



HIGH COURT OF AUSTRALIA

Parke Place
CANBERRA ACT 2600

Chief Executive &
Principal Registrar

12 July 2021

Senator the Hon Concetta Fierravanti–Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

BY EMAIL: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells,

I refer to your letter of 24 June 2021 relating to the *High Court of Australia (Building and Precincts – Regulating the Conduct of Persons) Directions 2021* (“the Directions”), on which the Committee seeks advice about the scope and operation of clauses 5(i) and (xii) of the Directions.

Those clauses provide a person shall not:

- (i) behave in a disorderly or offensive manner within the building or the precincts
- (xii) light any fire or deposit any litter or create any nuisance within the building or the precincts.

The Committee has sought:

“advice in relation to:

- the factors that are taken into account in determining whether an individual has acted in an ‘offensive and disorderly’ manner or created ‘any nuisance’;
- examples of the type of conduct that is proscribed by these provisions;
- whether events such as celebrations or peaceful protests within the High Court precincts would fall within the meaning of either paragraph 5(i) or 5(xii); and
- further details about who makes these determinations in practice.”

Factors that would be taken into account in determining whether an individual has acted in an offensive or disorderly manner or had created any nuisance

Factors that would be taken into account would be:

- whether the behaviour was impeding access to the Court building or the Registry for litigants, practitioners, visitors to the Court, staff and Justices;
- whether the behaviour had the potential to cause harm to any person in the building or in the precinct;
- whether the behaviour interrupted Court proceedings;
- whether the behaviour had the potential to cause damage to the building or its surrounds;

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- whether the behaviour was abusive to visitors, staff, guards or members of the public.

I note that in the year ended 30 June 2019 the Court had approximately 70,000 visitors including approximately 35,000 school children. The Court has also been the venue for regular free public concerts. (These were suspended during the COVID pandemic.)

Examples of the type of conduct that is proscribed by these provisions

Examples based on past incidents would be:

- yelling at or harassing visiting school children while exiting their tour bus;
- making physical threats to a Court staff member;
- setting fire to items and leaving them adjacent to the Court's doors;
- attempting to climb the exterior of the building;
- smashing the exterior glass of the building;
- entering a secure area of the building by running through a gate that had been opened to admit an authorised vehicle;
- attempting to intercept cars entering the secure carpark to speak with the occupants;
- climbing scaffolding.

Whether events such as celebrations or peaceful protests within the High Court precincts would fall within the meaning of either paragraph 5(i) or 5(xii)

The Committee has expressed concern that ‘celebrations or peaceful protests within the precincts may potentially be caught within the broad scope of these provisions, and notes that the High Court has a distinguished history of such events taking place in its precinct’. I note that similar provisions have been in previous iterations of the High Court precincts directions since 1983.

The holding of a celebration or a protest which did not impede access to the building or the Registry, did not impact on Court proceedings or on people needing to conduct business with the Court and did not damage the building, would not be likely to come within either of these clauses.

Further details about who makes these determinations in practice

The determinations are usually made in practice by the Court's Marshal or the Court's Chief Executive and Principal Registrar (CEPR). These determinations are made in the context of the immediate management a particular situation or incident.

Turning from the Committee's questions, more generally I would note that the terms “behave in an offensive or disorderly manner” and “nuisance” are words of ordinary meaning and are common in summary offences legislation (where they are not ordinarily defined).¹ They have been considered by a number of authorities².

¹ Variations of the phraseology in the Directions are common in every jurisdiction in Australia (*Summary Offences Act 1953* (SA), s 7(1)(a) (behave ‘in a disorderly or offensive manner’); *Summary Offences Act 2005* (Qld), s 6(1) (general offence of ‘public nuisance’ which includes ‘behaving in an offensive way’); *Crimes Act 1900* (ACT), s 392 (‘offensive behaviour’); *Police Offences Act 1935* (Tas), s 13(1)(a) (offence of ‘public annoyance’ which includes behaving in an ‘offensive ... manner’); *Criminal Code Act 1913*(WA), s 74A(1) (behaving in a ‘disorderly manner’ and an ‘offensive manner’); *Summary Offences Act 1923* (NT), s 47(a) (offensive conduct including ‘offensive behaviour’).

² In relation to “offensive behaviour” see *Densley v Mertin*, [1943] SASR 144 at 145 per Napier CJ; *R v Smith* [1974] 2 NSWLR 586 at 589 per Street CJ (“behaves in an offensive manner” means behaviour of the character generally described within the third of the Oxford English Dictionary’s meanings, that is to say, offensive in the sense of giving, or of a nature to give, offence; displeasing; annoying; insulting”). In relation

It is not possible to iterate all the types of conduct that are proscribed by those clauses. The Directions, in particular, enable the CEPR, or a person authorised by them, to act immediately when persons present a danger or threat to members of the public, practitioners, litigants, staff and Justices in the High Court building and precinct. I also note that the AFP have a presence at the High Court and would ordinarily be the first to intervene in instances of what appeared to be criminal conduct.

I am not aware of any prosecutions having taken place for the failure to follow a direction made under s 19(2) of the *High Court of Australia Act 1979* (Cth).

Please do not hesitate to contact me should the Committee wish for further assistance.

Yours sincerely

Philippa Lynch
Chief Executive & Principal Registrar

to “disorderly behaviour”, see *Barrington v Austin* [1939] SASR 130 at 132 (‘any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people, who may be in, or in the vicinity of, the street or public place’). The question of whether something is offensive is if it is “calculated to wound the feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable man” (*Inglis v Fish* [1961] VR 607 at 611 per Pape J.) The term ‘nuisance’ is well-known at common law. See *R v Clifford* [1980] 1 NSWLR 314 at 318, per Reynolds JA in context of s 23(1) of the *Prisons Act 1952* (NSW) offence of committing a nuisance as being “an act not warranted by law, if the effect is to endanger the life, healthy, property, morals or comfort of the public”.