QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Fair Trading Inspectors Bill 2013
Submission 001

The Research Director
Legal Affairs and Community Safety Committee
Parliament House

By Email: lacsc@parliament.qld.gov.au

Dear Madam/Sir

Fair Trading Inspectors Bill 2013

Thank you for the opportunity to make a submission in respect of this Bill which is important because it seeks to codify the powers of inspectors under various pieces of Queensland legislation.

The Queensland Council for Civil Liberties ("the QCCL") is a voluntary organisation committed to the implementation of the Universal Declaration of Human Rights in Queensland.

Relevantly the Universal Declaration provides as follows:

1. Article 9 – no one shall be subjected to arbitrary arrest, detention or exile.

2. Article 12 – no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour or reputation.

Over a series of submissions to various committees the QCCL has developed some principles concerning the appropriate powers for inspectors. In preparing these principles the Council has had regard to the fourth report of the Senate Standing Committee for the Scrutiny of Bills – *Entry and Search Provisions in Commonwealth Legislation* 6 April 2000 and the Report of the Victorian Parliament Law Reform Committee – *The Powers of Entry, Search, Seizure and Questioning of Authorised Persons – May 2002*

In the Council's view legislation should reflect the fact that the powers of inspectors serve different ends and those different ends need to be reflected in different types of powers and safeguards.

The legislation should recognise the distinction between the powers that an inspector should have to:-

1. investigate where a person is possibly exposed to some sanction be it criminal or otherwise.

2. monitor compliance with a regulatory scheme or funding program.

3. deal with emergency situations.

The Council says that:-

1. In first category of case a search warrant issued by judicial officer should be a prerequisite of an entry and search.

2. In the second category where the Authority wants to carry out an audit of compliance with guidelines, regulations or similar applied to an organisation we would accept that there is a proper basis for authorising entry under the legislation without consent and without a warrant so long as there is reasonable notice and it is to be carried during business hours. The inspectors need to be required to identify themselves properly and to identify the purposes for which they are conducting the search. Refusal to consent or allow entry would form the basis of an application for a warrant. In these sorts of situations the inspectors would only be allowed to go in and audit and inspect and check. They should not be authorised to seize things or arrest people.

3. We accept that circumstances may arise which make it impractical to obtain a warrant before an effective entry and search can be made. However, impracticality should be assessed in the context of current technology given the provisions allowing for electronic applications for a warrant. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer.

We now seek to apply these principles to the Bill:

1. In many respects the Bill adequately balances the right to privacy with the public interest in law enforcement.

2. Clause 22(1)(d) should be modified in accordance with the second principle enunciated above to make it clear that the entry is to be solely for the purpose of carrying out an audit for compliance with rules, guidelines or other statutory requirements applied to the organisation. It might be said that that limitation is implicit. However, we would prefer it were actually stated in the section to avoid any doubt.

3. Clause 26 should make it mandatory that the inspector obtains written consent or makes an electronic recording of the consent to the entry and the consent is by a person authorised to do so. In the case of a business that should be an owner, director or manager. The consent of, for example, the receptionist should not be enough.

4. Part 2 Division 2 should be qualified by a provision stating that evidence obtained during an inspection by consent is only admissible in relation to a proceeding under the legislation pursuant to which the inspector was acting at the time of the inspection.

5. Clause 31. It seems to us that this section narrows the test for setting aside a search warrant from that at common law. It is our submission that this section should be removed and the common law applied.

6. Part 3 Division 1 – Having regard to clause 33 of the Bill it follows from our statement of principles above that before a vehicle can be inspected, absent circumstances making the obtaining one impractical, a warrant should be a prerequisite. Of course if it is alleged impractical

circumstances exist then the action will have to be justified to a judicial officer after the event.

7. Clause 38(4). The QCCL is concerned based upon complaints it has received from members of the public and the experience of legal practitioners who are members of the Council that the police frequently detain computers for long periods of time. In contemporary society access to a computer is a critical part of life both for social and financial reasons. Furthermore, it is relatively easy for a forensic image to be taken of any computer or similar device. The legislation should provide that the inspector is required to return the device within say seven (7) days absent a Court Order extending the time. It should be a prerequisite to obtaining an Order that the inspector demonstrates that it has not been reasonably practical to obtain a forensic image or that for some reason a forensic image is inadequate for the purposes of the investigation.

8. Clause 43. Provision needs to be made for innocent third parties such as financial institutions to apply to the Court to obtain the release of anything seized so that they can vindicate their rights. The provision in Section 49 is in this regard entirely inadequate. An innocent third party such as a financier should have a separate right to obtain the release of the goods and if the inspector will not agree to seek a Court Order in that regard. This right should of course extend to liquidators and receivers.

9. Chapter 2 Part 4. The Act should provide that individuals whose criminal histories have been accessed pursuant to this part should be advised of this access within 12 months unless to do so would compromise an ongoing investigation. The Canadian decision of *R v Duarte* [1990] 1 S.C.R. 30 at 43 established it is a constitutional requirement that notification must be given to a person whose communications have been intercepted in the case of an interception or access warrant.

10. In addition, individuals executing search warrants should be required to report to the Court. The legislation should contain provisions similar to that in Section 21 of the *Search Warrants Act 1985 (NSW)* requiring the person to whom the warrant is issued to furnish a report in writing to the court who issued it stating whether or not the warrant was executed and setting out the results of the execution or setting out the reasons for why the warrant was not executed.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
14 January 2014