



G20, Security and Human Rights

Submission on the G20 (Safety and Security) Bill 2013

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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1. Introduction

1.1 Background

1. The Legal Affairs and Community Safety Committee has asked for feedback on the *G20 (Safety and Security) Bill 2013* for the G20 meeting to be held in Brisbane between 14 and 17 November 2013.
2. This submission by the Human Rights Law Centre (**HRLC**) addresses a number of human rights concerns raised by the Bill, with reference to obligations under international human rights law

1.2 Executive Summary

3. The HRLC recognises that the G20 is a global event attracting a number of high profile global leaders. The safety and security of the attendees, as well as local residents is a legitimate concern that must be addressed. However, a balance must be struck between ensuring the safety and security of persons and respecting the public's freedom of movement, freedom of expression, freedom of association, right to peaceful assembly and right to privacy during the G20 meetings.
4. Laws that seek to ensure greater safety and security during high profile events, by, among other things, increasing police powers and imposing restrictions on public movement, engage a number of human rights treaties to which Australia is a party including the *International Covenant on Civil and Political Rights (ICCPR)*.
5. Basic human rights guaranteed by the ICCPR such as freedom of expression, freedom of association and peaceful assembly,¹ ensure that individuals can freely participate in protest activity, gather in groups and express their views about issues of concern. The protection of these rights is fundamental to democracy. Indeed, under international human rights law, political forms of expression and political gatherings warrant higher levels of protection from interference.
6. The HRLC welcomes the fact that the Queensland Government has not prohibited peaceful protest within the security areas for the duration of the G20. However, we are concerned that other aspects of the Bill will still infringe fundamental human rights.

¹ *International Covenant on Civil and Political Rights* Article 19 (Freedom of Expression), Article 21 (Freedom of Assembly) and Article 22 (Freedom of Association) , available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

7. For the duration of the G20 meeting, the Bill creates a special security area, covering a large part of central Brisbane including thousands of homes and businesses, in which police have extraordinary powers to stop and search people, vehicles and premises, confiscate items, ban and exclude people and detain people charged with minor offences. The powers are drafted broadly and without precision, transferring significant discretion to police and increasing the risk of these extraordinary powers being used in an arbitrary and discriminatory way.
8. The powers are accompanied by a range of new offences which, again, are drafted broadly and without precision, making it extremely difficult for people to know whether they are acting lawfully or not when in engaging in protest activities. The reverse onus of proof for prohibited item offences undermines the presumption of innocence. The presumption against bail for minor offences reinforces the lack of balance in the Bill.
9. The Bill's cumulative effect is likely to be the stifling of legitimate peaceful protest and an increased risk that many peaceful protestors and passers-by will be unnecessarily affected, and worse, criminalised, by the Bill's operation.
10. The G20 event will showcase Queensland and Australia to the world. The Queensland Government should ensure that legislation around the event promotes and protects fundamental human rights, rather than undermining them.
11. With amendment, the Bill can achieve the appropriate balance between security and protest rights. Our recommendations are addressed towards this end.
12. The HRLC makes the following recommendations:

Recommendation 1:

Remove the word "disrupt" from the Bill and replace it with a higher threshold that reflects existing law around breaches of the peace.

Recommendation 2:

Require police officers to hold a reasonable suspicion before using the search powers, or the powers to request identity and reasons for presence, under the Bill.

Recommendation 3:

Narrow the list of prohibited items; remove the reversal of the onus of proof in the prohibited item offences and clarify that 'lawful excuse' includes 'for the purpose of peaceful protest'.

Recommendation 4:

Remove the prohibited person provisions or raise the threshold for police prohibiting a person to require evidence that the individual poses a serious threat to security or safety.

Require the Commissioner to inform individuals of their inclusion on the prohibited persons list sufficiently in advance of the G20 to ensure they are able to challenge their designation in a timely manner.

Recommendation 5:

Enable exclusion and prohibition notices to allow relevant individuals to access their home, work or study.

Establish a timely and accessible process to review prohibition notices.

Require police to inform a person who is excluded of the reasons for the exclusion and the name of the police officer.

Recommendation 6:

Remove the presumption against bail in the Bill, or at a minimum remove the presumption against bail for “disrupting” offences.

Recommendation 7:

Queensland Police should develop guidelines around the exercise of the powers under the Bill in consultation with protest and community groups.

2. “Disrupting” the G20

13. This submission outlines a range of concerns around broad and imprecise police powers and offences created by the Bill. The way these powers and offences have been drafted increases the risks of:
 - (a) legitimate peaceful protest being stifled and criminalised; and
 - (b) police acting against protestors and passers-by in an arbitrary or discriminatory way.
14. In particular, one vague concept which infects the Bill is the notion of “disrupting” the G20 meeting or any part of it.

15. For example, it is an offence to “disrupt” any part of the G20. A person can be arrested for this offence without a warrant and detained with a presumption against bail.
16. Police powers are also triggered in a situation where they believe a person has, or is likely to, “disrupt” the G20: police can ask for their personal details, remove them from a security area and ban them from a security area. In addition, any protest will be deemed unlawful if it disrupts any part of the G20.
17. Police can seize an item if an officer reasonably suspects the person could use the item to disrupt any part of the G20, even if a person is able to give a lawful excuse for having the item. The wide definition of prohibited item also includes consideration of whether the item is capable “directly or indirectly” of disrupting the G20.
18. The drafting of the Bill indicates that “disrupt” means something less than conduct which could injure people or property.
19. We recommend that the concept of “disrupting” the G20 be removed from the Bill and replaced with wording that reflects existing law around “breaching the peace”. At a minimum, the word “disrupt” should be defined to limit its meaning to serious interference, such as posing a physical threat to people or property rather than simply annoyance, nuisance or noise. The Bill should not outlaw protest action that is merely noisy or inconvenient.
20. We note that the NSW legislation introduced for the APEC meeting in 2007 avoided the term “disrupt”. For example, the ability of police to issue directions within a security area during the meeting was restricted to directions considered reasonable in the circumstances “for the purpose of substantially assisting in promoting the security or safety of an APEC meeting, its participants or the public or in preventing or controlling a public disorder”².

Recommendation 1:

Remove the word “disrupt” from the Bill and replace it with a higher threshold that reflects existing law around breaches of the peace.

3. Police powers in security areas

21. The Bill significantly increases police powers in “security areas” both in Brisbane and Cairns. The security areas comprise declared, restricted and motorcade areas defined in the Bill. Different police powers and public restrictions apply in the different security areas. The powers include the ability to ask individuals for identification, perform basic, frisk and special searches,

² *APEC Meeting (Police Powers) Act 2007* (NSW) section 14

ask individuals to move on or leave an area, confiscate property, including motor vehicles, and issue individuals with exclusion notices.

22. In addition, the Bill provides police with a wide discretion in the exercise of these powers, without sufficient guidance or safeguards. The HRLC is concerned that combination of these extraordinary powers and lack of guidance and safeguards will breach a range of human rights.

3.1 Stop and search powers

23. Under the Bill, police officers have the power to stop and search any person within a security area at any time during the event for any reason. There is no requirement that the police officer hold reasonable suspicion or belief that the individual may be committing an offence.³ Even a “basic” search includes a detailed search of their person, their clothing and their belongings. Failure to submit to a search may amount to an offence under section 69, attracting a penalty of 50 units. Police may also ask any person in a declared area to provide their details and a lawful excuse for being in the area.⁴
24. Searching a person and their belongings can breach the right to privacy under Article 17 of the ICCPR in certain circumstances. The right to privacy is not absolute and interferences with privacy may be lawful and permitted where legislation is precise and circumscribed.⁵ Decisions as whether to interfere with a person’s privacy must be made on a case-by-case basis. States must also ensure that decision makers do not possess overly wide discretion in authorising interferences with the right to privacy.⁶
25. In *Toonen v Australia*, the United Nations Human Rights Committee (HRC) commented that any non-arbitrary interference with privacy must be proportionate to the end sought and must be reasonable and necessary in the circumstances of any given case.⁷ Such interferences

³ See sections 23-25 and 31

⁴ Sections 36 and 37

⁵ *Duinhoff and Duif v Netherlands* (1984) 13 EHRR 478, [8].

⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <http://www.refworld.org/docid/453883f922.html> [accessed 11 October 2013], at [8]; *Duinhoff and Duif v Netherlands* (1984) 13 EHRR 478, [8]. See also the Committee’s Concluding Observations on the Russian Federation where it expressed concerns in relation to existing mechanisms to intrude into private telephone communications. Legislation setting out the conditions of legitimate interferences with privacy and providing for safeguards against unlawful interferences lacked sufficient clarity.

⁷ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994

must also be in accordance with the provisions, aims and objectives of the ICCPR and reasonable in the particular circumstances, that is, necessary and proportionate.⁸

26. The HRLC is concerned that the current Bill, empowering police officers to stop and search any individual without reasonable suspicion, and to ask for identification and reasons for their presence, fails to provide the necessary precision, is not sufficiently circumscribed and is not sufficiently connected to the Bill's objectives.
27. Accordingly, the Bill is likely to permit searches which breach the right to privacy under the ICCPR. The HRLC notes that similar provisions, found in anti-terrorism legislation in the United Kingdom, but used against protesters and activists, were held to breach privacy rights under the *European Convention on Human Rights*.⁹
28. The wide scope of the stop and search powers, and in particular the absence of any requirement for reasonable suspicion increases the risks that police will discriminate, either consciously or unconsciously, in using the powers, particularly against homeless people and young people.¹⁰
29. The HRLC recommends that the Bill be amended to require a police officer to form a relevant reasonable suspicion before using the search powers or powers to request identity and reasons for presence under the Bill.

Recommendation 2:

Require police officers to hold a reasonable suspicion before using the search powers, or the powers to request identity and reasons for presence, under the Bill.

3.2 Prohibited items, search and confiscation

30. A “prohibited item” is defined extremely broadly in the Bill to include everyday household items such as glass bottles, cans of food, eggs and surfboards. It includes common protest items such as large banners, megaphones or any banner or placard if a pole of any size is attached

⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <http://www.refworld.org/docid/453883f922.html> [accessed 11 October 2013], at [4]

⁹ *Gillian and Quinton v the United Kingdom (4158/05)*

¹⁰ Human Rights Council *Reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin A/HRC/13/37, 28 December 2009 http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A_HRC_13_37_AEV.pdf at [23], and Liz Snell for the Combined Community Legal Centres Group and Kingsford Legal Centre *Protest, Protection Policing: The expansion of police powers and the impact on human rights in NSW The Policing of APEC 2007 as a case study* 2008

to it. It also includes vague categories of items such as 'anything capable of being used as a weapon'.

31. The Bill provides little guidance on what a lawful excuse for possessing a prohibited item may be.¹¹
32. Under the Bill, a police officer is provided with specific powers in relation to prohibited items, including the power to:
 - (a) search people suspected of having a prohibited item without lawful excuse;¹²
 - (b) seize or require surrender of prohibited items in cases where a person is in possession of the item without lawful excuse. In such cases, the item is forfeited to the State;¹³ and
 - (c) exclude a person from a security area who the police officer is reasonably satisfied has a prohibited item in his or her possession without lawful excuse.¹⁴
33. Possession of a prohibited item without lawful excuse is also an offence under s 63 carrying a penalty of up to \$5,500.00. The offence reverses the traditional onus of proof, undermining the presumption of innocence and requiring the person with the item to prove that they had a lawful excuse.
34. The HRLC is extremely concerned about the potential for breaches of rights given:
 - (a) the broad and often vague definition of prohibited item;
 - (b) the limited guidance around lawful excuses; and
 - (c) the range of police and criminal responses that can be triggered by possession of a prohibited item.
35. In particular, the HRLC is concerned that the inclusion of household items and imprecise categories of objects under the list of prohibited items, coupled with the lack of adequate guidance as to 'lawful excuse' may lead to breaches of the right to privacy and the presumption of innocence. It may also stifle the exercise of people's freedom of expression and right to peaceful assembly.

¹¹ For example, while a megaphone is listed a prohibited item, it is conceivable that a lawful excuse for the item is to 'participate in peaceful protests near G20 events'. Megaphones are often used to organise a large group of protesters. However, given the significant discretion of the Police officer, it is unknown whether they will consider the excuse of 'protest' to be a lawful excuse, or whether they will consider a megaphone likely to disrupt the G20.

¹² ss23-25, 32

¹³ ss 59-62

¹⁴ s55

36. Similar to the breach of privacy issues described above, the HRLC is concerned that the power to search a person, including strip searching, on the basis that they may be in possession of a prohibited item without lawful excuse will lead to unlawful invasions of privacy.
37. The basis upon which some items are prescribed as 'prohibited items' is unclear. For example, it is unclear why banners over a certain size need be prohibited from security areas. The potential for a banner to become a weapon is unclear. Any restriction on political expression must be necessary and proportionate, in light of the aim of the legislation. The HRLC is concerned that justification for these limitations on fundamental rights has not been properly considered in the development of the Bill.
38. The Bill would give police officers on the ground enormous discretion to decide whether an item falls under the prohibited list and whether an excuse is lawful. This increases the risk of arbitrary and unlawful invasions of an individual's privacy. For example, given it is not unlawful to protest within declared areas, it is reasonable to expect that a person in possession of a large banner would provide the lawful excuse of 'for the purpose of peaceful protest'. It is, however, very difficult to know beforehand how a police officer would exercise their discretion in this particular circumstance.
39. The HRLC is also concerned that the requirement for an individual to provide a lawful excuse for being in possession of prohibited items amounts to a reversal of the onus of proof and a breach of the right to fair trial under Article 14(2) of the ICCPR. The presumption of innocence imposes upon the prosecution the burden of proving the charge and no guilt can be presumed until the charge is proven beyond a reasonable doubt.¹⁵
40. In light of the above concerns, the HRLC recommends the following:

Recommendation 3:

Narrow the list of prohibited items; remove the reversal of the onus of proof in the prohibited item offences and clarify that 'lawful excuse' includes 'for the purpose of peaceful protest'.

4. Prohibited and excluded persons

41. The Bill provides police with broad powers to ban certain individuals (prohibited and excluded) from entering any security area. The person may be banned from entering even if they live,

¹⁵ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, available at: <http://www.refworld.org/docid/478b2b2f2.html> [accessed 11 October 2013] at [30].

work or study within the security area.¹⁶ It is an offence carrying a penalty of up \$11,000 for a prohibited or excluded person to enter or attempt to enter a security area.

4.1 Prohibited persons

42. The Bill establishes a mechanism to allow police, in advance of the G20, to prohibit a person from entering a security area if the Commissioner of the Queensland Police is “reasonably satisfied” that they “may” pose a serious threat to safety and security of persons, “may” cause injury to persons or damage to property, or may “disrupt” any part of the G20 meeting.
43. The HRLC is concerned that these very broad criteria may arbitrarily deprive people of their freedom of movement, and, should they wish to participate in G20 protests, their freedom of expression and right to peaceful assembly.
44. The risk of that an individual may “disrupt” the G20 is too vague and an unacceptably low threshold for declaring a person prohibited. Given the Queensland Police are empowered to move on or exclude persons who are found to be disrupting the G20 during the event, it is unnecessary and disproportionate to prohibit persons on the outset on the suspicion that they may at some point disrupt the G20. As noted above, the NSW APEC legislation required the Police Commissioner to be satisfied that an individual would pose a serious threat to the safety of persons or property in the APEC security area. This is a much clearer and higher threshold than “disrupt”.¹⁷
45. There is no requirement that an individual be informed of the fact that they are prohibited in a timely manner. Accordingly, a prohibited person may not have sufficient time to make a submission to the Commissioner before the G20 commences. Further, there is no avenue for reviewing the Commissioner’s decision to prohibit someone other than costly and time consuming judicial review in the Queensland Supreme Court.
46. The HRLC recommends, at a minimum, providing time frames by which an individual must be informed that they are a prohibited person, allowing sufficient time for the individual to appeal the designation. The HRLC also recommends allowing any relevant prohibited individuals to access their homes, work or study during the G20.

¹⁶ Part 5

¹⁷ *Apec Meeting (Police Powers) Act 2007* No 14 section 26

Recommendation 4:

Remove the prohibited person provisions or raise the threshold for police prohibiting a person to require evidence that the individual poses a serious threat to security or safety.

Require the Commissioner to inform individuals of their inclusion on the prohibited persons list sufficiently in advance of the G20 to ensure they are able to challenge their designation in a timely manner.

4.2 Excluded persons

47. The Bill allows police to exclude people from the security area in a number of circumstances, including when a person has a prohibited item without lawful excuse, fails to provide identification or fails to provide a lawful excuse for being within a security area. A person who is given an exclusion notice (in writing or orally) can be prevented from entering the security areas for the duration of the G20.
48. As with prohibited persons, the consequences of exclusion can be significant, particularly if a person lives, works or studies in the security areas.
49. Again, the criteria for police exercising these powers are extremely broad, allowing police significant discretion and increasing the risk of the powers being used in an arbitrary or discriminatory way.
50. An individual may be excluded by an oral exclusion notice with no reasons and no avenue of appeal other than costly, time consuming and impractical judicial review. The lack of accountability around these powers increases the risks of them being misused.

Recommendation 5:

Enable exclusion and prohibition notices to allow relevant individuals to access their home, work or study.

Establish a timely and accessible process to review prohibition notices.

Require police to inform a person who is excluded of the reasons for the exclusion and the name of the police officer.

5. Offences and presumption against Bail

5.1 Creation of new offences

51. The Bill creates a number of new offences in relation to the G20 carrying penalties ranging up to \$11,000. Of particular concern are offences banning people from “disrupting” or “interfering with the reasonable enjoyment” of any part of the G20 meeting.
52. The offences are accompanied by provisions allowing police to arrest without warrant, and detain, people reasonably suspected of committing offences.
53. Criminal laws must clearly proscribe the conduct for which a person will be punished. The creation of overly vague laws can amount to a retroactive criminal law, prohibited under Article 15 of the ICCPR.¹⁸
54. The HRLC is concerned that the vague, imprecise language in many of the offences fails to provide necessary clarity for people to know whether conduct is illegal or not. It also increases the risk of police charging people with offences, and arresting and detaining them, in an arbitrary or discriminatory way.

5.2 Presumption against Bail

55. The Bill also reverses the normal bail rules by providing a presumption against bail for offences that involve assault, throwing objects and “disrupting” or attempting to disrupt the G20, among other offences.¹⁹
56. The HRLC is concerned that this presumption against bail breaches fair trial guarantees under Article 9 of the ICCPR.
57. Article 9 of the ICCPR states that “it shall not be the general rule that persons awaiting trial shall be detained in custody”. The burden is properly placed on the State to establish a need for detention to continue while awaiting trial. The UN Special Rapporteur on Terrorism has expressed concern about the reversal of the onus for granting bail, stating that “each case must be assessed on its merits, with the burden upon the State for establishing reasons for detention”.²⁰ While there may be cases where an individual should remain in custody, this should not be the presumption.

¹⁸ UN Human Rights Committee Concluding Comments on Portugal (Macau) (1999) UN doc CCPR/C/79/Add 115 at [12]

¹⁹ Section 82

²⁰ Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006), [34].

58. Reversing the presumption against bail provides an added, significant burden on the individual in a situation where time is limited and legal services may be difficult to find, given the public holiday and the potential higher number of arrests on that weekend. It risks unnecessarily detaining many individuals. In particular, the presumption against bail is particularly difficult to justify for the vague and imprecise “disrupting” offences.
59. The presumption against bail is unnecessary. The existing provisions of the *Bail Act 1980* are sufficient and would allow the courts to consider whether a person was an ongoing threat to the G20 and grant, or refuse to grant, bail accordingly.

Recommendation 6:

Remove the presumption against bail in the Bill, or at a minimum remove the presumption against bail for “disrupting” offences.

6. Freedom of speech and political participation

60. The HRLC welcomes the fact that the Queensland Government has not prohibited protest within the declared areas, nor will peaceful protest without prior notice be prohibited. However, we are concerned that the overall effect of the Bill will be to stifle the ability of the public to exercise their protest rights.
61. Article 19 of the ICCPR guarantees freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds. Article 21 of the ICCPR guarantees freedom of peaceful assembly, including peaceful protest. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary and proportionate in a democratic society. When the speech is political or concerns matters of public interest there is even less scope for restricting freedom of expression.²¹
62. While freedom of expression and the right to peaceful assembly can, for the purposes of national security and public order, be limited, they may only be limited in a manner that is necessary and proportionate. If the laws limiting freedom of expression and assembly are too broad or too vague then they are unlikely to be considered necessary and proportionate for protecting security.²²

²¹ *Ceylon v Turkey* ECHR 23556/94, 8 July 1999 at [34]

²² Joint declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005

63. The current Bill is vague in form and uncertain and broad in operation and effect. It will be difficult for individuals to know what actions or items are illegal.
64. Further, given the extraordinary police powers granted by the Bill and the inadequate safeguards around their exercise, the public may justifiably be concerned that these powers will be exercised in an arbitrary and discriminatory way.
65. It is likely that the overall effect of the Bill will be the stifling of legitimate peaceful protest during the G20. This is highly undesirable and corrosive to Australian democracy, at a time when Australia's respect for human rights should be showcased to the world.
66. However, with some modifications, the Bill could preserve and uphold human rights. Our recommendations have been targeted to this end.
67. At a minimum, even if the Bill is not amended, the HRLC recommends that Queensland Police develop guidelines around the exercise of the powers in consultation with protest and community groups.

Recommendation 7:

Queensland Police should develop guidelines around the exercise of the powers under the Bill in consultation with protest and community groups.