Police Powers and Responsibilities (Jack's Law) Amendment Bill 2022

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Police Powers and Responsibilities (Jack's Law) Amendment Bill 2022 – Handheld Body Scanner Expansion and Extension

Introduction

The primary objective of the Bill is to extend and expand the trial of handheld body scanners, used to detect unlawfully possessed knives beyond the Surfers Paradise and Broadbeach safe night precincts (SNPs). Until recently, the Police have been granted powers to use these devices only within these precincts and, for a limited time. The proposed bill intends to extend the temporary use of these devices beyond the Surfers Paradise and Broadbeach safe night precincts (SNPs) to include all 15 (SNPs), public transport stations and public transport vehicles such as buses and trains until April 2025.

This proposed bill has been named in honour of Jack Beasley, a 17-year-old victim of a fatal stabbing on the Gold Coast in 2019. Jack's parents Brett and Belinda have advocated strongly for these changes, successfully implemented temporarily on the Gold Coast since May 2021 resulting in the detection and seizure of more than 200 bladed weapons.

As a future legal practitioner and a community advocate for human rights, I have a professional and personal responsibility to protect the rule of law, the integrity of the legal system and the rights of others. To do this, I engage regularly with law review and encourage law reform. I am for the purposes of this submission, supportive of the implementation and extension of the proposed bill and have provided my reasoning below.

Safe Night Precincts

Safe night precincts are prescribed within the *Liquor Act 1992* and are characterised by 'the presence of licensed premises', concentrations of pedestrian traffic such as within a 'CBD', The boundaries of SNPs are also defined in the *Liquor Act 1992*. These areas tend to function as entertainment precincts and can result in the congregation of large numbers of people. The primary reason provided by the Minister for expanding the trial is to also capture areas of public transport infrastructure and reducing unlawful knife possession in public transport areas, including areas persons may be travelling to (such as SNPs) in possession of a knife.

I reside in one of the 15 (SNPs) proposed to be included in these amendments. I own and operate many businesses within the Cairns (SNP) and, I am a member of the local liquor accord as the manager of businesses which provide alcohol and entertainment, and this organisation is supportive of the proposed changes. Knife related crime within my local (SNP) is low however, as an area heavily reliant on tourism and frequented by individuals from outside of the local area, safety is a concern.

Public Places

The Courts have considered and defined 'public places', where offensive behaviours and language is used. Conduct and language engaged in at a football match or on a tennis or squash court may be acceptable, or, at least, unremarkable, but offensive if engaged in during a church service or a formal social event. Further, the offensive behaviour and language in

private places may be considered less offensive than in public. (SNPs) are defined as public places.

E (A Child) v The Queen

The case of *E (A Child) v The Queen*[1] is relevant only in that, the case considered the definition of public place and deemed that a police watchhouse was not a public place. It is relevant for this submission as the proposed amendments seek to include public places such as transport stations and transport vehicles.

A young person was charged with disorderly conduct and obscene language under Section 54 and 59 of the *Police Act*[2] and initially convicted of the offences before successfully appealing the decision. The youth had been picked up by police for being out on the street late at night without a responsible adult and taken back to the watchhouse where the police planned to have the youth picked up by a responsible adult however, whilst in custody the youth, frustrated and distressed, challenged the authority of the police to hold him. During that conversation with a female officer he said "I'm leaving. You have no right to hold me here. I want to [redacted] go". His swearing led to a warning that he would be arrested for obscene language, which prompted the reply "You can get [redacted]" and "[redacted] you".

The original Magistrate found the language to be obscene and he was convicted however, on appeal, White J held that;

> *"The question of whether language is obscene must be determined according to community standards, not the standards of a particular witness".*

Adding that;

> *"The question of whether language was obscene must be understood in its context. The use of the word "[redacted]" as an expletive, where there were no sexual overtones or implications, was not obscene language".*

The convictions also failed because the Court did not consider the watchhouse a "public place". In this case, the accused was an Aboriginal youth who was resisting police authority to impose a curfew and to detain him without any proper legal authority and in the absence of any formal power to hold him, offensive language provided the police with a "holding charge" and a legal basis for exercising authority over the youth. The judgment seems to be a judicial attempt to place limits on the offence and prevent its overuse against young people and minorities.

Attempts by the police to suppress conduct they deem offensive have not always been successful. The courts have imposed some limits on the scope of offensiveness in cases where the conduct is obviously "political".

Human Rights Issues

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[1] *E (A Child) v The Queen* (1994) 76 A Crim R 342
[2] *The Police Act* 1892 (WA) s54, s59

The Minister for Police and Corrective Services and Minister for Fire and Emergency Services Mark Ryan MP has in my opinion, correctly identified the human rights, relevant to the bill which include the right to life[3], freedom of movement[4], freedom of thought, conscience, religion, and belief[5], property rights[6], privacy and reputation[7], protection of families and children[8] and cultural rights[9].

I agree with the Minister in that, the amendments to the PPRA aimed at expanding the scope of handheld scanning provisions to all SNP and public transport stations, including public transport vehicles, promote the right to life but may limit the other rights identified.

Recognition and Equality before the law

The right to recognition and equality before the law[10] reflects that every person has the right to recognition as a person before the law, that every person is equal before the law and that laws should not be discriminatory. These laws will allow police to randomly stop and scan people without reasonable suspicion in public places in SNPs and public transport stations and public transport vehicles. The proposed amendments are discriminatory in that, only people who reside in or frequent these areas will be required to stop and be searched, the law will not apply to everyone generally in Queensland.

Freedom of movement

The right to freedom of movement[11] protects a person's right to move freely within Queensland, enter and leave it, and choose where to live if they are lawfully within Queensland. It has been proposed that this right may be limited as police will have the power to stop a person and require them to submit to the use of a hand held scanner, to ascertain if the person has a knife in their possession and should police form a reasonable suspicion that the person unlawfully has a weapon or knife, Police may then engage stop and search powers under sections 29 and 30 of the PPRA to search the person for a weapon or knife.
The power to search persons suspected of possessing weapons and illegal substances already exists and has been subject to definition and debate in the Courts. I have provided some examples of case law relevant to search powers further in this submission.

Police may issue a banning notice excluding the person from entering or remaining in a public place within a SNP for up to one month after the day the notice takes effect (if the individual is found to possess a weapon) and the banning notice may be extended for up to three months by a police officer of the rank of at least senior sergeant. I believe that the issuing of such a notice, although it may infringe on the human rights of an individual are necessary to promote public safety. Many other similar notices are already in place for the protection of the public such as banning notices for intoxicated and violent persons, paedophiles and sex offenders once convicted.

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[3] *Human Rights Act 2019* (Qld) s16
[4] *ibid* s19
[5] *ibid* s20
[6] *ibid* s24
[7] *ibid* s25
[8] *ibid* s26
[9] *ibid* s27
[10] *ibid* s15
[11] *ibid* s19

Property rights

This right protects all people's right to own property alone or with others and that a person should not be unlawfully or arbitrarily deprived of the person's property[12]. Within the context of human rights, arbitrarily is taken to mean unjust, and unreasonable however, there are already strict laws in place relevant to the possession of knives and other weapons such as firearms for the protection and safety of the community and individuals, the proposed amendments do not introduce any 'new' rules in respect to unlawful possession and it is my view that the amendments do not further interfere with such a right.

Privacy and reputation

The right to privacy and reputation[13] protects a person's right not to have their privacy and reputation unlawfully or arbitrarily interfered with. Arbitrary interference extends to lawful interferences, which are also unreasonable, unnecessary, or disproportionate. The concept of lawfulness in the context of the right to privacy means that no interference can occur except in cases envisaged by the law. Interference authorised by states can only take place based on law, and the law must be adequately accessible and precise so a person can regulate their conduct. These are concepts that are consistent with the rule of law principles. A person's right to privacy and reputation may be limited if they are selected by police to be scanned for a knife as this procedure may interfere with their dignity and bodily integrity, however, as is discussed in more detail below, any interference with a person by way of a police officer waving a wand over or near their body, is limited and is not invasive.

Protection of families and children

Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests because of being a child. As discussed later in greater detail, *The Anti-Discrimination Act*[14] provides protections for those that may be indirectly or directly discriminated based on race, disability, or age and it would be important for the Commission to consider what protections (if any) the Police will implement when it comes to enforcing these amendments among young Australians.

Cultural Issues

All persons with a particular cultural, religious, racial, or linguistic background must not be denied the right, in a community with other persons of that background, to enjoy their culture, to declare and practice their religion, and to use their language. It has been noted in the explanatory notes of the Bill that certain religious groups carry knives as part of their religion. The proposed amendment to search any such individual does not limit their right to carry a knife and as mentioned[15], these individuals and their rights have been considered. I do agree with the Minister that the proposed amendments are reasonable and demonstrably justifiable.

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[12] *Human Rights Act 2019* (Qld) s24
[13] *ibid* s25
[14] *Anti-Discrimination Act 1991* (Qld)
[15] *Weapons Act 1990* (Qld) s51

Section 51 of the *Weapons Act* [16]also provides that it is a reasonable excuse to physically possess a knife for a genuine religious purpose and gives the example that a Sikh may possess a knife known as a kirpan in a public place to comply with the person's religious faith.

The Over-Representation of Indigenous Persons

I covered the over-representation of indigenous Australians further in my submission to the Queensland Government Community Support and Services Committee: Inquiry into the decriminalisation of Certain Public Offences recently and was asked to speak directly to the Committee at a public hearing held in Cairns. Resist Arrest and Obstruct Police are commonly paired with offences relating to failure to move-along and public nuisance offences.

The importance of context was again emphasised in *Saunders v Herold*[17] where the accused, an Aboriginal man, and his friends were asked to leave the Canberra Workers Club, which they did. Outside, the accused was approached by police, and was alleged to have said "Why don't you [redacted] just [redacted] off and leave us alone?" His conviction for offensive conduct was quashed by Higgins J.

It is relevant for the Commission to consider whether such an amendment will increase such public offences and how the Police should better safeguard against that. If a child or indigenous Australian refuses to comply with a search and/or offensive language or actions are used to defy police, how will this behaviour be dealt with?

Police already could use their discretion when charging individuals for these types of offences however, there are still high rates of youth and indigenous Australians charged with these offences. The relevant concern here is will the implementation of the amendments in regional areas such as Cairns, Townsville, and Rockhampton where there are larger populations of indigenous peoples, whether it will contribute to increasing the rate to which other offences besides carrying weapons and knives are prosecuted as a result.

Is Age Discrimination a Breach of the Law?

It is submitted that the proposed amendments may breach the *Anti-Discrimination Act 1991* (Qld)[18] in particular, allowing police to unfairly discriminate against and target youths. The *Act*[19] provides protections for those that may be indirectly or directly discriminated based on race, disability, or age and it would be important for the Commission to consider what protections (if any) the Police will implement when it comes to enforcing these amendments among young Australians.

Freedom and liberty

The proposed amendment will give police powers to stop and scan people for knives in public places in all SNP areas, public transport stations and public transport vehicles potentially interfering with people's freedom of movement[20]. It might be thought that a

[16] *Weapons Act 1990* (Qld) s51
[17] *Saunders v Herold* (1991) 105 FLR 1
[18] *Anti-Discrimination Act 1991* (Qld)
[19] *Anti-Discrimination Act 1991* (Qld)
[20] *Human Rights Act 2019* (Qld) s19

person who is stopped will also be deprived of their liberty, as they are no longer free to move, much like when police detain an individual for the purposes of a search. The Minister proposes that the proposed amendments do not infringe on an individual's liberty however, I disagree for if an individual is no longer free, they are no longer at liberty to move, they no longer have liberty. The Committee should consider further, Does the individual have the right to refuse and go about their business? Or for the purposes of this type of search are they being temporarily detained?

Police are not above the law or immune to the law and are just as accountable before the law as anyone else. Firstly, because individuals have rights at common law and the courts place great importance on those rights.

> *"Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause.*[21]*'*

In the case of *Toobridge v Hardy*[22] Justice Fullagar stated that the;

> *'Right to personal liberty is the most fundamental, elementary right at common law.'*

This fundamental right was also referred to by Mason and Brennan JJ in their joint judgment in *Williams v The Queen.*[23]

Whilst Justice Dean in *Cleland v The Queen*[24] says;

> *'It is of critical importance, to the existence and protection of personal liberty that the restraints the law places on police officers are scrupulously observed'.*

In other words, it is held by the courts at common law that, courts will not look too kindly on Police officers ignoring technicalities of law.

The International Covenant of Civil and Political Rights[25] provides;

> '*People shall not be detained arbitrarily'.*

Let's consider further, the right of an individual to refuse a search of this type. What if an elderly female refused such a search, what safeguards are in place for police to ensure compliance and also ensure the safety of the public? There are provisions within the PPRA for searches to be undertaken with officers of the same sex but what if the woman now feels humiliated? Harassed and is aggrieved by the request and the use of force to comply? The Committee must carefully consider and balance the rights of others with the need to promote public safety.

Rice v Connolly

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[21] *Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp 120-121, 130-131
[22] *Trobridge v Hardy* (1955) 94 CLR at 152
[23] *Williams v The Queen* (1986) 161 CLR 278 at 292
[24] *Cleland v The Queen* (1982) 151 CLR at 26
[25] *International Covenant of Civil and Political Rights* Article 9

The precedent and/or rule established in *Rice v Connolly*[26] holds that there is no strict legal duty, to assist a Police officer prior to any arrest or caution. An individual is not obligated to provide any details to the Police, accompany them to any location such as a Police station or assist them with any enquiries.

Rice was spotted by an officer acting 'suspiciously' in an area known for a high rate of break-ins, some of which had occurred on the very same night. Originally, Rice was charged and convicted of 'wilfully obstructing Police' for failing to provide Police with his full name, his address and refusing to accompany the Police officer to a 'police box'. The Officer told the Court Rice was sarcastic however, there was no suggestion that anything he provided to the Officer was false.

Lord Parker CJ allowed an appeal in this case and found:

> *"In my judgment there is all the difference in the world between deliberately telling a false story something which on no view a citizen has the right to do and preserving silence or refusing to answer something which he has every right to do"*[27]

What this meant was that, if Rice had deliberately lied to the Officer on this occasion, it may very well have been considered as obstructing the Officer but because he simply refused to say anything at all, it was his right to do so. Rice was found not guilty on appeal.

Further, in considering police powers and responsibilities to question an individual at common law, Goff LJ, in *Collins v Wilcock* states plainly: "A Police officer has no power to require a man to answer him"[28]

In 1975, the Australian Law reform Commission suggested Police should have powers to obtain particulars where there is reasonable suspicion however, if it transpires that the individual cannot help the Police, or where it cannot be proven that the individual does not actually have that information, they cannot be found guilty of an offence[29]. Individuals will only be found guilty for an offence where it is proved beyond a reasonable doubt that they could help the Police and do not.

The decision of Rice v Connolly is an important one as it relates to the current proposals. It is clear the right to refuse in other circumstances could be considered illegal by the Courts, should new legislation circumvent more than 60 years of established case law around this particular issue?

The Issue of Consent

In circumstances where Police have been given consent, they can undertake activities outside of their powers and responsibilities. They could ask you to show them your bag or ask you to empty your pockets and/or accompany them to the police station for example.

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[26] *Rice v Connolly* (1966) 2 QB 414
[27] *Rice v Connolly* (1966) 2 QB 414
[28] *Collins v Wilcock* (1984) 1 WLR 1172 at 1178
[29] *Police Powers and Responsibilities Act* (2000) (Qld) s791

Dalton J in *Bossley*[30] asked and answered, where 'consent' to a search is given, "that will be an answer to any allegation of unlawfulness of a search" (referring to *Malone v Metropolitan Police Commissioner)*[31].

In *Halliday v Nevill & Anor,*[32] the majority held that a police officer had an implied license to enter the driveway of a premises that were not locked or barred by an obstruction in any way, to arrest a man and in *Coco v R*,[33] the Court allowed an appeal against a conviction that involved the use of evidence obtained by means of a listening device installed and maintained within a private premises. Mason CJ and Brennan, Gaudron and McHugh JJ wrote, at 435-436:

> *"In accordance with [the principle that every unauthorised entry upon private property is a trespass] a police officer who enters or remains on private property without the leave or licence of the person in possession or entitles to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law"*
>
> and
>
> *"It has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain on private property was intended."*

Bossley's Case

Mr *Bossley*[34] was in his early 20's, attending a music festival in Brisbane when approached by plain clothes police. Detective Senior Caulfield was one of about 20 police officers in the area tasked to detect people in possession of illicit drugs in the crowd at the festival. On seeing Mr Bossley, the Detective thought he seemed excited, hyperactive, and quite talkative compared to others and his overall impression was that was something out of the ordinary, he could be under the influence drugs or in possession of them.

The Detective then approached Mr Bossley and asked him whether he had any drugs on him to which, Mr Bossley replied in the negative. The Detective then noticed he had a bumbag and asked if he could look, Mr Bossley offered him the bumbag and the Detective opened the bag and found a clip seal bag containing pills, it was at this point Mr Bossley was detained for a search.

The Court found on this occasion that the Police did not have a 'reasonable suspicion' to search however, because Mr Bossley consented to the search of the bumbag, it was held that the search was legal. Police can ask questions of anyone by way of consent and do not need

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[30] *R v Bossley* (2012) QSC 292 at 14
[31] *Malone v Metropolitan Police Commissioner* (1979) Ch 344
[32] *Halliday v Nevill & Anor* (1984) 155 CLR 1
[33] *Coco v R* (1993) 179 CLR 427
[34] *R v Bossley* (2012) QSC 292

to comply with the responsibilities otherwise contained in the *Police Powers and Responsibilities Act*[35].

Still, it is not just what the accused believes is consent, the Court's look at the behaviour of Police, Were they overpowering, applying pressure or forceful in any way and if they are, you may have a defence however, simply complying because you 'think you have to' is not enough and the Police often rely on the consent given by individuals when acting outside of their rights and responsibilities.

These two cases highlight the importance of consent and identify legal recourse to incidents where consent is or is not obtained. This is relevant as the Committee shall consider both, whether consent should be sought and what should happen if consent is not given even in circumstances where it not a requirement of officers.

The proposal would allow police officers to randomly select people to stop and scan without any basis, such as a reasonable suspicion.

What Is Reasonable Suspicion and Belief?

Some arrests and almost all searches conducted by police will rely on the establishment of a 'reasonable suspicion' or 'belief'. An individual's personal liberty must be carefully balanced with the rights of the Police to arrest or search an individual over 'suspicions and/or beliefs.

Durward SC DCJ in *R v Varga*[36] defined reasonable suspicion, "The suspicion must be reasonable, as opposed to arbitrary, irrational, or prejudiced. If a young man is driving a smart car with some panel damage it is not sufficient to give rise to a reasonable suspicion."

George v Rockett

The Court in *George v Rocket*[37], the leading authority when determining the difference between mere belief and reasonable suspicion, the High Court described clearly, that where a reasonable suspicion must exist to establish a right or to allow an act, there must be an objective test applied whereby, the court considers what would be in the mind of an ordinary person when presented with all of the facts.

Michael Daniel Rockett, from the office of the Special Prosecutor asserted in an application for a search warrant that, he had 'reasonable grounds' for suspecting some documents were in the possession of solicitor Q. D George. The documents were said to be written by Sir Terence Lewis. (The Former Police Commissioner who was later charged with criminal offences following the Fitzgerald Inquiry).

Rockett believed the documents would prove Sir Lewis had committed perjury in the Court allowing for his prosecution. The Magistrate allowed the search warrant however, the High Court later considered an appeal made by Q. D George and concluded that, the warrant was invalid in the absence of any information in the sworn complaint that may have satisfied the Magistrate of the 'reasonable grounds' for Rockett's belief. Ultimately, the High Court held

[35] *Police Powers and Responsibilities Act* (2000) (Qld)
[36] *R v Varga* (2015) QDC 82
[37] *George v Rocket* (1990) HCA 26 - 170 CLR

that Rockett's 'belief' presented in his application was not enough and that he had not demonstrated a 'suspicion on any reasonable grounds'.

What this case highlights are the importance of and differences between a 'belief' and 'reasonable suspicion'. Police cannot act on a belief or a mere hunch, there is an objective test which must first be applied. The Police must be asked 'why did you think this way?' and 'what evidence do you currently have that this is the case?' This prevents Police from being able to stop, search and arrest almost anybody, anywhere, anytime for anything.

R v N

The Court was asked to consider in *R v N* [38]whether text messages found on a phone during an illegal search by Police should be declared admissible or not. Ultimately the Court was asked to determine whether the desirability of admitting the text messages as evidence, outweighed the undesirability of illegal and intrusive means of obtaining them. The Court in this case ruled that the material be deemed as inadmissible.

Police on this occasion were acting on a public nuisance complaint and had obtained information suggesting, there was drug use in the hotel room shared by N and her friends. The police were operating under the provisions of the (PPRA)[39] and did not make an application for a warrant to search the hotel room. N was subjected to a strip search by an officer which produced a negative result (the first search). At this point the officer was just following orders and held no personal suspicions about N having drugs.

Believing (wrongly) that drugs had been found elsewhere on the premises, the officer proceeded to search N's handbag for any illicit items (the second search), where the officer found $305.55 in cash and the iPhone. Suspecting that the money was proceeds of crime, the officer then seized the iPhone to search it for any signs of use in connection with drug dealing (the third search).

Incriminating text messages were found during the third search confirming that N had been engaging in the trafficking of drugs. There was no question that the first and second searches were legal, as the police responded to a complaint that included drug use and that, the police 'reasonably suspected' at the time there was evidence of drug use in the hotel. The question for the court was whether after searching the bag, there was enough 'reasonable suspicion' to search the phone.

The Chief Justice on this occasion stated;

> *"Free societies have a deeply rooted aversion to needless State intervention and interference with individual freedoms and civil liberties. This is reflected in the tight rein kept by the common law on police search and seizure powers for criminal investigation purposes. Truth and justice cannot be pursued at all costs or by any means. Democratic values such as personal integrity, privacy, and private property*

[38] *R v N* (2015) QSC 91
[39] *Police Powers and Responsibilities Act* (2000) (Qld) s160

rights, including possession and quite enjoyment, cannot always be sacrificed to meet law enforcement goals"[40].

The Court ruled the evidence inadmissible.

R v Peirson

This case of *R v Peirson* [41]also considered the admissibility of evidence obtained from a phone in relation to drug use, leading to the charge of 'drug trafficking' against Mr Peirson. Mr Peirson was stopped by Police after he emerged from a taxi in Brisbane's Fortitude Valley, with a group of young people in possession of open alcohol bottles.

Police acted pursuant to s 29[42] and s 30[43] of the *Police Powers and Responsibilities Act*[44], permitting an officer to search anything in the possession of a person detained required by the officer, who 'reasonably suspects' the person has something on them that may be considered unlawful, a dangerous drug or that may be evidence of the commission of an indictable offence. Those sections provide relevantly:

> **Section 29 - Searching persons without warrant**
>
> (1) A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following;
>
> (a) stop and detain a person;
>
> (b) search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained.
>
> **Section 30 - Prescribed circumstances for searching persons without warrant**
>
> The prescribed circumstances for searching a person without a warrant are as follows;
>
> (a) the person has something that may be;
>
> (ii) an unlawful dangerous drug; or
>
> (vi) evidence of the commission of a seven-year imprisonment offence that may be concealed on the person or destroyed; …"

Senior Constable Price was the arresting officer who saw Mr Peirson getting out of the taxi and approached Mr Peirson. His evidence was that he spoke to Mr Peirson and another man called Mr Shaughnessy while Sergeant Mitchell spoke to two or three others. He first spoke to Mr Peirson about drinking from an opened alcohol container and told him that was an offence.

He then observes Mr Peirson unsteady on his feet, his pupils dilated, sweating a bit and "licking his lips profusely". He also said that he was not smelling highly of alcohol. He then formed the

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[40] *R v N* (2015) QSC 91 at 11
[41] *R v Peirson* (2014) QSC 134
[42] *Police Powers and Responsibilities Act* (2000) (Qld) s29
[43] *Police Powers and Responsibilities Act* (2000) (Qld) s30
[44] *Police Powers and Responsibilities Act* (2000) (Qld)

view that Mr Peirson was under the influence of a drug rather than alcohol mainly because he was licking his lips.

Sergeant Mitchell then indicated to him that he had located drugs on another man from the group, Price then detained Mr Peirson for a search, telling him he reasonably believed he had dangerous drugs on him and asking him to turn out his pockets.

Mr Peirson had no drugs in his pockets but was visibly shaking and starting to sweat profusely on the upper lip. He had a mobile phone in his possession and Senior Constable Price asked him whether he had any drug related messages on it to which he replied: "Ah, there shouldn't be" which is when the officer started looking into his mobile phone. Senior Constable Price said that, in his experience as an officer covering about 8 years patrolling in Fortitude Valley, people in possession of drugs use mobile phone text messages to obtain the drugs.

He found some apparently drug related messages on the mobile phone, activated his recording device, gave Mr Peirson the standard warnings and recorded the balance of the encounter.

The court held on this occasion that Police had a 'reasonable suspicion', and the evidence was allowed.

R v Keen

In cases where evidence may be obtained illegally through an unlawful search, the Court has discretion as to whether that evidence can be allowed. Consider the *R v Keen*[45] case that involved finding Cannabis in a parked car. In this case, the Court found that the search of the car was unlawful, because it was not authorised under the *Police Powers and Responsibilities Act*[46] allowing for the searching of 'occupied' vehicles because Mr Keen and Mr Hetet, were not passengers of the vehicle when it was searched by Police.

Snr Constable Troy Anthony Cameron and Snr Constable Christopher Michael Hurtz identified themselves and asked the applicant and Mr Hetet for their names. Mr Hetet said that he was the driver of the Barina. SC Cameron returned to the police car and conducted a name check with Toowoomba Police Communications. He returned to the Barina and searched the vehicle. During the search the officer found a small plastic tub that contained what appeared to be a small amount of cannabis, a small tub that contained what appeared to be a pink crystalline substance, a plastic water pipe and a large sports bag in the boot. Inside the bag he located two large vacuum sealed plastic bags that contained what appeared to be cannabis. Mr Hetet said the sports bag was his. Hetet said that the cannabis was his and that he put it in the bag.

SC Cameron and SC Hurtz were brought into the operation "Kilo Agitator" by Det Snr Sgt Robb as a deliberate strategy. The plan was to make a "traffic" interception of the vehicle carrying the applicant. They would conduct a search of the vehicle and if, as believed, the vehicle contained dangerous drugs, the applicant would be arrested, and the dangerous drugs confiscated without alerting the applicant and others involved of the operation or presence of covert surveillance or to the extent of police knowledge about their business.

Section 31 - Searching vehicles without warrant

[45] *R v Keen* (2015) QSC 7
[46] *Police Powers and Responsibilities Act* (2000) (Qld) s31

(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—

(a) stop a vehicle.

(b) detain a vehicle and the occupants of the vehicle;

(c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.

The Court on this occasion allowed the evidence despite finding the search unlawful because the evidence was considered in the public interest to admit, as it was vital to the prosecution of Keen, the seriousness nature of the offences supporting the public interest discretionary rule and, the unlawfulness of the search was not deliberate and arose by mistake.

In the circumstances of the present case, the public interest in bringing a wrongdoer to justice and the factors favouring admission of the evidence outweigh the factors supporting its exclusion.

Although the evidence was allowed in this case, there are other very similar cases involving the searches of motor vehicles, where the defendant was not a passenger of the vehicle, and the evidence was not admissible.

R v Versac

In *R v Versac*[47] it was conceded by the prosecution that s 31[48] did not authorise a search of a parked car by police without warrant. In that case, the police officer observed the applicant at a court hearing and suspected that the applicant may have been under the influence of heroin.

The applicant was approached and gave responses to questions which the police officer considered evasive. The applicant said that he had been dropped off at court by a friend and denied that he possessed a motor vehicle however he had a set of keys in his hand.

The police officer formed the belief that the vehicle which the keys would open would contain illicit drugs such as heroin. The suspicion that the vehicle contained drugs was founded on the applicant's history, his demeanour, his possession of the keys and his evasive answers.

Police subsequently used the electronic remote on the keys to locate the vehicle in a nearby car park. However, it appears that s 31[49] did not apply on this occasion because the applicant was not an occupant of the vehicle at the relevant time and the vehicle, and its occupants were not detained to authorise any search.

R v Pohl

Further, in *R v Pohl*[50] it was conceded by the prosecution that s 31[51] did not authorise the search in another similar case. The applicant in that case was arrested for supplying a dangerous drug at a hotel.

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47 *R v Versac* (2013) 227 A Crim R 569
48 *Police Powers and Responsibilities Act* (2000) (Qld) s31
49 *Police Powers and Responsibilities Act* (2000) (Qld) s31
50 *R v Pohl* (2014) QSC 173
51 *Police Powers and Responsibilities Act* (2000) (Qld) s31

The arrest was based on an anonymous tip that a man who the applicant was accompanying outside the hotel was intending to buy unlawful dangerous drugs at the hotel. Upon questioning, the applicant stated to police that he lived at a certain location and had walked to the hotel. The police knew from a review of CCTV footage that he had not walked to the hotel. Due to the false story, and the fact that no drugs had been found on the persons involved, the police formed the view that the drugs were in the vehicle in which the applicant had arrived, visible on the CCTV footage.

Using a remote keypad found in the applicant's pocket, police located and unlocked a vehicle in the car park, which was searched. Again, the case seems to have proceeded on the basis that the applicant was not an occupant at the relevant time and the vehicle, and its occupants were not detained to authorise the search.

R v Jaudzems

In *R v Jaudzemz*[52], a question arose as to whether there were grounds to reasonably suspect, dangerous drugs were in a vehicle searched by Police. In that case, the Court held that officers did have a reasonable suspicion to search the vehicle.

The vehicle, driven by the applicant was pulled over for a random breath test. While that was occurring, one of the police officers involved had a radio conversation with the Townsville area police communications. Communications informed him that an intelligence submission, stated that the driver of the vehicle may be involved in the supply and trafficking of amphetamines in the Cairns area. A further statement was made shortly afterwards that the driver was a 'large scale' supplier of ecstasy in Cairns and that the informant who had provided that information to police had been open and honest regarding the informant's involvement.

Cairns Supreme Court Justice Henry observed that there is a *"...well-established principle regarding reasonable suspicion that there must exist some factual basis to reasonably ground the suspicion, but it is unnecessary that there exists proof of the fact reasonably suspected."*[53]

His Honour continued that:

> *"The existence of apparently reliable information that one of four men in a vehicle pulled over at Ayr was an active drug trafficker in Cairns gave Constable F grounds that were reasonable in harbouring his suspicion unlawful dangerous drugs may have been in the vehicle."*[54]

In my view, on the balance of probabilities, there were grounds that were reasonable in the circumstances for SC Cameron, to reasonably suspect that there was something in the Barina that may have been a dangerous drug. SC Cameron had the required suspicion, and that suspicion was reasonable.

Alternatives

The following alternatives were considered:

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[52] *R v Jaudzems* (2014) QSC 74
[53] *R v Jaudzems* (2014) QSC 74
[54] *R v Jaudzems* (2014) QSC 74

requiring a police officer to hold a suspicion or reasonable suspicion before stopping and scanning a person;

requiring a police officer to be satisfied of some lower state of satisfaction before stopping and scanning a person;

requiring a police officer to seek a person's consent before scanning the person; and

excluding children from the persons who may be subject to use of a handheld scanner;

The Minister has considered the alternatives above, and I agree with the Minister in that, these alternatives will have increased the risk that knives would not be detected until they have placed the community at risk. As such, while those alternatives would be less restrictive measures, they would not be as effective in achieving the purpose however, the ends do not necessarily justify the means so to speak and careful consideration should be given to the alternatives considered. Should everyone be subject to a strip search in public because it would reduce drug possession for example?

Safeguards For Oral Directions

Where oral directions are to be given by an officer, there are certain responsibilities Police must follow such as; telling the individual that they could be charged with an offence for failing to follow a lawful direction[55] and allowing the individual to adequately explain what they are doing[56] and must give the individual reasonable time to comply.

> **Section 633 - Safeguards for oral directions or requirements**
>
> (1) This section applies if a police officer gives someone an oral direction or makes an oral requirement under this Act.
>
> (2) If the person fails to comply with the direction or requirement, a police officer must, if practicable, warn the person;
>
> (a) it is an offence to fail to comply with the direction or requirement, unless the person has a reasonable excuse; and
>
> (b) the person may be arrested for the offence.
>
> (3) The police officer must give the person a further reasonable opportunity to comply with the direction or requirement.

These provisions have been placed into the Act to safeguard individuals against unlawful conduct by the Police and prevent any arbitrary use of Police powers against private citizens. Of course, when we look at Section 633, Sub-section two[57], the reference to 'if practicable' provides officers with some defence, when a warning has not been given however, a subjective test will apply to all facts and evidence. The below section applies where a person is committing or has committed a summary offence.

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[55] *Police Powers and Responsibilities Act* (2000) (Qld) s633 (2)
[56] *Police Powers and Responsibilities Act* (2000) (Qld) s634
[57] *Police Powers and Responsibilities Act* (2000) (Qld) s633 (2)

Section 634 - Safeguards for declared offences under Summary Offences Act 2005

(1) This section applies to an offence under the *Summary Offences Act 2005* that is a declared offence for this Act.

(2) A police officer who suspects a person has committed a declared offence must, if reasonably practicable, give the person a reasonable opportunity to explain;

(a) if the offence involves the person's presence at a place, why the person was at the place; or

(b) if the offence involves entering a place, why the person entered the place; or

(c) if the offence involves any of the following, why the person did the relevant thing;

(i) parachuting or hang-gliding onto a building or structure;

(ii) Base-jumping or hang-gliding from a building or structure;

(iii) climbing up or down the outside of a building or a structure;

(iv) abseiling from a building or structure; or

(d) if the offence involves possession of a graffiti instrument or an implement, why the person was in possession of the graffiti instrument or implement at the relevant time; or

(e) if the offence involves possession of a thing that is reasonably suspected of having been stolen or unlawfully obtained—how the person came to have possession of the thing.

(3) If;

(a) the person fails to give an explanation; or

(b) the police officer considers the explanation given is not a reasonable explanation; or

(c) because of the person's conduct, it is not reasonably practicable to give the person a reasonable opportunity to give an explanation;

Example for paragraph (c)—
It may not be reasonably practicable to give the person a reasonable opportunity to give an explanation because of the person's conduct, for example, the person may be struggling or speaking loudly without stopping.

the police officer may start a proceeding against the person for the declared offence.

(4) In this section, **"declared offence"** means an offence against *section 11* , *12* , *13 (1)* , *14* , *15* , *16* or *17* of the *Summary Offences Act 2005* .

There are also provisions within the *Act*[58], for Police to provide their details, especially in circumstance where Police are not in uniform and cannot be clearly identified as Police.

Section 637 - Supplying police officer's details

(1) This section applies if a police officer;

(a) searches or arrests a person; or

(b) searches a vehicle; or

(c) searches a place, other than a public place; or

(d) seizes any property; or

(e) stops or detains a person or vehicle; or

(f) requires a person to state his or her name and address; or

(g) gives to a person a direction under *section 48* or *177* ; or

(h) enters a place to make an inquiry or investigation or to serve a document; or

(i) exercises a power as a public official.

(2) The police officer must, as soon as reasonably practicable, inform the person the subject of the power of the following;

(a) if the police officer is not in uniform;

(b) that he or she is a police officer; and

(i) his or her name, rank and station;

(c) if the police officer is in uniform—his or her name, rank, and station.

(3) If the police officer is not in uniform, the police officer must also produce for inspection his or her identity card.

(4) If the police officer is searching a person, vehicle or place, other than under a search warrant, the police officer must state the purpose of the search and the reason for seizing any property.

(5) If 2 or more police officers are searching the vehicle or place, only the senior police officer present is required to comply with *subsections (2)* to *(4)*.

[58] *Police Powers and Responsibilities Act* (2000) (Qld) s637

(6) However, if a person asks another police officer for the information mentioned in *subsection (2)* or to produce an identity card, the police officer must give to the person the information requested or produce the identity card.

Scanning for knives is intended to be quick and non-invasive. The amendment does not propose a requirement for the names of individuals who are scanned reducing any limitation of an individual's privacy and reducing the time during which an individual's movement is limited however it should be considered by the Committee.
Further, I agree with the following provisions requiring the police officer to exercise the power in the least invasive way that is practicable in the circumstances;

allowing the police officer to detain the person for only so long as is reasonably necessary to exercise the power;

requiring the police officer to provide their name, rank, and station if requested;

requiring the police officer to inform the person to be scanned that they are required to allow the officer to use a handheld scanner to determine whether the person is carrying a knife or other weapon;

requiring the police officer to offer to give the person to be scanned a notice (and to give that notice if that offer is accepted) that states:

a) the person is in a public place in a safe night precinct or at a public transport station or on a public transport vehicle within 1 scheduled stop of a particular public transport station;

b) the police officer is empowered to require the person to: stop and allow, or allow again the use of a hand held scanner in relation to the person or their belongings to determine whether the person is carrying a knife or other weapon; and

c) produce a thing that may be causing the scanner to indicate the presence or likely presence of metal; and it is an offence for the person not to comply with the requirement unless the person has a reasonable excuse; and

Another safeguard in the operation of the scanning powers is the current requirement in police policy that police officers allocated a body worn video camera are to commence a recording as soon as practicable after an officer reasonably believes they may exercise a police power under legislation. This is the current practice when police conduct handheld scanning under Chapter 2, part 3A of the PPRA. The problem with this provision is with the device and technology itself in that; there is a 30 second delay in audio that I predict will be an issue in future legal actions as the initial 30 second period missing from the audio will encompass more often than not, any provisions by the officer of name, station and rank and also, any directions and/or warning given to the individual that has been stopped.

Conclusion

In my opinion, the Police Powers, and Responsibilities (Jack's Law) Amendment Bill 2022 is somewhat compatible with human rights under the *Human Rights Act 2019* because it does limit some human rights however, a human right is limited only to the extent that is

reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom.

Further consideration must be given to the application of the proposed amendments in some areas and communities with higher populations of indigenous Australians, age, and race. Consideration must also be given to implement safeguards aimed to reduce further limitations on human rights, focusing on de-escalation in order to prevent individuals being prosecuted with other public order offences as a result of non-compliance.

Any power is also designed to be exercised non-intrusively and for the shortest period possible, with no ancillary power to request a person's name. On balance, the need to detect knives in safe night precincts and public transport stations/vehicles is to support community safety and this outweighs the limitation of the rights to the individuals screened.

Victoria, South Australia, and Western Australia permit limited scanning of persons in particular public places for weapons