures restricted the scrutiny of both banning Bills. In 2007 a stated need to respond rapidly to the perceived issue of alcohol-related disorder in the NTE\textsuperscript{6} led to compromises over the right of appeal, which removed a key due process protection for banning notice recipients. The speed of enactment of both Bills confounds Waiton’s (2008) contention of the ‘nonchalant drift of polices through Parliament’, but the substance of the debates confirms his underlying concern that parliaments fail to adequately consider how policies affect individual rights. Parliamentary scrutiny of legislation for and on behalf of Victorians should not be curtailed by what can be construed as arbitrarily imposed timelines. The time pressures combined with flawed assertions of Charter compatibility to significantly limit the effectiveness of pre-enactment scrutiny of the banning provisions.

In 2006 the Victorian Parliamentary Drugs and Crime Prevention Committee (DCPC) concluded that “all policies and strategies that seek to address and reduce alcohol-related harms must be evidence-based” (2006, p.xi). A year later, and despite the \textit{Charter Act 2006} s7(2) requirement to fully justify any limitation of a Charter right, the \textit{LCRA Act 2007} passed through parliament without any empirical support for either the stated need or presumed effectiveness of the banning provisions. The only substantive due process right that was discussed during parliamentary debates in 2007 related to the right of appeal against a banning notice, an issue not identified in the 2007 Statement of Compatibility. Despite principled support from Opposition members, this key due process requirement was conceded as part of the time-driven

\textsuperscript{6} Specifically to enable two key entertainment precincts in Inner Melbourne to be declared as designated areas before the 2007 Christmas and New Year holiday period.
compromises, and was not revisited during parliamentary scrutiny of the JLA Bill 2010.

At the conclusion of the parliamentary debates of the LCRA Bill 2007 one Assembly member observed: “At this late hour, on our last sitting day before Christmas, this should be seen to be a celebration of Parliament working” (Legislative Assembly 2007d, 4408 [McIntosh, Liberals]). The pressure of limited time that led to the abandonment of principled amendments was regarded by McIntosh as evidence of parliament working effectively. This comment highlights the primacy of expedience in the legislative process, whereby the longstanding due process principles of appeal and a fair hearing were subordinated to a greater need to pass the 2007 LCRA Bill. The detail of the banning notice provisions were compromised to the incumbent government’s need to be seen to do something about alcohol-related issues in the NTE.⁷

Victoria’s banning provisions embody a number of recurring themes about the growth of summary justice, expressed across a range of relevant research documented in Chapter Two. In particular, the passage of the LCRA Act 2007 personifies Crawford’s (2009) depiction of the ‘net-widening’ effect of policing by discretionary summary justice. Banning notices permit Victoria Police to punish individuals for a range of subjectively assessed behaviours, without the protection of an independent right of appeal. This undermines the principle of the separation of powers, considered by Zedner (2005, p.525) as “one long lauded means of protecting democratic freedom.” Banning amplifies the issues Burney (2002, 2006), Ashworth (2004a), Von Hirsch and Simester (2006) and others identified with similar prohibitive measures, such as the dispersal order in England and Wales.⁸

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⁷ Although beyond the scope of this thesis, the compromises agreed in the passage of the LCRA Bill 2007 prompts more general consideration of the nature of compromise in parliamentary debate. For example, examining whose interests are served and whether the pressure of time should ever supersede adequate debate of principles or full consideration of alternative policy proposals.

⁸ Discussed in Chapter Two, such measures enable discretionary police powers to be applied to loosely framed behaviours. Dispersal orders may be imposed anywhere with blanket restrictions, preclusions and preventative prohibitions (Crawford & Lister 2007)
decision to impose a banning notice is entirely at the behest of a police officer, but with no possibility of a court-based appeal against its imposition.

The dilution of individual rights is compounded by the permissible pre-emptive imposition of banning notices. In response to the repeated assertions of a need to re-balance the administration of justice to ensure public safety in the NTE, banning notices can be imposed without any discernible criminal act being committed. The deterrent, restorative and/or punitive effect of a banning notice is predicated upon its immediate imposition. The practicality of enabling an appeal before the ban takes effect is acknowledged. However, this should not preclude a right of subsequent independent or judicial review of a police decision to ban. Under Queensland’s Safe Night Out Legislation Amendment Act 2014 a discretionary police-imposed banning notice may last for ten days, significantly longer than in Victoria. However, a ban must first be approved by a more senior officer, which adds an additional layer of immediate executive scrutiny. Recipients may also seek an independent review of the imposition of the ban via the Queensland Civil and Administrative Tribunal. Victoria does not permit a similar clear right of appeal in its banning legislation.9

In the context of ‘re-balancing’ the provision of justice, any trade off between rights and security must be closely examined to determine whether security is actually enhanced, or if the result is more symbolic or political (Waldron 2003; Zedner 2003, 2005, 2007a, 2007b; Michaelsen 2006). The parliamentary discourse made repeated claims of the effectiveness of banning notices in tackling issues of disorder in the NTE. However, no benchmarking was undertaken prior to their introduction and there has been no research into the specific consequences, deterrent effect, or success of banning notices since. Their passage mirrors trends in other studies that significantly pre-date the introduction of the banning legislation, such as Fox and Freiberg (1989). The flaws in the Charter compliance analyses were not challenged, and relevant concerns raised by SARC were overlooked or side-stepped. Even a

9 More complex forms of legislative and administrative law review are possible, but there is no option of appeal against the imposition of a banning notice.
direct request for evidence to justify the extension of banning notices to 72 hours, by Green’s member Pennicuik in 2010, was ignored by the government repeatedly.

If evidence for the need and effectiveness of banning was available it should have been presented. If no evidence existed, then the measures should not have been enacted. Attorney-General Hulls’ argument, in 2010, that banning powers needed to be strengthened to enhance their deterrent effect, casts further doubt upon the continued claims that banning was both necessary and effective. Available records indicate that only Pennicuik demonstrated any awareness of this logical anomaly. Prior to the debate of the JLA Bill 2010 two reporting periods of banning notice data had been published (2007-08 and 2008-09). Within the justifications for extending the deterrent effect of banning, Hulls cited the occurrence of multiple banning notice recipients. However, there is no evidence that the substantive banning notice data was analysed and the actual effect of banning upon alcohol-related disorder in the NTE was not addressed during the parliamentary debates of the JLA Bill 2010. Furthermore, in 2007 it had been made clear that the value of banning notices lay in the immediate removal of troublesome individuals from problematic situations. The stated rationale for 72 hour bans was to increase the deterrent effect. Yet proponents of the JLA Bill 2010 did not explain how, for example, banning someone from the Melbourne CBD until Tuesday for behaviours perpetrated on a Saturday would be more of a deterrent than a 24 hour ban.10 Other than by ‘blunt assertion’ (Zedner 2007a), Hulls also failed to explain why a 72 hour ban does not constitute a punishment.

The parliamentary debates of the banning provisions reveal an underlying differential approach to the assurance of individual rights. Rights and due process protections should not be more or less applicable to any individual or demographic group. The Charter Act “provides equal protection to all people in Victoria” (Department of

10 This logical flaw was picked up during the interviews with Magistrates. It is part of a broader question about the appropriateness of deterrence arguments in the context of alcohol and drug consumption. The behaviours that the measures seek to deter may not be based upon rational decision-making or consideration of potential consequences.
Michaelsen’s (2006, 2010) proportionality test, which should ensure that a state-initiated response to undesirable behaviour is necessary, suitable and appropriate, was not evident during consideration of the banning notice provisions. In 2007, a number of speakers did reference Victoria Police crime statistics and associated data relating to alcohol-related issues. However, the data used was largely selective, taken out of context, and lacked objective analysis. The overriding justification across the parliamentary debates, in 2007 and 2010, was a repeated but unquantified need to re-balance the provision of justice in the NTE to protect the broader community of potential victims of alcohol-related disorder. The actual effect of banning notices upon recipients and community safety was not examined during the debates in 2010. The passage and extension of Victoria’s banning provisions exemplify the risk identified by Waldron (2003) and Zedner (2003, 2005, 2007a, 2007b), whereby unsubstantiated demands for public security or community protection are used to legitimise the circumvention of individual rights.

Throughout the parliamentary debates the need for public protection embodied the presumed moral axiom of the primacy of the rights of the ‘in group’ (Chilton 2004, p. 127). For the banning notice Bills this represented the wider law-abiding community who (like parliamentarians) are intolerant of, and deserving of protection from, undesirable behaviours. Descriptors such as ‘hoons’, ‘morons’ and ‘troublemakers’ used across the parliamentary debates, were rhetorical devices to highlight and marginalise the undesirable, in a way that was relatable to the majority of Victorians. As such it is easier to limit the rights of those of whom the majority intrinsically do not approve - such as the ‘them’ who engage in alcohol-related disorder - against the interests and potential safety of the ‘us’ who comprise the broader community. The image created by these descriptors conveys a perceptible sense of disorder, unruliness, recalcitrance and general non-conformance with acceptable and decent standards. This subjective construction of the undesirable is highlighted by opposition to other measures which also undermine due process rights. Most notably,
an expansion of pre-emptive exclusionary police powers in 2014\textsuperscript{11} focused upon participants in industrial disputes, and was vehemently opposed by the Labor proponents of the banning provisions. Unlike the undesirable ‘them’ receiving banning notices in the NTE, those who risked being ‘moved-on’ by the 2014 police powers were more likely to be aligned with the Labor cause and not so easy to marginalise. The ‘them/us’ divide becomes blurred when the individual rights of ‘us’ are threatened more directly.

By describing those to whom the banning notice restrictions were directed as ‘troublemakers’ or ‘morons’ the measures were positioned to target behaviours that were not necessarily criminal, but for which tolerance was increasingly limited. The actual behaviours exhibited in relation to such labels may be trivial, and not necessarily commensurate with the fear and risk embedded in the debates.\textsuperscript{12} The effect was to lower the threshold for the definition of the undesirable ‘others’ in the NTE. A police determined suspicion of potential disorderly behaviour, the interpretation of which may be vague, subjective and unpredictable, was sufficient for the imposition of a banning notice. The parliamentary discourse reinforced the notion that only those who deserve a ban will receive one, with the well-behaving majority enjoying protection. This perspective was epitomised by the observation during the 2007 debates: “is a 24 hour ban really so bad?” (Legislative Assembly 2007c, 4072 [Thomson, Labor]). The banning provisions were legitimised with an innate sense that ‘the majority’ do not need to worry about the consequences of how it is done, because ‘the majority’ will not be affected by the measures, except to be safer in their communities. However, being a ‘moron’ or a ‘troublemaker’ does not justify the erosion of human rights. “Human rights are for all people, not just our friends and family… [they include] the unpopular, the unworthy, the feared and despised,” regardless of their behaviours (Burnside 2006, p.3).

\textsuperscript{11} The \textit{Summary Offences and Sentencing Amendment Act 2014} enabled Victoria Police to issue pre-emptive move-on orders from public places in anticipation of a possible obstruction or a reasonable apprehension of future violence (see Chapter Six).

\textsuperscript{12} Although due to omissions in the published data, the precise reason for the imposition of banning notices is not known (see Chapter Seven).
The way in which the banning notice legislation passed through the Victorian Parliament, the nature of the debate and the detail of the final provisions had significant consequences for individual rights. The identification of the need for a right of appeal, and some disquiet about the possible effect of the legislation upon vulnerable groups were acknowledged in the 2007 debates, and concerns identified by SARC were noted during the debate of the JLA Bill 2010. This suggests that the Victorian Parliament had some capacity to identify issues missed by the Charter compliance process. However, minimal consideration of the potential consequences of banning notices upon due process, or the apparent lack of supervision and accountability in their implementation, was evident across the debates for both Bills. The pressure of time and a seemingly incontestable belief in the existence of a problem about which ‘something must be done’ (Ashworth 2006b; Crawford 2013), rendered parliamentary scrutiny of both the LCRA Bill 2007 and JLA Bill 2010 limited and ineffective, and ensured that the political drive to introduce banning notices prevailed.

8.3 A Vacuum of Accountability?

The final research question considered whether post-enactment public scrutiny has enabled meaningful analysis of the imposition and human rights consequences of Victoria’s banning provisions. The importance of public engagement with human rights was emphasised by VEOHRC.

The Charter is grounded in the notion of a human rights dialogue, in which an ongoing public ‘conversation’ or exchange of views about human rights takes place between the Victorian community, government, Parliament and the courts. The human rights based approach to government emphasises the importance of the community understanding human rights principles – both their scope and their relevance (2009, p.29).

However, despite these expectations, VEOHRC (2009) reported limited public scrutiny of legislative developments and a near absence of a community perspective regarding their human rights implications. Crawford (2009) expressed particular concern about the lack of ongoing analysis of UK discretionary police-imposed
powers to punish. With no evidence of proactive scrutiny by the Victorian Parliament, Victoria Police or the media, the analysis documented in Chapter Seven demonstrates that banning notices typify Crawford’s perceived deficiency. For example, it was only as a result of interactions undertaken for this thesis that the routine application of 72 hour bans in the Melbourne CBD was identified, contrary to the requirements of the *JLA Act 2010* that longer bans would only be imposed in appropriate circumstances.\(^{13}\)

The imposition of banning notices emphasises the significance of accountability in the use of police discretion. The formal publication of banning notice data was regarded during parliamentary debates in 2007 as essential to monitor the appropriate application of the legislation. The data, and its public scrutiny, was to be a safety net for police accountability and the assurance individual rights. Analysis of the first five years of data confirmed that the detail was insufficient to effect accurate monitoring, assessment of usage patterns, or identification of the consequences for specific groups (for example, by age, location, homelessness or Indigenous status). The mandated records relating to the Indigeneity of recipients are vague. The widespread use of ‘unknown’ to categorise the Indigenous status of recipients hides the potential over-policing of Indigenous Victorians,\(^{14}\) and which could demonstrate another dimension of the ‘them/us’ divide. A disproportionate number of bans given to Indigenous Victorians does not necessarily point to ethnic or racial profiling, but the opacity of the data precludes meaningful analysis of the disparity that is evident. The repeated omission of the offences for which banning notices were imposed also renders assessment of their use impossible. Attorney-General Hulls’ expectation that increasing the permissible length of a ban to 72 hours would improve the deterrent effect is not born out by the data. When compared with the period covered by Hulls’ concerns, the data for the three years after the *JLA Act 2010* indicated that the proportion of multiple banning notice recipients doubled. That an increasing

\(^{13}\) Documented in Chapter Five.

\(^{14}\) Which has been a notable issue for Victoria Police (see Chapter Seven, footnote 16).
proportion of offenders were being banned on more than one occasion does not support the individual or general deterrent effect of banning notices.

It is not known why these shortcomings in the published data have not been identified by the Victorian Parliament. In particular, given the legislated requirement to monitor the effect of banning upon disadvantaged groups, it is a clear failure of scrutiny that the data has not prompted a reassessment of way in which the banning provisions are implemented. The parliamentary debates in 2007 identified the need to monitor the use of banning notices. Despite revisiting the legislation in 2010, the deficiencies noted in this research, in particular the way in which Indigeneity is recorded, the failure to monitor the effect on homeless people, and the absence of offence specific data, appear to have been missed. There has been an “ominous silence” (Young 2010, p.47)\(^\text{15}\) about the use and consequences of Victoria’s banning notices. Irrespective of their value in addressing issues in the NTE, these shortcomings should be resolved as a matter of urgency.

An examination of Victorian newspapers for the period 2007-12, revealed a lack of concern for the due process consequences of banning notices. The media coverage mirrored the parliamentary debates in both the implied assertion of the need for banning notices, and the demonising of likely recipients. Alcohol-fuelled challenges to community safety, and a focus upon individual tragedies leveraged the dramatic value of atypical incidents to reinforce anxiety about disorder in the NTE (Sacco 1995). This heightened a generalised sense of fear to implicitly support the banning provisions (Altheide 2006; Beale 2006; Mason 2007; Simon 2007; Drake 2011). No consideration was given to any consequences of banning upon broader issues, such as individual rights. The political perspective prevailed with the additional police powers presumed to be necessary and effective.

\(^{15}\) Despite a lack of meaningful data regarding the reasons for and the recipients of police-imposed summary penalties in England and Wales, Young (2010) highlighted how their use continued to expand within a justifying ‘crime control’ rhetoric.
Despite the passage of a discretionary, pre-emptive police power there has been no post-hoc legal review of Victoria’s banning legislation or of the imposition of individual banning notices. This reflects a serious failing of pre-enactment and post-enactment scrutiny. To explore the gap in the judicial scrutiny of the banning provisions, interviews with Magistrates gathered their perspectives and perceptions of police-imposed discretionary banning notices. The difficulty that was encountered in securing interview participants provided a valuable insight into the general lack of awareness of the banning provisions across the Magistracy. That judicial cognisance of the legislation is low emphasises the absence of meaningful post-enactment legal oversight. The much lower use of court-initiated exclusion orders, when compared with police-imposed banning notices, appears to contradict assertions across the debates for both Bills that banning is an essential tool for the NTE. The absence of objective assessment of Victoria’s banning provisions is acknowledged. However, if banning is accepted as effective in the control of alcohol-related disorder, then it is something of an anomaly that so few exclusion orders are imposed in relation to the more serious behaviours likely to be dealt with by Magistrates.

The majority of Magistrates interviewed expressed concern about the lack of accountability in the implementation of banning notices and the clear risk of abuse in their use. Although no specific incidents were reported, the discretion afforded to police officers and the absence of effective judicial, parliamentary or media oversight makes it unlikely that issues of inappropriate or disproportionate use of banning will be visible. With respect to the only avenue through which an individual ban can be challenged, via an appeal to a more senior police officer, it is not known how many appeals are made, what reasons are given or the outcomes.

Within a general expression of concern about the risks associated with the discretionary imposition of banning notices, the Magistrates agreed with the Liberal/Nationals opposition in 2007 that a right of appeal was essential. Labor proponents of LCRA Bill 2007 contended that an appeal is unnecessary and/or unworkable. If the primary aim of a banning notice is to manage unacceptable behaviour and to
diffuse potentially problematic situations, delaying its imposition could remove any immediate beneficial effect of the ban. However this should not preclude a later appeal. Similarly, where a penalty is imposed upon an individual, the time it may take to document the evidence should not be used to justify not doing so. Banning notices are recorded on the Victoria Police Law Enforcement Assistance Programme (LEAP) database and remain indefinitely. If a recipient has a genuine objection it is difficult to rationalise the absence of a right of clear line of independent review of the decision, outside of the domain of the police to enable a banning notice record to be expunged from their LEAP record. The Magistrates interviewed demonstrated principled support for the right of appeal, and offered several practical solutions. A number of the appeal options put forward by the Magistrates, such as retrospective court or VCAT review, were considered during the 2007 parliamentary debates. Queensland’s 2014 banning provisions demonstrate that an immediate review and subsequent independent appeal of discretionary police powers are both appropriate and achievable.

An incidental finding from the interview research relates to the claims by Attorney-General Hulls in 2010 that banning notices are a deterrent and not a punishment. This is discussed in Chapters Five and Seven. Hulls’ assertions, that the purpose of banning was public protection, are empirically and conceptually contentious. Analysis of the published banning data demonstrated his expectation of an increased deterrent effect due to 72 hour bans was erroneous. Although opinion was divided, half of the Magistrates disagreed with Hulls’ claims and considered bans to be a punishment. As well as casting doubt on Hulls’ justifications for banning, perspectives offered by some of the Magistrates highlight a significant logical flaw. For a deterrent to be effective, a sufficiently certain and demanding consequence needs to be in place (Von Hirsch et al. 1999; Nagin & Pogarsky 2001; Tonry 2008).

16 The banning notice form (see Appendix B) already requires police officers to note their ‘grounds for suspicion.’ Adding the precise time and location, for the possible review of CCTV or police body camera footage, and the names and contact details of witnesses, on a separate record if necessary, would not have to be a significant additional burden.

17 See Chapter Two, footnote 21.

Chapter 8: Discussion & Conclusion
If the ‘consequence’ of a ban is not a punishment it is unclear how a ban would constitute a deterrent. Furthermore, Hulls’ assertions of the deterrent effect of banning conflated specific and general deterrence. The thesis findings in relation to multiple banning notices refute the inference of specific deterrence. Although there has been no research examining the general effect of the banning provisions upon alcohol-related disorder in the NTE, no clear deterrent effect was evident in the banning notice data.

The failure of the Victorian Parliament to scrutinise the published data, and media indifference to the consequences of banning appear to both reflect and promote a lack of public interest in the due process issues embedded within the banning provisions. This belies the purpose of a meaningful human rights dialogue, and the specific expectations of VEOHRC. Unlike legislative responses to high profile issues, such as terrorism, banning notices have received very little public attention. The analysis that has occurred, evidenced by the newspaper coverage, presents an overwhelmingly positive view of banning - as a valid, necessary and appropriate response to issues of alcohol-related violence in the NTE. Neither the actual effectiveness of banning, or any of the fundamental rights-based issues, have been examined publicly. Instead, the procedural consequences have been subordinated to the political and media drive to do something about the stated ‘crisis’ in the NTE. There may be a genuine public apathy to the due process issues. The power of the media to influence public perceptions and opinion (Gelb 2006; Roberts & Indermaur 2009), and the intrinsic link between politics, power and the media (Surette 2015) are both acknowledged. However, the effect of the ‘them/us’ discourse, the associated demonising of the undesirable, and the consequences for meaningful public debate about fundamental rights are unknown.

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18 A full discussion of deterrence theory and sentencing practices lies beyond the scope of this analysis. However, future research could explore the perceptions of banning notice recipients, and the effectiveness of banning in addressing alcohol-related disorder in the NTE.

19 For example, the federal *Telecommunications (Interception & Access) Amendment (Data Retention) Act 2015*, justified as being essential for counter-terrorism and serious crime investigations, generated widespread concern about its expansive reach and privacy implications.
The political and media framing of alcohol-related issues in the NTE appears to have generated sufficient fear among the ‘law abiding’ majority to ensure a vacuum of concern about the human rights consequences of Victoria’s banning provisions. Parallels can be drawn with the work of Hall et al. (1978) in relation to media coverage creating a ‘crisis’ which necessitated and justified significant legislative and policing change. The findings typify Crawford’s (2013) concern that reactive policy development is driven by a desire for governments to be seen to do something in response to high profile issues regardless of the possible consequences for individuals, or overall conceptions of due process rights. It also demonstrates Valverde’s (2009) contention that issues dealt with at the lower levels (in this case on the street by police officers) rarely raise concerns relating to human rights. Despite the formalisation of individual rights in the Charter Act, their application is limited by the different contexts in which rights exist and operate. Banning notices are a discretionary police power that may be imposed without visibility, accountability or meaningful monitoring of their impact upon individual rights.

Whether or not a banning notice is a punishment, the effect of a ban is analogous to other infringement and criminal penalties. A banning notice recipient is restricted in their freedom to move and to exercise their usual right to enter a public space. Breach of a ban, to which reverse onus provisions apply, may carry criminal consequences upon conviction (from a fine to possible imprisonment in the event of persistent non-payment). The way in which banning notices may be imposed fundamentally dilutes individual due process rights. Given the limitations that were evident in the parliamentary scrutiny of the banning notice Bills, and the failure to offer clear, measurable and objective justifications for the dilution of the individual rights of banning notice recipients, ongoing scrutiny of the use to the discretionary power to ban is essential. However, across these three domains of scrutiny the public examination of the actual operation of police-imposed banning provisions is clearly compromised. When considered in the context of the consequences for due process rights and protections, the significance of such a lack of political and public accountability increases.
8.4 Conclusion: Is a 24 hour ban such a bad thing?

Victoria’s discretionary, pre-emptive police-imposed banning notices undermine the individual rights of recipients. They blur the boundaries of criminal, civil and administrative justice (Crawford 2003, 2009, 2013) but lack visibility and accountability in their application. The banning provisions were enacted and extended despite deficiencies in the application of Charter Act compliance requirements, incomplete parliamentary scrutiny, evident time pressures and concessions, a presumed and unproven need, and without evidence of the effectiveness of banning as a method to ensure public safety. The discretionary police power to ban has been subject to no meaningful ongoing analysis and, crucially, the legislation and the imposition of individual notices have not been tested or validated by judicial oversight. Banning notices are a quasi-criminal provision within an administrative regulatory Act. Had banning been introduced as a mechanism within an amendment to Victoria’s Crimes Act 1958 or Summary Offences Act 1966 then a right of legal appeal would have been much clearer. By positioning banning notices within the Liquor Control Reform Act 1998 the processes of judicial oversight of discretionary policing activity and criminalisation are redefined. The option of appeal is moved away from the Magistracy, ensuring any possible administrative review is far from straightforward.

A key justification for the introduction of Victoria’s banning notice provisions was to ‘re-balance’ the administration of justice in the night-time economy (NTE). The declared need to ensure that the broader community was safe from the perceived risk posed by the alcohol-fuelled minority, legitimised a pre-emptive, on-the-spot penalty that cannot be reviewed through conventional criminal or administrative processes. There is a disconnect between the use of balance to explain the need for the banning provisions and to normalise their effect upon the due process rights of individuals. Parliamentary scrutiny of the LCRA Bill 2007 and the JLA Bill 2010 should have ensured that a sufficiently evidenced need to introduce banning notices was ‘balanced’ against full consideration of the due process consequences for banning
notice recipients. Apart from a clear forum for judicial review of the imposition of a ban, none of the significant due process limitations contained within either banning Bill were meaningfully discussed in parliament. Banning notice recipients were not afforded the protection of a presumption of innocence, legal representation, criminal appeal rights or any opportunity to offer a defence for the behaviours of which they were accused. Pre-emptive, on-the-spot banning notices are manifestly unbalanced. They conflate pre-emption, intent, deterrence and punishment, and reconfigure the meaning of individual rights in the provision of justice. Rather than framing the response to alcohol-related disorder as a criminal law issue in and of itself, a discretionary police power to punish was introduced under the auspices of the Liquor Control Reform Act 1998, within which due process protections were subsumed.

Discretion is an inherent and necessary aspect of policing. However, balanced justice and discretionary police powers are not mutually exclusive. Police practices should enable the community to be and feel protected, while the rights of individuals are respected. Effective and balanced policing requires a clear evidence-base from which practices can be monitored and assessed. Despite the annual publication of data to enable the use of discretionary police-imposed bans to be monitored, there is no evidence of its proactive scrutiny by the Victorian Parliament or Victoria Police. Furthermore, clear flaws and omissions in the published data were not identified or challenged by the Victorian Parliament. Of particular concern is that banning may have a disproportionate effect upon Indigenous Victorians. However, the data does not enable an accurate assessment of either individual or collective recipients of bans. In the light of admissions by Victoria Police of racially discriminatory practices, during the time that the banning provisions were introduced, and the clear risk of banning for other vulnerable groups, future research should seek to establish a clear understanding of ‘who’ are the recipients of banning notices, and what effect banning has had specifically and more generally.

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20 See Chapter Seven, footnote 16.

21 Beckett & Herbert (2008, 2009, 2010a, 2010b) highlight the particularly deleterious effect of banning mechanisms upon the homeless.
The absence of transparent, balanced and rigorous pre- and post-enactment scrutiny of Victoria’s banning provisions has been highlighted throughout this thesis. As well as the specific consequences for recipients, the shortcomings in parliamentary and public scrutiny of the banning notice powers have a number of broader ramifications for the balance of individual rights and community protection.

Firstly, banning notices set a precedent in Victoria for the dilution of individual rights via a pre-emptive penalty issued in the name of public protection, for behaviours that may be trivial. Pre-punishment mechanisms had previously been directed towards serious risks to public safety posed by, for example, sex offenders or the post-9/11 terror threat. However, measures such as Supervision Orders under Victoria’s *Serious Sex Offenders Monitoring Act 2005* and Control Orders introduced under the *Anti-Terrorism Act 2005* (Cth)\(^\text{22}\) required court approval and were not imposed directly by Victoria Police. The discretionary banning notice provisions lowered the threshold for preventative justice to include public disorder in the NTE, determined by a police officer. Since 2007, banning notice powers have expanded temporally and spatially. This expansion built upon the flawed rationale applied to their initial implementation through the *LCRA Act 2007*. The original legislation was not tested or reviewed when the permissible length of a banning notice was extended in 2010. The fact that the banning notice powers existed was used by the incumbent government in 2010 to justify their extension. Zedner noted that any challenge to due process rights must be “proportionate to the risks faced” (2007c, p.266). If the curtailing of individual rights can ever be justified, it should be an exceptional measure in response to a serious and urgent risk, for which there is both a demonstrable need and a clear articulation and monitoring of likely consequences. The normalisation of the erosion of due process rights through the banning provisions confounds common law principles and expectations of democratic governance. The *Charter Act* created a framework for the protection of human rights, yet the individual due process rights of

\(\text{---} 22\) See Chapter Two, footnotes 37 and 38.
banning notice recipients have been ‘hollowed out’ (Hallsworth & Lea 2011, p.153) within this framework.

The growth of Victoria’s discretionary police powers highlights a second broader concern. Unsubstantiated notions of ‘them/us’ in the NTE were reinforced across the parliamentary and media discourse of the banning provisions. The rhetoric implicitly justified a two-tier rights framework, with those in the majority ‘us’ expecting and receiving greater protection than the undesirable minority, or ‘them.’ Mechanisms claiming to ‘re-balance’ the criminal process in favour of the majority ‘good’ population have generated a wealth of research and discussion, which is documented in Chapter Three. Whatever the merits of the proposed banning notice measures and their expected benefit for the broader community, the effect of such provisions on the perceived ‘problem-causing’ minority should still matter. As Zedner (2003, 2005, 2007a, 2007b) contended any erosion of individual rights in the interests of collective security must be carefully scrutinised. Waldron (2003) conceived the protection of civil liberties as a fundamental element of preventing abuses of state power. The specific risk of abuses of police banning notice powers were noted by Magistrates interviewed for this thesis. The general lack of scrutiny and accountability for the use of the banning provisions adds to the risk of their discriminatory or otherwise inappropriate imposition.

As well as reinforcing the ‘them/us’ division to legitimise the due process consequences of banning notices, the provisions explicitly lowered the threshold of behaviours regarded as undesirable and for which a penalty may follow. Many of the behaviours targeted, such as being disorderly or quarrelsome, are not objectively assessable. This compounds the difficulty of enforcing a human rights focus to police interactions. Despite the discourse of balance, the individual rights of those accused of minor offences have been eroded. The parliamentary and media rhetoric suggests that the rights of those who may be affected by a banning notice are secondary to the politically framed needs of the community to feel and to be safe. When compared with other provisions that undermine individual rights in the name of public safety,
such as the response to the post-9/11 terror threat, the issues embodied within the banning provisions may seem insignificant. However, due process protections and their links with individual human rights are not relative. Although there are ongoing challenges to some due process rights, such as the right to silence, defendants accused of the most serious offences expect and receive the fundamental protections of presumed innocence, legal representation, a fair and open trial. Yet these core rights are diluted in Victoria for individuals accused of much less serious behaviours. The anomaly is made even more stark by the permissible pre-emptive nature of banning provisions, which can be imposed in anticipation of ‘problematic’ behaviour. Key rights are denied on the basis that an individual may do something unacceptable, in the discretionary determination of a police officer. This conflation of intent and punishment disregards the core purpose of the Charter Act, the separation of powers and expectations of due process.

The third broad concern arising from this thesis reflects the apparent lack of appetite to monitor the effect of the banning provisions, upon individuals or behaviours. Despite the assertions made across the parliamentary debates of both banning Bills, there has been no explicit examination of the effectiveness of banning notices in addressing and controlling alcohol-related disorder. Given the consequences for the individual rights of recipients, and the continued increase in the number of declared designated areas across Victoria, it is a significant oversight that the actual deterrent and restorative effect of banning in the NTE has not been subject to objective analysis. In addition, ongoing scrutiny is essential to ensure that police officers adhere to the principles of procedural justice and evidence-based policing (Sherman 1998; MacCoun 2005; Bradford, Murphy & Jackson 2014), and to confirm that police processes and behaviours uphold individual human rights and the protective elements of the criminal law. This thesis has identified that there are insufficient mechanisms available to enable such scrutiny. Victoria Police is a visible and high
profile component of the criminal justice system. Given the lack of scrutiny of the application of the banning notice powers, there is a clear risk that their use may be inappropriate, unfair and/or discriminatory. The potential consequences for police legitimacy and, more significantly, individual rights, are considerable, but currently unknown.

As well as issues of Charter Act compliance, parliamentary and public scrutiny, there is an ongoing risk of proceeding with, and augmenting, legislative provisions on the basis of an assumed need and presumed effectiveness. The ‘drive to do something’ about alcohol-related disorder in the NTE conflated and juxtaposed the principles-based Charter Act and rhetoric-driven banning legislation. Victoria’s banning notice measures incorporated criminal provisions into administration mechanisms relating to liquor control. They undermine proportionality and the separation of powers, redefine the meaning of due process under the criminal law, and dilute the quality of justice. Although part of a growing trend towards pre-emptive justice, banning notices appear to sit outside of established models of the criminal process. The way in which the provisions are framed combines pre-emption and pre-punishment with aspects of the crime control and police power models (Packer 1964, 1988; Duff 1998; Dubber 2002, 2005, 2006, 2011; Dubber & Valverde 2006). A blended ‘pre-crime: crime-control’ model prioritises the potential future victimisation of the broader community over the due process rights of the accused. Paradoxically though, the banning provisions sanction the circumvention of individual rights to balance the administration of justice. In their current format, Victoria’s banning notices are the antithesis of balance.

The expectation and needs of community safety are acknowledged, but the drive to ‘re-balance’ the provision of justice in Victoria’s NTE traded the rights of the undesirable against the needs/rights of the broader community. The needs of potential or actual victims and the rights of alleged offenders do not have to be mutually exclusive. Whatever the perceived risk, the subordination of the due process protections of banning notice recipients is not a necessity. Queensland
demonstrates a solution that more effectively balances both ‘needs’. With the passage of Victoria’s *Summary Offences Amendment (Move-on Laws) Act 2015*, the incumbent Labor government has demonstrated its capacity to correct legislative measures which undermine due process rights and risk marginalising vulnerable Victorians. Victoria’s banning notice provisions should similarly be amended to ensure an effective balance of the needs of both prospective victims and potential offenders. The most logical enhancement is to enable a straightforward post-hoc, independent appeal. This would not correct all of the issues documented in this thesis, but would facilitate a more balanced outcome better aligned to the *Charter Act*, due process and the meaningful provision of justice.

Alcohol-related disorder in the NTE can have tragic consequences. However, the upholding of individual rights and due process is fundamental to open and transparent justice, and meaningful scrutiny of police discretionary powers. The assurance of human rights, formalised in Victoria by the *Charter Act*, should act as a necessary check on the power of government and executive law enforcement agencies. That Charter rights can be limited and circumvented without evidence or scrutiny, has legitimised the erosion of longstanding principles. The steady growth of pre-emptive police-imposed punishment poses a particular threat to the principle of separation of powers and the administration of justice. When there is no provision for independent or judicial review of police decisions the seriousness of the threat intensifies. Packer emphasised that the way in which the rules of the criminal process are implemented is as significant as the rules themselves (1968, p.171). It is simplistic and disingenuous to argue that public protection necessitates and justifies the erosion of individual rights. However urgent or compelling, any provision that undermines the separation of powers or circumvents individual due process protections must be subject to extensive, open and ongoing parliamentary, public and judicial scrutiny.

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25 Which amended the *Summary Offences and Sentencing Amendment Act 2014* (see footnote 11).
Reference List


**Legal Authorities**

*DPP v Hamilton* (2011) VSC 598

*Hemingway v Hamilton* (2011) VMC 10

*Momcilovic v The Queen & Ors* (2011) HCA 34

*Owens v Normanton Liquor Accord & Ors* (2012) QSC 118


**Legislation**

**Victorian Legislation**

*Charter of Human Rights & Responsibilities Act 2006*

*Constitution Act 1975*

*Constitution Act 1855*

*Constitution Act 1903*

*Constitution Act Amendment Act 1958*
Constitution Amendment Act 1890
Constitution Amendment Act 1994
Constitution (Duration of Parliament) Act 1984
Constitution (Parliamentary Reform) Act 2003
Constitution Reform Act 1937
Crimes Act 1958
Crimes (Family Violence) Act 1987
Crime Statistics Act 2014
Drugs, Poisons and Controlled Substances Act 1981
Family Violence Protection Act 2008
Imperial Acts Application Act 1980
Infringements Act 2006
Justice Legislation Amendment Act 2010
Justice Legislation Amendment Act 2011
Justice Legislation Amendment Act 2012
Justice Legislation Amendment (Victims of Crime Assistance & Other Matters) Act 2010
Liquor Control Reform Act 1998
Liquor Control Reform Amendment Act 2007
Liquor Control Reform Amendment Act 2010
Magistrates (Summary Proceedings) Act 1975
Monetary Units Act 2004
Parliamentary Committees Act 2003
Road Safety Amendment (Hoon Driving & Other Matters) Act 2011
Sentencing Act 1991
Serious Sex Offenders Monitoring Act 2005
Summary Offences Act 1966
Summary Offences & Control of Weapons Acts Amendment Act 2009
Summary Offences Amendment (Move-on Laws) Act 2015
Summary Offences & Sentencing Amendment Act 2014
Vehicle Impoundment & Other Amendments Act 2005
Victorian Regulations

Infringements (Reporting & Prescribed Details & Forms) Regulations 2006
Road Safety (General) Regulations 2009

Australian Legislation

Anti-Terrorism Act 2005 (Cwlth)
Australia Act 1986 (Cwlth)
Australian Constitutions Act 1850 (Cwlth)
Commonwealth of Australia Constitution Act 1900 (Cwlth)
Constitution Act 1889 (WA)
Constitution Act 1902 (NSW)
Constitution Act 1934 (SA)
Constitution Act 1934 (Tas)
Constitution Act 2001 (Qld)
Constitution Acts Amendment Act 1899 (WA)
Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)
Evidence Amendment (Evidence of Silence) Act 2013 (NSW)
Human Rights Act 2004 (ACT)
Human Rights (Parliamentary Scrutiny) Act 2011 (Cwlth)
Liquor Act 1992 (Qld)
Safe Night Out Legislation Amendment Act 2014 (Qld)
Self Government Act 1975 (NT)
Self Government Act 1988 (ACT)
Telecommunications (Interception & Access) Amendment (Data Retention) Act 2015 (Cwlth)
Young Offenders Act 1997 (NSW)

International Legislation

Anti Social Behaviour Act 2003 (UK)
Anti-Social Behaviour, Crime & Policing Act 2014 (UK)
Bill of Rights 1688 (UK)
Bill of Rights 1996 (South Africa)
Charter of Fundamental Rights of the European Union 2000
Charter of Rights and Freedoms 1982 (Canada)
Constitution (Bill of Rights) 1791 (USA)
Convention on the Rights of the Child (UNCRC) 1989
Crime & Disorder Act 1998 (UK)
Criminal Justice Act 2003 (UK)
Criminal Justice & Court Services Act 2002 (UK)
Criminal Justice & Police Act 2001 (UK)
European Convention on Human Rights 1950
Human Rights Act 1993 (New Zealand)
Human Rights Act 1998 (UK)
International Covenant on Civil & Political Rights (ICCPR) 1966
International Covenant on Economic, Social & Cultural Rights (ICESCR) 1966
Police Reform Act 2002 (UK)
Prevention of Terrorism Act 2005 (UK)
Terrorism Prevention & Investigation Measures Act 2011 (UK)
Universal Declaration of Human Rights 1948
Violent Crime Reduction Act 2006 (UK)

HANSARD


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Appendices
### Appendix A  Overview of Legislation and Key Measures

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<td>24 hour banning notices by police; can be 'pre-emptive' (s148B-G)</td>
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<td>Specified offences for banning notices/exclusion orders (s7)</td>
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<td>Introduction of liquor accords (s146A-D)</td>
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<td>Liquor accord licensees given the power to ban from accord premises (s146A-D)</td>
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<td><strong>Summary Offences &amp; Control of Weapons Acts Amendment Act 2009</strong></td>
<td>Police enforceable move on powers; can be 'pre-emptive'; issued orally; non return for 24 hours; breach = 5 penalty units (s3)</td>
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<td></td>
<td>Search powers in designated areas (including children), without warrant (new s10, Control of Weapons Act 2010)</td>
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<td>Increased penalties for alcohol-related offences: person found drunk: 1 → 4 penalty units (s4)</td>
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<td>Drunk &amp; disorderly: 1 → 5 penalty units; or, arrest and remove to safe custody (s5)</td>
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<td>New offence of 'disorderly conduct'; 5 penalty units; infringement notice penalty = 2 penalty units (s6)</td>
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<td>Chief Commissioner may declare temporary designated area; not longer then 12 hours (s10C-L)</td>
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<td><strong>Justice Legislation Amendment Act 2010</strong></td>
<td>Terminology amendments (ss22-25)</td>
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<td><strong>Justice Legislation Amendment (Victims of Crime Assistance &amp; Other Matters) Act 2010</strong></td>
<td>Banning period increased to 72 hours (s49)</td>
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<td>Person found drunk: 4 → 8 penalty units (s50)</td>
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<td>Drunk &amp; disorderly: 5 → 10 penalty units (s51)</td>
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<td>Disorderly conduct: 5 → 10 penalty units (s52)</td>
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<td></td>
<td>Infringement penalties introduced: drunk &amp; disorderly offences: 2 or 4 penalty units (s53)</td>
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<tr>
<td><strong>Liquor Control Reform Amendment Act 2010</strong></td>
<td>Various licensing and responsible service of alcohol amendments</td>
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<tr>
<td><strong>Justice Legislation Amendment Act 2011</strong></td>
<td>Barring orders introduced; may be issued by 'responsible person'; duration 1 – 6 months (s4)</td>
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<td></td>
<td>Breach or failure to comply: up to 20 penalty units (s4)</td>
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<td></td>
<td>Drunk &amp; disorderly penalty change: 20 penalty units, or 3 days in custody. Second/subsequent offence = 20 penalty units or 1 month in custody (s9)</td>
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<td>Drunk &amp; disorderly infringement notice: 5 penalty units, 10 if similar notice within 3 years (s10)</td>
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<tr>
<td><strong>Justice Legislation Amendment Act 2012</strong></td>
<td>Updated to include references to newly created VCGLR. No new substantive legislation (s6)</td>
</tr>
<tr>
<td><strong>Summary Offences &amp; Sentencing Amendment Act 2014</strong></td>
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</tr>
<tr>
<td><strong>Summary Offences Amendment (Move-on Laws) Act 2015</strong></td>
<td>Repealed the amendments introduced in 2014, which restricted the right to protest and extended pre-emptive police move-on powers to non-NTE situations.</td>
</tr>
</tbody>
</table>
Appendix B  Victoria Police Banning Notice

BANNING NOTICE

Police member issuing this Banning Notice:
Name

Registered No.
Station

Ban Period Start: Date
Time
hrs

Ban Period End: Date
Time
hrs

Details of Person Banned
Family Name

Given Names

Date of Birth
Sex M F

Address (Street number, Street, Street Type, Suburb/Town, State)

or
No Fixed Place of Abode

Aboriginal or Torres Strait Islander origin
Aboriginal T.S.I. Both
Neither Not Stated/Unknown

AREA / PREMISES BANNED FROM:
You are banned from entering the [ ] Designated Area, or [ ] all Licensed Premises in the Designated Area. The Designated Area is:

[ ] Map of Designated Area provided to Banned Person

SPECIFIED OFFENCE -
(Endorse Act, Section, Description)
You are suspected or known to have committed the specified offence of:

GROUNDS FOR SUSPICION -
The grounds for the suspicion of the offence are:

[ ] notified by [ ] telephone or [ ] fax on
Time

Revised [DD/MM/YYYY]

- Victoria Police - VP Form 1312

Liquor Control Reform Act - Part 8A

Banning Notice number

[Redacted]