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Police Powers (Motor Vehicle Impoundment) & Other Legislation Bill 2012
Submission 015

Research Director
Legal Affairs and Community Safety Committee

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

Dear Madam/Sir

Submission in relation to Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012

In 2002, the *Police Powers and Responsibilities Act 2000* ("Act") was amended to incorporate measures to curb hoon behaviour. By a 2007 amendment, the scope of these provisions was widened as to the types of offences which attract vehicle impoundment.

The Police Powers and Responsibilities (Motor Vehicle Impoundment) Amendment Bill 2011 was introduced in November 2011 and lapsed in February 2012 as a result of the current Government. The 2011 Bill introduced wide powers for police officers to impound motor vehicles in broad circumstances.

The Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012 ("Amendment Bill") represents a further increase in the scope of the vehicle impoundment powers of police officers. We note that these powers are either operated by the discretion of the police officer or by automatic operation of the Amendment Bill. Without judicial supervision scrutiny of the widened powers is warranted and we thank the Committee for the opportunity to comment on the Amendment Bill.

A BROADER SCOPE FOR HOON BEHAVIOUR

The Amendment Bill introduces a wider scope for what constitutes hoon behaviour without placing any checks on police officers applying the provisions.

This is exemplified in the broader definition of burnout. By removing the word "smoke" from the definition of burnout a significantly wider definition will be applied to type 1 vehicle related offences. The removal of the word "smoke" creates a more discretionary definition and subjective test for police officers to apply. Under the Amendment Bill definition, any driver who experiences sustained loss of traction with the road surface will fall within the definition of burnout if the conduct of the driver is considered by the police officer to be wilful.

The definitions of type 1 and type 2 vehicle related offence are also broadened under the Amendment Bill. Type 1 vehicle related offences currently include careless driving offences and offences involving racing but will only fall within the type 1 vehicle offence provision if they are committed in circumstances that involve a speed trial, a race between motor vehicles or a burn out.

However, the inclusion under the Amendment Bill of offences against section 754 of the *Police Powers and Responsibilities Act 2000* into the definition of type 1 vehicle related offences extends the operation of this impoundment provision considerably. There is no requirement that an

offence against s754 be committed in circumstances of hoon behaviour. The charging of an offence under s754 will be sufficient to empower a police officer to impound a vehicle for the prescribed impoundment period of 90 days. We submit that this extensive definition of type 1 vehicle related offence goes beyond the purpose of this legislation and empowers police officers to effectively impound a vehicle for 3 months whenever a person is charged with failing to stop their motor vehicle irrespective of whether they are exhibiting hoon type behaviour.

INCREASES IN TIME LIMITS FOR IMPOUNDING

Type 1 Vehicle Related Offences

The Amendment Bill increases the initial impoundment period to 90 days for a first type 1 vehicle related offence. In addition the definition of when a person is charged with a vehicle related offence is to be widened by the Amendment Bill to include any time a person is served with an infringement notice. The explanatory memorandum characterises the impounding of a motor vehicle as following automatically from an offender being charged. However, the legislation makes use of the word "may". This implies discretion in the police officer. If it was intended to follow automatically then the Parliament would use the word "must".

It is unclear in what circumstances the period will be imposed by a police officer. While this standard is a continuation from the current Act, it is concerning that an increased impoundment period of 90 days is now open to be imposed by a police officer without the reason for the decision being justified or made in accordance with any standardised criteria.

We submit that the discretionary employment by a police officer of the provisions enabling the automatic impoundment period to run amount to an over-empowering provision.

In circumstances where the right to enjoy personal property would be denied for up to 90 days it is appropriate for the decision to be made on the basis of a standard criteria. It is not sufficient for a police officer to rely on the offence or number of offences to justify the impoundment without a declaration from the Committee that that is sufficient justification for invoking the respective impoundment periods. While the explanatory notes recognise the limitations placed on personal liberties, it is noted that the Act does not enable any checks and balances to be placed on the exercise of the police officers' discretion. A provision should be included allowing a person to apply to the court for the return of their vehicle on the basis of special hardship and previous good behaviour (similar to 'special hardship applications for disqualified drivers).

The current bill empowers the police officer to impound a vehicle in relation to a first type 1 offence for 90 days. The previous Government's bill provides impounding for 28 days, for what is in effect the second repeat type 1 offence. However, to impound a vehicle for 90 days there had to be an Application brought to the court. That power arose in a case of type 2 offences for the second repeat and subsequent offences and for the first repeat and subsequent offences of the type 1 class. We encourage the oversight afforded to the Court under the previous bill, even though it would have been subjective, but do not support the automatic impoundment of a motor vehicle for 3 months without Court oversight.

Type 2 Vehicle Related Offences

This is similarly the case for type 2 vehicle related offences where the initial impoundment period will be increased from 48 hours to 7 days. It is recognised that the initial impoundment period of 7 days is used in some other Australian State jurisdictions. It has been recognised that the initial impoundment period at present is having a deterrent effect as individuals become concerned for the ramifications of further offending knowing that the impoundment period will increase.

Under this bill the type 2 offences the vehicle can be impounded for 7 days for the second offence and 90 days for the third type 2 offence. These powers are all invested in police officers and our previous concerns about a lack of standardised criteria for determining when the impoundment provisions will be activated is echoed. A lack of judicial over sight is again a problem that could be addressed, as described above.

Forfeiture of Motor Vehicles

The Amendment Bill introduces automatic forfeiture of a vehicle on being found guilty of a second or subsequent type 1 offence. The Amendment Bill increases the relevant period from 3 years to 5 years so that any person who commits a second type 1 vehicle offence within 5 years is subject to the forfeiture. This greatly increases the number of individuals who may fall within the forfeiture category.

In relation to type 2 offences the forfeiture provisions will be triggered upon the commission of a fourth or subsequent type 2 vehicle related offence within the relevant period of 5 years.

The automatic forfeiture of the motor vehicle raises two (2) issues:

Firstly, it is an expropriation of private property which is employed as a punishment in addition to other punishments imposed. If the private property is subject to the *Personal Property Securities Act 2009* then any claim by a secured party pursuant to that Act is extinguished. The Amendment Bill appears to only make provision for compensation for the expropriation where the driver is found not guilty and the motor vehicle has been disposed of. This expropriation of a motor vehicle without compensation which is undertaken in addition to any other penalty imposed constitutes a gross imbalance particularly where the forfeiture itself is not determined by a Court but by automatic operation of a legislative instrument on the commission of a second offence.

The effect of the proposed "automatic" forfeiture rule leaves the decision making power in the hands of the police. This is inconsistent with the rule of the law. It is also inconsistent with the rule of the law in that it leaves no discretion to the Court. If the forfeiture serves the same purpose as a sentence, that is, punishment and deterrence, which presumably it does, the forfeiture and sentence must be assessed together so as to ensure that the punishment fits the crime. For example, account must be taken of the extent to which the vehicle is used for criminal and non-criminal purposes.

This is a form of mandatory punishment which will inevitably result in injustices particularly if the practice develops of charging an individual on one occasion with a number of offences. Automatic forfeiture is likely to have far more significant impact on a poor person than on rich person. The poor person may depend upon the car for the necessities of life or for their employment or both. A rich person may not be so constrained.

The impact may also be greater in a rural area than in the city where there may be better access to alternative transport.

This has the potential to undermine the fairness of the judicial system. The decision as to whether the property should be forfeited is too important and the effect on individuals too great to deny the Courts the ability to consider the impact when assessing a proposed forfeiture order.

REMOVAL OF RESTRICTION FOR SAME OFFENCE TYPE

It is our submission that the removal of the restriction for repeat offences under the type 2 vehicle impoundment scheme to be of the same offence type will increase significantly the number of individuals to whom the scheme will apply. We submit that increasing the number of individuals

who will potentially come within the impoundment scheme will not have the deterrent effect intended.

It is recognised that increasing the number of pre-impoundment type 2 offences is intended to limit the number of individuals falling within the automatic vehicle impoundment scheme. However, it must be recognised that, in practice, individuals are often charged with multiple offences at a time, and often include more than one type 2 vehicle offence.

In these circumstances, the principle of section 108 in relation to previous occasions is illustrative. As we read the provision it provides that individuals charged with multiple offences at one time who are processed at that time shall be counted as a single occasion for the purpose of certain provisions relating to impoundment/forfeiture orders and notices required by the Act.

There is a concern that in the absence of a clarification about the meaning of charges committed previously there is a capacity for an individual to be charged on one occasion with a number of type 2 charges and that these will be classified as multiple charges.

Without this clarification there is a concern that the "relevant period" restriction, which was encouraged under the current Act, will become an inadequate restriction for the purpose of deterrence and rehabilitation in practice. This is particularly important given that the Amendment Bill proposes to increase the relevant period from 3 years to 5 years.

ISSUING OF VEHICLE PRODUCTION NOTICES

The inclusion of this provision is welcomed. It allows drivers to depart a location where spoken to by police and then forfeit the vehicle within a nominated time. It ensures that drivers are not left stranded, potentially in isolated locations.

INCREASING THE POWERS OF POLICE TO IMMOBILISE MOTOR VEHICLES

The Amendment Bill introduces further powers for police to immobilise motor vehicles as another way to keep a motor vehicle that may be impounded. There is no indication within the Amendment Bill of when the immobilisation and number plate removal powers will be exercised over the impoundment powers. It is clear that the decision is to be made by a police officer who is not obliged to apply any test to make such a decision.

INCORPORATION OF APPLICATION FOR RETURN OF IMPOUNDED VEHICLE

We encourage the incorporation of safeguards for owners of vehicles whose rights are infringed by authorised and unauthorised use of vehicles by offenders especially the insertion of Division 5 "Other provisions relating to motor vehicles impounded for automatic impoundment period" and especially the insertion of proposed provision 84C.

However, in relation to section 84B of the Amendment Bill, we would urge the Committee to consider incorporating both the automatic impoundment period and the initial impoundment period as defined as time periods during which an application for return of the vehicle can be made. As the proposed initial impoundment period amounts to a week long impoundment, we are concerned that a vehicle impounded for the proposed initial impoundment period will have an effect on employment and other responsibilities of both the offender and their family.

In relation to section 84C of the Amendment Bill it is submitted that the use of the words "necessary information" are unclear. It is apparent that "the application must be made in the approved form and supported by enough information to enable the commissioner to decide the application" in accordance with section 84B if the Amendment Bill. However, the evidentiary

element of this proposed provision, namely s84B(2)(b), does not impose any element of necessity.

The presumption that remains is that the "necessary information" will either form part of the approved form or is a decision made by each individual as to what he/she considers necessary. While it is recognised that individuals should remain responsible for their applications under this provision, in order to effectively enact this provision, the Committee should consider what necessary information will be required. If this term is not described by the Act or subsequent regulation its effectiveness in lessening the hardship an individual would otherwise face will be lost. It is submitted that the following information should fall be included:

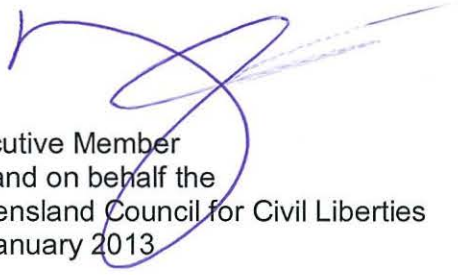
- Current place of employment;
- Current number of hours worked per week and indication of work hours;
- Description of employment tasks and role;
- Availability of alternate transport – public or private (through a relative or friend);
- Current income and liabilities (including weekly or monthly liabilities);
- Other people supported by individual's income (including whether support is paid to a child, former spouse or relative);
- Weekly spending commitments;
- Driving history and circumstances of any previous offences;

We recognise that the vehicle impoundment scheme has had some success in decreasing the number of amount Type 1 and Type 2 offences this past year and that there has been a decrease in the number of excessive drink driving offenders (over 0.15 blood alcohol level). Although we recognise the existence of a deterrent effect in this legislation, it is noted that the deterrence is limited to decreasing the perpetration of those offences classified as Types 1 and 2 by the Act and that while the number of those offences is decreasing the decreases are relatively small.

The QCCL acknowledges that this submission is largely the work of Emma Higgins and Dan Rogers.

We trust this is of assistance to you in your deliberations

Yours Faithfully,



Executive Member
For and on behalf the
Queensland Council for Civil Liberties
31 January 2013

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