



Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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Our ref: BDS-CrLC

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

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

Dear Committee Secretary

Police Powers and Responsibilities and Other Legislation Amendment Bill 2018

Thank you for your letter dated 16 April 2018 inviting the Society to provide comments on the Police Powers and Responsibilities and Other Legislation Amendment Bill 2018 (the bill). The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

1. Introductory comments

At the outset, the Society is supportive of measures to preserve and enhance community safety. QLS supports proportionate legislative responses to the threats against community peace and safety. Such legal responses must respect the principles of necessity, legality and proportionality.

In our view, the expansion of police powers to deal with inappropriate conduct must strike a balance between protecting the community and preserving fundamental principles of law. Appropriate safeguards including the provision of suitable processes and opportunities for those affected to challenge the lawfulness of the order and maintaining proper oversight must restrain the proposed expansion of police powers.

QLS remains concerned that expanding the breadth of police powers can shift expectations and could lead to the replication of extraordinary measures in other areas in criminal law. Appropriate oversight and review mechanisms are crucial to ensuring the proposed amendments represent a measured and suitable means of response to an alleged offence.

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2. Key points

Our key concerns in the bill are:

- The ability of police officers to demand access to passwords for applications and subscriptions for any electronic storage device connected to the internet - whether or not they had any connection to the place or to the device (clause 25).
- The lack of the reasonable suspicion threshold test in the establishment of a high-risk missing person scene and the ability of commissioned police officers to authorise the establishment of a missing person scene before obtaining a missing person warrant (clause 27).
- The proposal to allow notices to appear regarding traffic offences to be served at an individual's most recent address which might lead to a significant increase in people failing to appear (and subsequent conviction in absence) on notices to appear due to non-receipt of relevant notices (clause 28).
- The extension of police powers of search for persons detained for breaches of the peace (clause 30).

1. Clause 25 - insertion of new s 178A

Clause 25 seeks to insert a new section 178A which deals with orders for access information for a storage device at or seized from a crime scene. The Explanatory Notes accompanying the bill state:

Police are continually hampered in their investigation of serious criminal offences when they encounter locked electronic storage devices, such as mobile phones and computers. Police forensic examination of locked storage devices is extremely difficult.

This provision models sections 154 and 154A of the *Police Powers and Responsibilities Act 2000* (PPRA) which applies to obtaining access to information stored on electronic devices, which are subject to search warrants. The proposed section 178A lacks the phrase "only accessible" which is seen in section 154. Therefore, an order made under this provision would allow police officers to demand access to passwords for applications and subscriptions for any computer connected to the internet - whether or not it had any connection to the place or to the device. This might include, for example, passwords for social media accounts (such as Facebook, Instagram, etc), online banking, online newspaper subscriptions, Dropbox, OneDrive, online dating sites.

We appreciate that investigative impediments can occur when QPS officers are unable to obtain access to locked storage devices. However, procedural and departmental efficiencies should not alone be adequate justification for impinging on the rights and liberties of individuals who are subject to these powers. In our view, limits must be placed on the use of these powers to ensure that they are not misused. In this regard, the Society does not support this proposal as we consider that it has the potential for abuse.

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2. Clause 27 - insertion of new ch 7, pt 3A

Clause 27 seeks to insert a new chapter 7 into the *Police Powers and Responsibilities Act 2000* (PPRA) to deal with high-risk missing persons (HRMPs).

The establishment of the missing person scene is set out in proposed Division 2 of the bill. The Society is particularly concerned by proposed section 179E. This provision allows a commissioned officer to provide authorisation to establish a missing person scene before obtaining missing person warrant.

The Explanatory Notes to the bill state:

In most missing person investigations, police are allowed by the consent of an occupier to enter the HRMP's residence or place of employment to conduct their investigations. However, for a diverse range of reasons, this consent may not always be forthcoming.

If consent is denied, police cannot enter a place by establishing a crime scene under the PPRA unless they hold a reasonable suspicion that a crime scene threshold offence has occurred. In many instances involving HRMPs there is insufficient information to reach the threshold that any offence has occurred, and as such, police are unable to enter a place without an occupier's consent.

In circumstances where it is necessary as a matter of urgency to establish a missing person scene before obtaining a missing person warrant, a commissioned officer may authorise the establishment of a missing person scene if satisfied the criteria pre-requisite to exercising the powers have been met.

The HRMP scheme is well intentioned, but it has the potential for misuse. The Society has several concerns about the proposed scheme.

First, the Society is concerned about the privacy implications for missing persons and the privacy of everyone associated with them. This situation is exacerbated by section 179T of the PPRA, which only protects individuals where the maximum penalty for the offence is four years or less. We note that a maximum penalty of four years does not apply to many offences – for example, a small amount of cannabis has a maximum penalty of 15 years. As such, it is the view of the Society that the threshold test of reasonable suspicion must be maintained in order to ensure that the rights and liberties of persons occupying a residence are preserved.

Secondly, we are concerned about the breadth of these powers that can apply to entry on a HRMP's residence or place of employment.

Thirdly, we do not support the ability of commissioned officers to authorise the establishment of a missing person scene before obtaining a missing person warrant. Despite the requirement to obtain a warrant, 'as soon as practicable', we consider that this broad power may be susceptible to abuse. The ability to obtain a post-search warrant is seen in relation to the procurement of crime scene warrants. However, in the case of crime scene warrants, the basic threshold test of reasonable suspicion must be satisfied before a crime scene is established. In the case of the HRMP scheme, it is proposed that no reasonable suspicion test be applied. As such, we consider that it is essential that police officers obtain warrants before the establishment of a HRMP scene.

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3. Clause 28 - amendment of s 382 (Notice to appear may be issued for offence)

Section 56 of the *Justices Act 1886* deals with the service of summonses

The proposed amendment to the *Justices Act 1886* in clause 28 states:

section 56(1)(a) or (2)(a), (b) or (c) authorises service on a person at the person's place of business or residence last known to the complainant, or at an address stated on the person's driver licence or a current certificate of registration for the person's motor vehicle.

This amendment would allow notices to appear regarding traffic offences to be served at an individual's most recent address. The Society does not support this proposal.

The 'most recent address' can mean the last address Queensland Police Service have for the person or the address on their licence or registration. The address last known to the Queensland Police Service may be years out of date. Our legal practitioner members have reported that their clients almost never still reside at the last address listed with Queensland Police Service and some people are not diligent at updating their details with the Department of Transport and Main Roads.

In our view, the amendment might lead to a significant increase in people failing to appear on notices to appear due to people not receiving the relevant notices. The result of this will be large numbers of notices being sent to obsolete addresses. That may lead to convictions in absence (section 389(1)(a)) for people who have no idea they are being prosecuted, and applications for warrants.

Defendants failing to appear causes a significant financial cost to the judicial system and ultimately the tax payer. Any fail to appear, whether it is punishable or a means to produce a person before a court, requires a duplication of the resources of Queensland Police, the judicial system and potentially Queensland Legal Aid (if in custody).

We suggest the current model be retained. Most notices to appear for traffic matters are served on the spot. Therefore, if the decision is made not to issue a notice to appear in a particular case, then Queensland Police Service should bear the onus to track down the person and to personally serve a notice to appear to ensure that is received. Due to the rare occurrence of this situation, it is unlikely that this will be a resource intensive exercise.

4. Clause 29 - amendment of s 389 (Court may order immediate arrest of person who fails to appear)

Clause 30 amends the powers of court if a person fails to appear. The proposed amendment in section 389(3) is misconceived and does not materially change the issue of warrants. The Society does not support this proposal.

5. Clause 30 - amendment of s 442 (Application of ch 16)

Clause 31 seeks to amend section 442 of the PPRA by inserting the following:

(aa) is detained under section 50 in relation to a breach of the peace; or

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The current section 442 of the PPRA reads as follows:

442 Application of ch 16

This chapter applies to a person if the person—

- (a) is lawfully arrested; or
- (b) is in lawful custody for a charge of an offence that has not been decided; or

Examples—

1 The person may be in lawful custody because bail has been refused or revoked or a condition of bail is contravened.

2 The person may be in lawful custody pending the satisfaction of a condition on which the person is to be released on bail.

- (c) is in custody under a sentence for a period of imprisonment or, for a child, a detention order; or

(ca) is detained for transport to, or is admitted to, a sober safe centre under chapter 14, part 5, division 2; or

(cb) is detained for the purposes of testing under chapter 18A; or

(d) is otherwise lawfully detained under another Act.

Therefore, the amendment proposed in clause 30 of the Bill appears to give police powers of search for persons detained for breaches of the peace.

The Society does not support this extension of police powers. The Society is concerned that the search power to be created by this clause represents a new intrusion into the civil liberties of law-abiding citizens. This power would allow a search of all passengers and luggage in a bus, train or aeroplane if the police detained and searched the vehicle because of the actions of one suspicious passenger. Similarly, it would allow police officers to search every person in a crowd of demonstrators if they were temporarily detained to prevent a breach of the peace.

While the safety of police officers is an important consideration, it should not be overlooked that in most circumstances the proposed provision would permit people who have not committed, or are not suspected of committing, an offence to be detained and searched. It is to be noted that police officers have possessed the related detention power for centuries, and it has not previously been thought necessary to impose a related power to search.

Furthermore, there appear to be no appropriate safeguards that apply to all searches. They do nothing to allay the Society's concerns about the un-necessarily wide extent of this power. With the vague and relatively low threshold of 'breach of the peace' comes scope for officers to use that as a means to search, where they do not later need to justify that action by reference to a suspicion or a basis for a charge the person was arrested for.

The power seems highly susceptible to abuse – ordinarily search powers in such a context rely upon either a reasonable suspicion of the person having something (drugs, weapons, evidence etcetera) or on their having been arrested for an offence.

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If this proposal were to proceed, we strongly suggest that training be undertaken to remind police what constitutes a breach of the peace. In our view, behaviour that would cause a constable to believe that a breach of the peace has occurred (or will occur) must relate to violence. Such a breach occurs when harm is actually done, or is likely to be done, to a person or, in his or her presence, to his or her property. Alternatively, such a breach occurs where a person is put in fear of being so harmed through an assault, affray, unlawful assembly or other disturbance; *Howell [1981] 3 WLR 501*. However, the Court in *Howell* states that, “the word ‘disturbance’ when used in isolation cannot constitute a breach of the peace.”

These words immediately precede the words of the classic definition, “we are emboldened to say that there is a breach of the peace whenever harm is actually done, or likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.”

Therefore, loud, rude, disobedient, obnoxious or disorderly behaviour does not constitute a breach of the peace. A refusal to leave when directed to do so by a constable is not a breach of the peace. Lying in the road in a distressed or intoxicated state is not a breach of the peace. It is essential that the term breach of the peace is appropriately defined and construed narrowly.

6. Clause 43 - Amendment of s 790 (Offence to assault or obstruct police officer)

The Society supports the separation of the offence to assault and obstruct police officers within the subsections of section 790. We would also support the placement of the assault and obstruct police offences in two completely separate sections.

7. Clause 49 - amendment of sch 9, s 7 (Crime scene warrant application)

Clause 49 seeks to amend section 7 of the *Police Powers and Responsibilities Regulation 2012*. This provision states:

Amendment of sch 9, s 7 (Crime scene warrant application)

(1) Schedule 9, section 7(d)(i) and (ii)— omit, insert— (i) an indictable offence, for which the maximum penalty is at least 4 years imprisonment, happened at the place; or

(ii) an offence involving deprivation of liberty happened at the place; or

(iii) there may be at the place evidence of a significant probative value of the commission of an offence, mentioned in subparagraph

(2) Schedule 9, section 7(g) to (i)—

omit, insert—

(g) if the crime scene is not where the relevant offence happened—when and where the relevant offence happened, if known;

(h) why it is necessary to protect the place to search for and gather evidence of the commission of the relevant offence;

(i) information about any proceeding started against a person for the relevant offence.

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(3) Schedule 9, section 7—

insert—

(2) In this section— relevant offence, for a crime scene, means the suspected offence for which the crime scene is, or is to be, established.

In relation to crime scene warrants, presently, the law has different thresholds for “secondary crime scenes” where there might be evidence. A secondary crime scene can only be searched for a “serious violent offence” (as defined in Schedule 6). Lowering the bar to a four year offence effectively opens up many new areas to search under the crime scene powers. The crime scene powers might then be used in preference to the search warrant powers. We do not consider that it is appropriate to describe these secondary places as “crime scenes”.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Manager, [REDACTED] on [REDACTED] or [REDACTED].

Yours faithfully



Ken Taylor

President