QUEENSLAND POLICE SERVICE

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Your Ref:

Hon Dean Wells MP
Acting Chair
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Wells

I refer to your correspondence dated 6 October 2011 requesting a departmental response to issues raised the Legal Affairs, Police, Corrective Services and Emergency Services Committee to assist with the examination of the Police Powers and Responsibilities and Other legislation Amendment Bill 2011 (the Bill). Attached is the Queensland Police Service's written response to the issues raised.

Where possible I have provided information that may be of assistance to the Committee.

Deputy Commissioner (Specialist Operations) Ross Barnett will represent the Queensland Police Service at the continuation of the Committee deliberation on 12 October 2011.

If you have any questions or comments, please contact Senior Sergeant Robert Utz of the Legislation Development Unit on or email .

I trust this information is of assistance.

Yours sincerely

R ATKINSON
COMMISSIONER

Attachment to the letter to Legal Affairs, Police, Community Safety and Emergency Services Committee

Police Powers and Responsibilities and Other Legislation Amendment Bill 2011

1. ***The submission by the CMC that the additional pat-down powers will lead to an increased number of referrals of police officers to the CMC.***
   - The QPS is unable to speculate on whether the power will cause an increase in the number complaints against police officer made to the CMC.
   - However, the QPS can indicated that for the period 1 July 2010 to 1 May 2011 there were:
     - 16.8 complaints against police per 100 sworn (operational) staff
     - 36.4 complaints against police per 100 000 population
     - This is much lower than the comparable figures for the 2009/10 period were 20.6 complaints per 100 sworn (operational) staff and 43.6 complaints per 100 000 population were recorded.
   - To ensure continuous improvement, the QPS constantly monitors the number and nature of complaints received. It examines all aspects of any increase in reported complaints in order to identify the primary contributing factors.
   - If the number of complaints increased due to pat-down search powers, the Police Service will be able to identify that trend and address the contributory factors, through for example, increased training, amending policy supporting the power.
   - With regard to clause 6, the person must already be detained by police under sections 50-52 of the PPRA before the search power can be utilised.
   - The exercise of the pat-down search power pursuant to clause 8 will not necessitate a pat-down search of the minor in all circumstances. For example, due to the clothing worn by the minor, it may be obvious that no alcohol is concealed in the clothing and therefore a search of their possession would not be necessary.
   - Furthermore, a pat-down search will not be a mandatory exercise. The power merely expands the toolbox available for police officers in dealing with situations. It was acknowledged in the CMC Report *Policing public order: a review of the public nuisance offence* that the exercise of discretion was vital to achieving the right balance between the rights and liberties of individuals and the rights of the community as a whole.

2. ***The submission by the Youth Advocacy Service that the new power would lead to an increase in the number of charges for obstructing police.***
   - The QPS is unable to speculate on whether the power will cause an increase in the number of charges for obstruct police.
   - However, by comparison. as published in the CMC Report '*Police move-on powers: A CMC review of their use*', most persons provided a move-on direction were charged with disobeying a move-on direction only and were not charged with other types of offences. Of those disobey move-on subjects charged with other offences, 9.3 per cent were also charged with offences against police (such as resist arrest, obstruct police, assault police).

- The comparison of the 12-month periods before and after the statewide expansion showed that there was a significant decrease in the proportion of disobey move-on subjects charged with any other offences.
- The principles of the *Youth Justice Act 1992* would still apply, in that before commencing a proceeding for an offence against the minor, the police officer would have to first consider, whether in all the circumstances it would be more appropriate to take no formal action or administer a caution.

3. ***The suggestion that, unless the discretion not to prosecute is exercised with careful regard for the Director of Public Prosecutions guidelines, particularly the guideline that a prosecution should not proceed unless it is in the public interest to do so, the new power would lead to the generation of an increased number of police records for persons whose circumstances might be better handled differently.***
    - Both QPS policy and the Director of Public Prosecution Guidelines provide that the prosecution of persons should be initiated or continued wherever it appears to be in the public interest. The Public Interest test involves determining whether, in the light of the probable facts and the whole of the surrounding circumstances of the case, the public interest will be served in pursuing a prosecution. The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Factors which may alone or in conjunction arise for consideration in determining whether the public interest may not require a prosecution include any mitigating circumstances, age, physical health, intelligence, mental health or special infirmity of the alleged offender.
    - Additionally, as aforementioned, in circumstances where the person is a child the principles of the *Youth Justice Act 1992* would still apply, in that before commencing a proceeding for an offence against the minor, the police officer would have to first consider, whether in all the circumstances it would be more appropriate to take no formal action or administer a caution..

4. ***The suggestion that minors in possession of alcohol could be dealt with in another way, using existing powers.***
    - The current provisions allow a police officer to seize opened and unopened liquor if the police officer reasonably suspects the person has committed, is committing or is likely to commit and offence, among others under section 157(2) of the *Liquor Act 1992*.
    - As the power to seize the liquor does not include a power to search a person or property in the possession of the person for liquor, a police officer may only seize liquor that is sighted or voluntarily given to the police officer.
    - Therefore, under the current legislation, after a police officer seizes 'sighted' liquor from a minor, the officer may choose to provide the minor with an informal caution. This caution would have no affect on the minor if the minor had further liquor in his or her bags and continued to consume that liquor after the police officer left the incident.

- If a police officer locates an intoxicated child, and the police officer determines it necessary to arrest the child to preserve the safety of the child and for example, transport the child home, because the child has been arrested, the police officer may search the child. While the same safeguards such as same gender apply, the search is not limited to a pat-down search, or search of property in the possession of the minor, for liquor.
- During the public hearing on 4 October, it was suggested by both Dr. Young and Mr. Clark, both representing Drug Arm Australasia, that by amending existing section 603 'Power to seize potentially harmful things' of the PPRA to include alcohol, this section could be used to search the minor for alcohol. Section 603 is not excluded from the operation of section 629 'Removal of clothing for search' and would be a far broader search power than what is sought by the amendment, including the removal of clothing. The QPS views the search power provided under clause 8 would be sufficient for police to locate alcohol in the possession of the minor.

5. ***The submission by the CMC that, if laboratories other than the Queensland Health facility were used for DNA, we might see the emergence of accommodating opinions from laboratories seeking work.***

- The current arrangements between the QPS and Queensland Health (QH) are of a commercial nature, whereby the QPS pays the QH Forensic Science Services (John Tonge) to undertake the analysis of DNA samples. This arrangement is no different from that which is proposed with a non-government laboratory.
- While the QPS is unable to speculate on the issues raised by the CMC, the experience of the New South Wales (NSW) Police Force is relevant as a comparison. The NSW Police Forensic Services Group has outsourced about 18,000 samples to non-government laboratories over a three year period. The non-government laboratory met all of their quality requirements including turnaround times.
- There has not been any judicial criticism of the analysis work undertaken by the non-government laboratory.
- The process involved with the analysis of DNA samples does not include any personal particulars or identifying information. The DNA samples are identified only through a unique barcode which remains the reference point for the sample. Upon analysis of the DNA sample, the laboratory develops a DNA profile which is a series of indicators.
- Any non-government forensic laboratory will need to be accredited by the National Association of Testing Authorities, Australia (NATA), or international equivalent, for compliance with the standard prescribed under regulation. The prescribed standard is set by the International Organisation for Standardisation. This body is composed of representatives of various national standards organisations and exist for the purpose of setting internationally uniform standards in a wide range of fields.

6. ***The argument by Respect Inc. that the provision of the power for the Police to lawfully impersonate a client to seek sexual services from prostitutes without a prophylactic undermines the strategies pursued by Queensland Health, because every time the prostitutes say no to such a request, they are reminded that they could get considerably more money if they had said yes.***
    - The QPS does not believe that controlled activities undertaken to in relation to the prostitution without the use of a prophylactic does not undermine the strategies of Queensland Health.
    - The QPS Prostitution Enforcement Task Force (the Task Force) does receive complaints about sex workers offering and providing sexual services without a prophylactic. It is appropriate that these offences, as with any reported offence, are investigated and should it be appropriate commence a proceeding.
    - Importantly, it should be noted that often these complaints come from other sex workers who are complaining about the unlawful behaviour (providing sexual services without a prophylactic) of fellow sex workers. While it is accepted that complaints from other sex workers are often driven simply because of competition and the amount of (extra) earnings by those offering the unlawful services, these issues do not outweigh the significant risks to health and safety of both sex workers and their clients. The Task Force supports sex workers who report other sex workers who are committing offences through the investigation of their complaints.
    - Written submissions 26 and 27 comment that sex workers coming into Queensland from New South Wales and offering their sexual services without condoms are creating the demand in the client sector for sexual services without the use of prophylactics.

7. ***The argument by Respect Inc. that, because the Police do not identify themselves when the prostitute says no, the provision of this power would tend to normalise the behaviour that the law is designed to stop (namely the clients seeking to obtain sex without a prophylactic from a prostitute).***
    - The 'provision of this power' is not only designed to stop 'clients seeking to obtain sex without a prophylactic from a prostitute', it also designed to stop sex workers who are unlawfully offering sex without a prophylactic. Whether a police officer identifies themself or not after receiving a 'no' cannot possibly lead to a normalisation of this behaviour as being okay to do. The law supports the sex worker in saying no by reinforcing to the client that such services are unlawful.
    - As aforementioned, written submissions 26 and 27 comment that sex workers coming into Queensland from New South Wales and offering their sexual services without condoms are creating the demand in the client sector for sexual services without the use of prophylactics.

8. ***The argument of the Queensland Law Society that the practice of police referring a defendant to a particular solicitor, at whatever stage of the proceeding, creates a real or perceived conflict of interest.***
    - During the last three years, there has only been 1 complaint in relation to police officers referring defendants or suspects to particular lawyers. This complaint was made within the last month.
    - The QPS is working with the QLS in the development of a regional lawyer list. Based on current progress, it is envisaged that the list will be available and published on the QPS intranet site in early 2012.
    - Under the current legislation and the proposed Bill, police officers are required to make available to a relevant person, who wants to speak with a lawyer, a regional lawyer list, if available or a telephone directory for the region.
    - The QPS does not believe it is appropriate to comment on the concerns of the QLS regarding the behaviour of lawyers who are not under the responsibility of the Queensland Police Service.

9. ***The extent to which the Director of Public Prosecutions guidelines in respect of the discretion to prosecute, particularly the public interest guideline, are fully understood by officers involved in public contact duties?***
    - As addressed in point 3, the Service policy regarding the discretion to prosecute or commence a proceeding is based on the Director of Public Prosecutions guidelines.
    - A brief of evidence submitted by an investigating officer is scrutinised to ensure the brief withstands both the sufficiency of evidence test and the public interest test. The checking process involves scrutiny by the investigating officer's supervisor, the local brief checking officer and the prosecutor allocated the file. Additionally, the brief manager of a police district conducts random audits of briefs of evidence to support the process.
    - Additionally, as addressed in point 3, if the person is a child, the principles of the *Youth Justice Act 1992* apply.
    - The QPS policy and the Director of Public Prosecutions Guidelines are taught to recruits during initial training. These are further re-enforced through training undertaken during the Constable Development Program, Management Development Program and Detective Training. Police prosecutors and brief checkers are additionally trained on the policy and guidelines and duties to undertake if a prosecution is commenced, but later determined not to be in the public interest to continue with the prosecution.

10. ***Clause 6 Insertion of new s 52A (52A 'Power to conduct pat-down search for ss 50–52')***

Why is the power necessary, i.e. in what way are the current powers inadequate?

- Under the current law, a police officer has no power to search a person, or the person's possessions, when they are detained under sections 50, 51 or 52 of the PPRA.
- The pat-down search power supports police officer and community safety.
- If a police officer detained a person under the provisions and determined that it was necessary to transport the person from the area to another location, in placing the person in the police vehicle, the police officer may be placing his or her safety at risk.
- In some circumstances, several persons may be detained in the same police vehicle under sections 50-52 and therefore, other persons detained may be at risk.
- The person, in being placed in a police vehicle may also have an item that would cause self harm or assist in their escape.

How will the powers address the issues to be resolved?

- Clause 6 will enable the police officer to undertake a pat-down search of a person, and a search of the person's possession in circumstances where the person is detained under sections 50, 51 or 52 of the PPRA.
- The search is limited to items located that can ordinarily be used by a person to cause harm to himself or herself or others (including the detaining officers), or to effect escape.
- The pat-down search power is not available to a police officer who for example, directs a person away from an area.

What alternatives to the pat-down search were considered and why these were not considered adequate?

- During the deliberations of the PPRA Review Committee alternatives to the current proposed amendment were considered. An undertaking of confidentiality was given to all PPRA Committee members to enable free and robust discussion.

Do police in other states have similar powers?

- The search powers in other Australian states do not extend to circumstances similar to those proposed in clause 6 of the Bill.

Clause 8 Insertion of new ss 53C and 53D (53C 'Power to conduct pat-down search of minor')

Why is the power necessary, i.e. in what way are the current powers inadequate?

- Currently, if a police officer finds a minor has possession or control of liquor in a public place, the police officer may seize liquor from the minor.
- Without the power to search, the seizing of the liquor is limited to only liquor that, whether or not opened, can be seen by the officer.
- The search power is therefore necessary to locate all alcohol that is unlawfully in the possession of the minor.

How will the powers address the issues to be resolved?

- This pat-down search power will allow a police officer to not only seize liquor that is seen in the possession of the minor, but also take hidden liquor from the minor.

What alternatives to the pat-down search were considered and why these were not considered adequate?

- During the deliberations of the PPRA Review Committee alternatives to the current proposed amendment were considered. An undertaking of confidentiality was given to all PPRA Committee members to enable free and robust discussion.

Do police in other states have similar powers?

- A comparison of other states identified that the following states have the ability to conduct a search (as opposed to conduct a limited pat-down search) of a minor reasonably suspected of committing an offence.

- **South Australia:**

  Section 68 'Power to search suspected vehicles, vessels, and persons' of the *Summary Offences Act 1953*(SA) states:

  > A police officer may do any or all of the following things, namely, stop, search and detain—
  >
  > …
  >
  > (1)(b) a person who is reasonably suspected of having, on or about his or her person— …
  >
  > (ii) an object, possession of which constitutes an offence; or …

  Section 117 'Minors may not consume or possess liquor in public places' of the *Liquor Licensing Act 1997* (SA) states:

  > (1) A minor who consumes or has possession of liquor in a public place is guilty of an offence.

- **Western Australia**:

  Section 68 'Searching people for things relevant to offences' of the *Criminal Investigation Act 2006* (WA) states:

  > (1) If an officer reasonably suspects that a person has in his or her possession or under his or her control any thing relevant to an offence, the officer—
  >
  > (a) may do a basic search or a strip search of the person; …

  Section 123 'Possession and consumption by juveniles of liquor' of the *Liquor Control Act 1988* (WA) states: …

  > (2) Without limiting section 119, a juvenile who has any liquor in his or her possession or control in any place or on any premises to which the public is permitted to have access, whether on payment of a charge or otherwise, commits an offence.
  >
  > Penalty: a fine of $2 000.

11. What is the view of Department of Communities on the impact of pat-down searches on vulnerable members of society such as those with a disability or mental illness?

- The Department of Communities was engaged throughout the policy development and the Bill's development. The outcome of the consultation was considered by Cabinet and is subject to 'Cabinet in Confidence'.

12 In relation to clause 8

What alternatives to the pat-down search power are available for dealing with the problem of minors suspected to be in possession of alcoholic beverages?

- The current provisions allow a police officer to seize opened and unopened liquor if the police officer reasonably suspects the person has committed, is committing or is likely to commit and offence, among others under section 157(2) of the *Liquor Act 1992*.
- As the power to seize the liquor does not include a power to search a person or property in the possession of the person, for liquor, a police officer may only seize liquor that is sighted or voluntarily given to the police officer.
- If a police officer locates an intoxicated child, the police officer may determine it necessary to arrest the child for the child's own safety and for example, transport the child home. Because the child has been arrested, the police officer may search the child.

What would be the result of a police officer finding other prohibited items following a pat-down search of a minor reasonably suspected of carrying alcohol?

- During a pat-down search of a minor or the search of personal property in the possession of the minor, for liquor, if the police officer locates an item reasonably suspected of being an item contained in section 30, any continuance of the search will be under the authority of section 29 'Searching persons without warrant' of the PPRA, hence not confined to a pat-down search or search of property, for liquor. The police officer may take action against the minor in accordance with the principles of the *Youth Justice Act 1992*.
- Section 380'Additional case when arrest of child may be discontinued' of the PPRA requires the police officer to release the child at the earliest reasonable opportunity and for example take no action or administer a caution. To determine the most appropriate course of action, the police officer will consider the circumstances of the offending and the child's previous criminal history.

13. Clause 101 Amendment of sch 5 (Additional controlled activity offences)

What is the view of the QPS on whether the proposal would undermine public health strategies in relation to sex workers

- See response for point 6.
- The Prostitution Enforcement Task Force supports and encourages safe sex practices. Section 77A of the *Prostitution Act 1999* provides police officers with the power to investigate and prosecute the minority of sex workers who jeopardise not only their own health, but the health of their clients and

the wider community, by accepting or offering to provide unlawful and unsafe sexual services.

What are the practicalities of exercising this power?

- The application for a controlled activity is somewhat similar to applying for a search warrant. The QPS policy requires the investigating or applicant officer to provide details about the involvement of the target person in the offence under investigation. The policy also requires the inclusion of details about the reliability of the information and an intelligence assessment.
- Operationally, the process would require that an officer will have either received a complaint or has identified an offence through self-generated investigations. The officer will then complete enough inquiries and investigations to satisfy a reasonable belief that an offence has occurred. Only then is the officer able to make an application for a controlled activity.

Will officers have the discretion to issue warnings?

- The health risks associated with providing a sexual service without prophylactic, to both the sex worker and the client, are significant and therefore in most, if not all circumstances, it would be appropriate to commence a proceeding against the offender. However, the police officer would need to determine whether it is in the public interest to commence and continue with the prosecution.

What internal processes will be in place to monitor the use of this power eg rotation of staff, effective training etc.

- Officers at the Prostitution Enforcement Task Force are subject to the same rotational processes as all officers in State Crime Operations Command. This requires the rotation of all staff (every 12 months for plain clothes officers and every three years for detectives).
- Furthermore, all officers who undertake covert duties under the authority of a controlled activity must have successfully completed the QPS 'Controlled Activity Course' which is provided by the QPS Covert and Surveillance Unit. Whilst it is possible that an applicant police officer may not have completed the aforementioned training, the police officer who undertakes a role in the controlled activity must have completed the training.
- A commissioned officer approves the application. This ensures the integrity of the process.

14. Clause 63 Amendment of s 489 (Power to analyse etc. DNA samples)

Why is the power to use of private laboratories require; what is the problem being addressed?

- The QPS asserts that QH will always be the preferred provider as the QPS is satisfied with the current QH service and the expertise of QH staff. The current turnaround times are 4-5 week analysis, and QPS and QH are working toward 2 weeks. These times currently lead the nation in terms of analytical performance in DNA testing. Therefore, there is no incentive for QPS to replace QH as the preferred and primary service provider.

- However, the QH business continuity plan does not provide a 100 percent guarantee to meet the volume of analysis required by the QPS should QH not be able to provide the current analysis service. This was evident in 2008/09 when QH experienced technical difficulties which caused the robotics to be offline for approximately 15 months. While this was not a fault of QH, the QPS needs to ensure that the approximately 20,000 DNA samples taken each year will be analysed with the DNA profile placed on the National Criminal Investigation DNA Database (NCIDD) to allow DNA comparisons to be undertaken. When there is a significant delay in the analysis and uploading of DNA profiles, police investigation and the apprehension of offenders is stalled.

Do other jurisdictions outsource the analysis of DNA samples and if so, have any issues of actual or perceived bias arisen?

- New South Wales engage external laboratories to undertake crime scene analysis.
- Victoria, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory do not have any legal restrictions to engaging external providers to undertake the analysis of DNA samples or crime scene samples.
- The QPS is not aware of any issues regarding bias in the analysis of DNA samples, actual or perceived.

Has there been any judicial comment, of which the Service is aware, in other jurisdictions that outsource DNA analysis, as to the quality of that analysis?

- The QPS can advise the Committee of information provided by the NSW Police Forensic Services Group.
- The Group outsourced about 18,000 samples for private analysis over a three year period. The non-government laboratory used met all of their quality requirements including turnaround times.
- There has not been any judicial criticism of the analysis work undertaken by the non-government laboratory.

How many Queensland laboratories have been identified as able to undertake the analysis?

- There are currently no other Queensland laboratories that have been identified as able to undertake the analysis of DNA samples.

What are the proposed safeguards to ensure continued high standards of DNA analysis?

- The process for taking a DNA sample is such that utilising a non-government provider will not cause a privacy breach. The samples will only be labelled with a unique barcode and the testing laboratory will not be provided any of the personal details of the donor. The testing laboratory will not have access to NCIDD. They will simply provide the QPS with the DNA profile that was obtained for that particular barcode.
- Any service provider used must hold National Association of Testing Authorities, Australia (NATA) accreditation which is designed to safeguard standards. The QH Forensic Science Services is NATA accredited and any laboratory will of the same standard as any proposed laboratory that will be used to analyse DNA samples. Therefore, the

NATA accredited non-government laboratory will meet the same requirements and include all of the measures in place at QHFSS. Laboratories simply will not attain NATA accreditation unless strict nationally approved standards are met.

- In any case, person sample testing is of relatively low risk, because if there was any question raised in relation to the accuracy of the testing, a second sample could easily be obtained from the person to verify the result.

15. Clause 12 Amendment of s 118 (Sale of motor vehicle if not recovered after impounding ends), How does the proposal to extinguish a charge or security interest under the MVBSA 1986 conform to the overall policy on registered security interests particularly in relation to the Personal Property Securities Act 2009 (Cth)?

- The *Personal Property Securities Act 2009 (Cth)* was developed to establish a single national law governing security interests in personal property through Australian States and Territories. To facilitate this, as with all other States and Territories, Queensland agreed to pass legislation to transfer certain security matters to the Commonwealth, hence the *Personal Property Securities (Commonwealth Powers) Act 2009* (the PPS Act).
- Section 4(2) 'Meaning of referred PPS matters' of the PPS Act specifically exempted certain personal property security matters from referral to the Commonwealth. These included the forfeiture of interests in property in connection with the enforcement of the law of the State.
- The explanatory notes for the PPS Act explicitly outline that the powers that enable the state to confiscate vehicles used for hooning are valid, and are not transferred to the Commonwealth.
- Consequently, the *Personal Property Securities Act 2009 (Cth*) has no applicability to the proposal to extinguish a charge or security interest registered under *the Motor Vehicles Boats and Securities Act 1986* as it is specifically exempted by the PPS Act. This proposal remains a matter upon which the State may legislate.

Alignment with current court ordered forfeiture

- The removal of the right of a security holder to enforce a security interest by repossessing a motor vehicle that has been administratively forfeited is aligned with the current practice when a vehicle is the subject of a court ordered forfeiture.