GAT:dgr

5 July 2018

Legal Affairs and Community
Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: LACSC@parliament.qld.gov.au

Dear Committee Secretary

Re: Police Powers and Responsibilities and Other Legislation Amendment Bill 2018

Thank you, on behalf of the Bar Association of Queensland ('the Association'), for the invitation to make a submission in relation to the Legal Affairs and Community Safety Committee's review of the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2018* ('the Bill').

The Association has restricted our substantive comments to those proposed amendments which appear to us to raise the most important matters for consideration and comment.

Part 2 – Amendment of Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004

The practical effect of the proposed introduction of ss 471.20,[1] 471.22[2] and 471.26[3] of the *Criminal Code* (Cth) ('the Commonwealth Code') into Schedule 1 of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) is that an offender will be listed on the Child Protection Register ('the Register') unless a conviction was not recorded[4] or only a single offence was committed.[5]

The Association has, on previous occasions, expressed concern that young people who engage in consensual sexting are not adequately protected against offending child exploitation material laws and being listed on the Register in Queensland. This concern was, in part, triggered by the Queensland Sentencing Advisory Council's finding that the average age of a child exploitation offender is 14.3 years.[6]

[1] Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service.
[2] Aggravated offence – offence involving conduct on 3 or more occasions with 2 or more people.
[3] Using a postal or similar service to send indecent material to persons under 16.
[4] *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 5(2)(a).
[5] Ibid s 5(2)(c)(ii).
[6] Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Consultation Paper* (2017) 17.

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Being listed on the Register requires a young person to report in-depth personal details,[7] each February, May, August and November;[8] intended absences from Queensland which are longer than 48 hours;[9] and all 'reportable contact' with a child[10] for a period of five years.[11] 'Reportable contact' includes an attempt by a young person to befriend or establish further contact with a child.[12] It would be intolerably burdensome for a young person to report contact with new friends at school, or other young people they work with in their part-time job.

The application of laws intended to prevent sexual exploitation against children involved in relationships with other children of roughly their own age without carefully considered adjustments to the regime imposed by those laws causes many absurd results.

The whole purpose of those laws is to prevent exploitation by adults of children. To apply them to young people because of their relationships with one another is implementation of policy without thought or sensitivity. The offender reporting requirements of the laws represent only one aspect of this absurdity.

One adjustment that might be considered is that laws against sexual exploitation of children only apply where the "exploited" child is at least two years younger than the alleged offender. However, the issues deserve thorough and expert consideration. The Association would recommend that the subject be referred to the Law Reform Commission for inquiry and report.

In the meantime, for the reasons expressed, the Association is opposed to the inclusion of ss 471.20, 471.22 and 471.26 of the Commonwealth Code in Schedule 1 of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld).

If such a step were to be considered, it should only take place with statutory safeguards included to prevent young people who engage in consensual sexting being listed on the Register.

Part 3 – Amendment of Corrective Services Act 2006

Where the Parole Board Queensland ('the Board') refuses to grant an application for parole, s 193(5)(b) of the *Corrective Services Act 2006* (Qld) requires the Board to decide a period of time, of not more than six months after the refusal, within which a further application must not be made without the Board's consent.

Clause 6 of the Bill proposes to amend the maximum time during which the Board may decide the person may not make a further application for parole without the Board's consent from not more than six months to not more than 12 months for a prisoner serving a life sentence.

The Association is aware that members of the Parole Board have a high workload which is intended to be ameliorated by this and other proposals including the proposal that the Board sit as a three person Board in circumstances where, presently, all five members

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[7] *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) sch 2.
[8] Ibid s 19, sch 5.
[9] Ibid s 20.
[10] Ibid s 9A(1) defines 'reportable contact' as *'(a) has physical contact with the child; or (b) communicates with the child orally, whether in person, by telephone or over the internet; or (c) communicates with the child in writing (including by electronic communication)'*.
[11] Ibid s 36(1)(a).
[12] Ibid s 9A(3).

are required to sit. The proposals as a whole are directed to making the Board members' workload manageable.

Of course, the *Corrective Services (No Body, No Parole) Amendment Act 2017* (Qld) which was opposed by the Association is one factor contributing to that increased workload.

It is acknowledged that there is a superficial appeal to the proposal that prisoners serving life for murder only be allowed to apply for parole every 12 months, rather than every 6 months. The Association also concedes that some prisoners serving life for murder do not have a realistic prospect of ever being released.

The Association, however, is very much aware of the dangers associated with leaving people incarcerated, potentially, for life without regular reviews. Despite the workload involved in such reviews (triggered by applications by the prisoner), the Association would be concerned if a person who has already served more than 20 years in jail was not able to apply at least every six months.

It is crucially important to our society that we are not seen to have thrown away the key for long term prisoners. Such a perception may lead to a loss of hope such that prisoners cease any continuing attempts at gaining rehabilitation.

For these reasons, the Association is opposed to this proposal.

There are other important factors concerning the sentencing for murder. The mandatory life sentence and the increased minimum period of 20 years for parole eligibility means that many prisoners are serving over 20 years in jail when the criminality of their action may not justify anything like such a long sentence.

The truth is that the heinousness of murders varies very greatly. Some persons convicted of murder may merit very long sentences. Some persons convicted of murder may have been victims of the person that they murdered. The defences of provocation and self-defence apply in some circumstances but they are very technical defences whose applicability (or non-applicability) often does not reflect the criminality of the original act said to amount to murder.

By way of example, women who have been victims of domestic violence sometimes feel as if they have no option but to kill their tormentor. Very often, however, the circumstances in which they act do not satisfy any defence. They end up being sentenced to life with a minimum of 20 years before they are eligible for parole.

A sentencing court which is not forced to impose the mandatory penalty might impose a sentence of less than five years in such circumstances. Such a sentence would suit the criminality of the last resort action on the part of the woman whose partner has subjected her to violence over many years.

The Government is urged to refer the issue of non-mandatory sentencing for the offence of murder to the Queensland Sentencing Advisory Council for consideration and report.

One of the advantages of sentences that meet the criminality of the offence is that resources are not wasted on imprisoning people for many years when this is not warranted by the offence. The resources saved by such a process would be able to be re-allocated to assist the Parole Board deal with the difficult tasks which are entrusted to it.

Part 4 – Amendment of Criminal Code

The Association provides no comments on these proposed amendments.

Part 5 – Amendment of Maritime Safety Queensland Act 2002

The Association provides no comments on these proposed amendments.

Part 6 – Amendment of Motor Accident Insurance Act 1994

The Association provides no comments on these proposed amendments.

Part 7 – Amendment of Police Powers and Responsibilities Act 2000

Crime scenes

Clause 23 of the Bill proposes to insert a new Division 1AA into Chapter 7, Part 3 of the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2018* (Qld) ('the PPRA').

Section 163B proposes to define a *'crime scene'* as (emphasis added):

> *A place is a crime scene if –*
> *(a) Either of the following apply –*
> *(i) A crime scene threshold offence happened at the place;*
> *(ii) There may be evidence at the place, of a significant probative value, of the commission of a crime scene threshold offence that happened at another place; and*
> *(b) It is necessary to protect the place for the time reasonably necessary to search for and gather evidence of the commission of the crime scene threshold offence.*

A *'crime scene threshold offence'* is then defined in proposed s 163A as:

> *(a) an indictable offence for which the maximum penalty is at least 4 years imprisonment; or*
> *(b) an offence involving deprivation of liberty.*

The establishment of a crime scene under Chapter 7, Part 3 of the PPRA enlivens broad police powers. Some of those powers exist prior to any crime scene warrant being issued including the power to enter and restrict access to any place. Once a crime scene warrant has been issued, additional powers are bestowed pursuant to ss 176 and 177.

The additional powers include:

- enter the scene and expel the lawful owner or occupier;
- take electricity for use at the scene and direct the occupier to maintain a continuous supply of electricity (with no legislative provision establishing a right to compensation as a result of the use of electricity);
- open anything that is locked;
- excavate; and
- remove walls, ceiling linings or floors.

If a crime scene warrant is issued by a Supreme Court judge, the powers can extend to permit causing structural damage to buildings.

The definitions of *crime scene*, *primary crime scene* and *secondary crime scene* have remained in their present form since the enactment of the PPRA more than 16 years ago. Indeed, the same definitions were contained in the current Act's predecessor, the *Police Powers and Responsibilities Act 1997,* which was itself the result of many years of consultation and development following the Fitzgerald Inquiry.

The exercise of such powers represents a significant imposition on both common law and statutory rights of owners and occupiers of properties. Such imposition should not occur unless there is a strong justification for doing so, particularly if there are no reasonable grounds for suspecting that the owner or occupier of premises has committed any offence.

As such, the Association has serious reservations about broadening the range of suspected offences which would enliven crime scene powers. This is especially so given the proposed reduction of the maximum penalty from 7 to 4 years imprisonment. Such a large reduction would result in most offences under the *Criminal Code* (Qld) ('the Queensland Code') being included, rather than only the serious offences.

The broad mesh scale of the proposed threshold may also be understood by reference to the fact that many offences which carry high maximum penalties are committed on most occasions in ways that justify minimal penalties being imposed. While stealing, properly, carries a high maximum penalty, it is unlikely that a crime scene would need to be established for most shop lifting offences which are very minor infractions of the law.

Similarly, the Association has serious reservations about broadening the circumstances in which a place where a crime has not actually been committed can be subject to the exercise of the same powers. The Association is concerned that the proposed definition of *'crime scene threshold offence'*, being the mere possibility that there may be evidence at the place of the commission of an offence that happened at another place, is insufficient to justify overriding the statutory rights of owners and occupiers of properties. This is particularly the case when the owner and/or occupier of a property:

- may have perfectly legitimate reasons for not wanting their premises to be searched by police; and
- are not suspected of committing any offence themselves.

Storage devices

Currently s 154A in Chapter 7, Part 1 of the PPRA enables a police officer to apply to a Supreme Court judge or a magistrate for an order to access and read information on a storage device, but only after a storage device has been seized under a search warrant.

Clause 25 of the Bill seeks to insert s 178A to enable a police officer to apply to a Supreme Court judge or magistrate for a similar order in relation to a storage device situated at a crime scene, without first applying for a search warrant.
Under the proposed s 178A, an access information order will require a specified person[13] to (emphasis added):

[13] It is noted that the proposed definition of 'specified person' in s 150AA is the same definition as a 'specified person' in the operation of s 154A.

- give a police officer:[14]
  - access to the storage device; or
  - access information for the storage device; or
  - any other information or assistance necessary for the police officer to be able to use the storage device to gain access to information stored on the device that is accessible only by using access information; or
- allow a police officer, given access to the storage device, to do any of the following in relation to information stored on or accessible only by using the storage device:[15]
  - use access information or other information to gain access to the stored information,
  - examine the stored information to find out whether it may be evidence of the commission of the offence for which the crime scene was, or is to be, established;
  - make a copy of the stored information that may be evidence of the commission of a crime scene threshold offence, including by using another storage device; and/or
  - convert the stored information into a form that enables it to be understood by a police officer.

The Association has serious reservations about investigating police being able to access information on a storage device located at a crime scene without first obtaining a search warrant, particularly given the low threshold proposed for a *'crime scene threshold offence'*.

The Association submits such a proposal is unjustified. If investigating police had reasonable grounds for suspecting a storage device contained evidence of the commission of an offence, then they would conceivably be entitled to apply under s 154A for a warrant to seize, and access information on, the device.

Missing person scenes – generally

Clause 27 of the Bill seeks to insert a new Chapter 7, Part 3A in the PPRA to enable police officers to establish a missing person scene within which they are able to exercise powers analogous to crime scene powers. Further, it is proposed that officers be empowered to establish a missing person scene for a 'high-risk' missing person without first obtaining a warrant.

The Minister refers to the missing person scheme as 'an Australian first',[16] and the Bill's Explanatory Note confirms that:

> *In 2016/17, 8,292 people were reported missing to Queensland police. Of those persons reported missing, two were later found to be murdered and 31 were later found to have committed suicide.*

There is limited empirical research and data relating to missing people in Australia. The most recent publication appears to be by the Australian Institute of Criminology in 2008,[17] within which it is also noted that there is an absence of comprehensive data on missing people (especially the risk factors in adults).

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[14] *Police Powers and Responsibilities and Other Legislation Amendment Bill 2018* cl 25, s 178A(5)(a).
[15] Ibid cl 25, s 178A(5)(b).
[16] Queensland, *Parliamentary Debates,* House of Representatives, 12 June 2018, 1416 (Mark Ryan).
[17] Marianne James, Jessica Anderson & Judy Putt, *Missing persons in Australia* (2008) Australian Institute of Criminology <https://aic.gov.au/publications/rpp/rpp86>.

The Association supports evidence-based policy. Thus, in the absence of:

- empirical research and data regarding the success of missing person scenes;
- documented experiences from other States and Territories; and/or
- evidence showing the inadequacies of the PPRA in enabling police officers to investigate missing persons in Queensland;

The Association cannot comprehensively comment on the merits of this proposal. Separately, it is not clear what specific situations the proposed amendments are intended to target. For example, if the intention is to investigate a missing person who is a suspected victim of domestic and family violence, the Association considers the amendments unjustified. If investigating police have reasonable grounds for suspecting the commission of such an offence, they would conceivably be entitled to investigate or question a suspected person. If the intention is to enable police officers to focus more time and attention on investigating missing persons at an early stage, the Association considers a more appropriate solution may be to increase policing resources.

Missing person scenes – 'high-risk' missing persons

The proposed s 179E will enable a police officer to establish a missing person scene before obtaining a warrant if the officer is:

- satisfied a missing person is 'high-risk';
- satisfied it is necessary to establish the scene before obtaining a missing person warrant; and
- authorised to establish a missing person scene by a commissioned officer.

Whilst police officers are required to apply to a Supreme Court judge or a magistrate for a warrant under s 170 to enliven crime scene powers under ss 176 and 177 of the PPRA, the proposed s 179J will enable an officer to exercise analogous powers without a warrant. The only safeguard appears to be that the officer must be authorised by a commissioned officer[18] under s 179E(2).

The Association considers the factors relevant to whether the officer reasonably suspects a person may suffer serious harm if not found as quickly as possible in the proposed s 179C(3) to be broad and subjective. These factors do not adequately safeguard the exercise of powers which are a significant imposition on both common law and statutory rights of owners and occupiers, and which may interfere in a situation where a person's safety is dependent on an intentional decision to go 'missing' (for example, in situations of domestic and family violence).

Thus, the Association is of the view that the officer should be required to have probative evidence that a person is 'high-risk' before being able to establish a missing person scene under s 179E or, alternatively, should be required to apply for a warrant before being able to establish any form of a missing person scene.

Part 8 – Amendment of Police Powers and Responsibilities Regulation 2012

The Association provides no comments on these proposed amendments.

Part 9 – Amendment of Police Service Administration Act 1990

The Association provides no comments on these proposed amendments.

[18] Defined in the proposed s 179A as *'a police officer of at least the rank of inspector'*.

Part 10 – Amendment of State Penalties Enforcement Act 1999

The Association provides no comments on these proposed amendments.

Part 11 – Amendment of Transport Planning and Coordination Act 1994

The Association provides no comments on these proposed amendments.

Part 12 – Minor and consequential amendments

The Association provides no comments on these proposed amendments.

Conclusion

Thank you for the opportunity for the Association to provide feedback on the Bill.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

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President