

# CRIME AND MISCONDUCT COMMISSION

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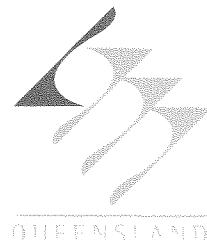
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LAPCSESC  
Police Powers  
Submission 012



Our Reference: AD-11-0530 / DD  
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**IN-CONFIDENCE**

23 September 2011

Hon Dean Wells MP  
Acting Chair  
Local Affairs, Police, Corrective Services and Emergency Services Committee  
Parliament House  
George Street  
Brisbane Qld 4000

By hand

Dear Mr Wells

***Police Powers and Responsibilities and Other Legislation Amendment Bill 2011***  
**Call For Submissions**

Thank you for your letter dated 2 September 2011 to the Chairperson, seeking comments on the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2011* ("Bill").

On behalf of the Commission, I make the following comments on the bill:

Clarification of terminology and definitions - search, frisk, and pat down

The CMC is concerned by the use of three terms to describe something that has a common definition: (1) search, (2) frisk, and (3) pat down.

Clause 6 of the Bill proposes a power for a police officer, without warrant, to conduct a 'pat-down search' of a person.

Clause 102(7) (Schedule 6) defines *search* to include 'a frisk search or pat-down search of' a person.

In the amendments to the *Police Powers and Responsibilities Regulation 2000* (Part 8), s.36 'Searches of persons' requires information about an enforcement act (which includes a search of a person) to be included (i.e. reported) in the register of enforcement acts—

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- (a) if known, the name of the person;
- (b) when and where the person was searched;
- (c) the purpose of the search;
- (d) whether the search involved the removal of outer clothing in circumstances requiring the search to be conducted out of public view;
- (e) for a search because of a reasonable suspicion—how long the person was detained for the search;
- (f) a description of anything seized because of the search;
- (g) information about the return, destruction or disposal of anything seized.

The CMC would prefer a single term be used to avoid confusion. The CMC is also concerned that the ambiguity around definitions and terms may be used by officers to avoid the requirement to record the search in the register. The CMC feels that whenever a police officer performs any type of search of a person that it be recorded in accordance with the provisions of section 36. This would include any search that uses terms such as 'frisk' or a 'pat down'.

#### Clause 8 - Pat down search of minors

Clause 8 (53 C) of the Bill proposes a power for a police officer to conduct a pat down search of a minor if the police officer reasonably suspects the minor to have committed, is committing or is about to commit an offence against the *Liquor Act 1992*. A minor is anyone under the age of 18 and could, in accordance with this new provision, include a very young child.

In 2009, the CMC released a report titled '*Interactions between police and young people*'. The report concludes that:

Relations between police and young people are often described as problematic. Shaped significantly by negative attitudes and perceptions from both sides and often characterised by tension, mistrust and conflict, interactions between police and young people have resulted in adverse consequences for both sides, including charges against young people and complaints against police. Such negative interactions have also served to reinforce the unfavourable attitudes and perceptions that exist between these two groups, thereby perpetuating a cycle of dissatisfaction and mistrust (p 47).

Although the CMC acknowledges the often difficult task faced by police officers when dealing with young people, particularly during events such as Schoolies, the CMC is concerned about the possible damage that could be done to the relationship between police and young people if the use of this power was indiscriminate. Further, the power has potential net-widening effects. At the very least, the CMC believes that there should be a requirement for a police officer to report any search of a minor to a senior officer and record the details of the search in the register of enforcement action.

#### Clauses 81 to 85 - Noise

Our comments in relation to Clauses 81-85 are made in the context of excessive noise from off-road motorbikes.

In April 2010, in accordance with Section 808(1), the CMC published its report, "*Sound Advice: A review of the effectiveness of police powers in reducing excessive noise from off-road motorbikes*". The report contained 12 recommendations, two of which are particularly relevant in this context.

The CMC found that the noise laws have not provided police with effective law enforcement powers for regulating excessive noise from off-road motorbikes. Consequently, the CMC recommended (Recommendation 1):

That the off-road motorbike noise laws found in Chapter 4 and Chapter 19 Part 3 *Police Powers and Responsibilities Act 2000* (Qld) be repealed and replaced with a series of enforcement strategies that are responsive to the characteristics of off-road motorbike noise problems in specific locations.

The Government did not accept this recommendation (refer to the *Off-Road Motorcycling Management Strategy*), noting that the QPS will undertake a review of the PPRA to identify changes needed to improve the effectiveness of the legislation. The CMC's view is that the Bill does not do this. We refer the Committee to our report for a more detailed discussion of the legislative deficiencies.

The issue of anonymity of the complainant (amendment Clause 81) was considered by the Police and Corrective Services Portfolio Subcommittee on Trail Bikes, established in 2003 by then Minister for Police and Corrective Services, the Hon. Tony McGrady, to examine the issues concerning the misuse of trail bikes and to advise the Minister for Police and Corrective Services of appropriate legislative and other responses to address the issue. The Subcommittee proposed a number of legislative and non-legislative solutions specific to the management of noise. The Subcommittee's recommendation to allow the complainant to remain anonymous was rejected.

Given anonymity of the complainant was not a feature of the legislation we did not examine the issue and, as such, are unable to comment on the merit of Clause 81. However, we note that Clause 81 may have implications for the effectiveness of one of our recommendations (Recommendation 7):

That a civil regulatory scheme be created that allows people who are subject to excessive noise emanating from a nearby property to apply for a noise abatement order against the person responsible for the noise. The scope of persons who may bring an application should include private individuals as well as police and local government officers. The jurisdiction to determine the matter should be the Queensland Civil and Administrative Tribunal (QCAT).

The objective of this recommendation is to provide a civil remedy for people who are affected by excessive noise emanating from a neighbouring residence that is economical, easily accessible, fair and timely. In the context of a residential dispute, the identity of the noise-affected neighbours cannot remain anonymous; the noise-affected neighbours will need to inform the authorities that they feel the noise is excessive and outline the impact it has had on them.

The Off-Road Motorcycling Management Strategy does not respond to this recommendation.

#### Clause 86 - Amendment of s 609 (Entry of place to prevent offence, injury or domestic violence)

Section 609 does not relate to search warrants but gives police officers emergency type powers to enter a place where the officer suspects imminent injury to person, property or domestic violence has

or will occur. It allows an officer to search the place to ensure imminent danger does not exist or to provide help. The proposed amendment allows the police officer to exclude an occupier from accompanying the officer in the search if the officer reasonably suspects that further injury to a person may occur if the occupier was to accompany them. The police officer is required to give the occupier a warning to that effect prior to the search. Although the explanatory notes do not provide the reasoning behind this amendment, it would appear that it is aimed at attempting to diffuse the volatile situation between the occupier and other persons in the place.

However given it interferes with the occupier's rights and is subject to a warning, it may be appropriate that the exercise of the power to exclude is recorded. The Enforcement of Acts Register (currently in Responsibilities Code and to be relocated as Part 8 of the Regulation) requires many exercised powers to be recorded including searches of premises and vehicles. Exclusion of an occupier, exercising the power under s.609, could be included in the Register. It is noted that an officer who exercises the power to exclude a support person from a police interview with a suspect is required to record the act on the register (New Part 8 clause 45 of the Regulation).

#### Clause 101 - Prostitution

Clause 101 amends Schedule 5 of the PPRA as it relates to 'controlled activities' and the *Prostitution Act* 1999. Section 221 PPRA allows police officers to carry out a controlled activity to further investigate certain prescribed offences. Action by a police officer which may otherwise constitute an offence is made lawful if conducted in accordance with an approved controlled activity. Currently, public soliciting (s.73 *Prostitution Act*) is a prescribed offence. The Bill proposes to add to the prescribed offences – section 77A (Prostitute providing sexual intercourse or oral sex without a prophylactic). If a controlled activity was approved, this would enable a police officer to covertly request such service, without being themselves liable to an offence.

In the CMC recent review of the Prostitution Act, we received a submission to the effect that police officers were unlawfully posing as clients and offering extra money for services without a condom. This allegation was forwarded to QPS who advised that police were aware that this activity was illegal and they do not engage in that practice, but only lawful covert activities. We noted the proposed amendment in our report.

We recognise that policing prostitution offences is difficult as most activities are private and consensual. Similarly to the offence of public soliciting, it is very difficult for the QPS to investigate the offence of providing services without a prophylactic, without the police officer making such an approach/offer. Including this offence in the prescribed offences for controlled activity would allow QPS to detect and effectively investigate this offence.

#### Search Warrants

The *Police Powers and Responsibilities Regulations* in relation to search warrants has been amended in essentially a technical/administrative way to relocate provisions from the Responsibilities Code into the Regulations. We note however that the corresponding provision in the Act still refers to the responsibilities code e.g. ss.150 (5) and 212(2).

Clause 28 - Surveillance Device Warrant

Clause 28 of the Bill requires an application for a surveillance warrant to be made with the help of a lawyer approved by the Commissioner. The CMC's surveillance warrant applications are made under the PPRA; this provision needs to be either broadened, or limited in its application to QPS applications. The latter would be preferable as it is always the case that CMC applications are made with the help of CMC lawyers.

We note the security of facilities issue for listening posts is dealt with in proposed regulation 28 of the PPRA Regulation. These provisions will require broadening as the CMC listening posts are staffed both by CMC police officers and civilian monitors.

Section 328(3)(d)

Section 328(3)(d) requires a surveillance device warrant application to include information required in a regulation. This information used to be listed in the Responsibilities Code, however it was removed in 2006. There is a similar requirement for covert search warrant applications: see section 212(2)(b). There still is a list of matters that must be included in a covert warrant application about previous applications in the Code – soon to be moved by the Bill into the Regulation.

We note, however, there is no equivalent provision in a regulation about including information about previous surveillance device warrant applications.

Finally, we would like to note that a large number of PPRA powers are used by agencies other than the QPS, and request that the draftspeople take care to ensure that all relevant provisions are sufficiently widely drafted to accommodate this fact.

Thank you for the opportunity to comment.

Yours sincerely



**ROB HUTCHINGS**  
General Counsel