



The Secretary  
Legal Affairs and Safety Committee  
Parliament House  
QLD 4000

lasc@parliament.qld.gov.au

Dear Sir/Madam,

### **Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021**

Thank you for the opportunity to make a submission in relation to the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 (Qld) ('the Bill').

The Queensland Council for Civil Liberties is an organisation of volunteers founded over 50 years ago to protect the individual rights and liberties of Queenslanders.

This submission will only address one area of concern that arises from the Bill, which is the expansion of circumstances in which a police officer may apply for an access order to a digital device.<sup>1</sup> The Council accepts that the rest of the Bill complies with the relevant principles to a significant degree.

#### **Allowing police to apply for an access order to a digital device in circumstances where a search warrant was issued or where the device was lawfully seized**

The proposed amendment to s 154A<sup>2</sup> will enable a police officer to apply to a Magistrate or Supreme Court judge for an access order where the search warrant was issued by a Magistrate or a Supreme Court judge and the search warrant did not originally contain the order or the search warrant did contain the access order but further access is required.<sup>3</sup> The access order can be made where the judicial officer is satisfied there are reasonable grounds for suspecting that the digital device contains evidence of the commission of an offence. This power also extends to situations where there are reasonable grounds for suspecting that information on the device may be evidence of a crime scene threshold offence<sup>4</sup> or an offence against ss 223 (distributing intimate images), 227A (observing or recording in breach of privacy) and 227B (distributing prohibited visual recordings) of the *Criminal Code 1899* (Qld).<sup>5</sup>

The Council agrees that it would assist the administration of justice to enable police officers to apply for digital access orders in a broader range of circumstances. However, there are real concerns as to whether this expansion of powers will infringe upon an individual's right to personal privacy<sup>6</sup> and the privilege against self-incrimination.<sup>7</sup> The consequences of these

<sup>1</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 154.

<sup>2</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 154A.

<sup>3</sup> Explanatory Memorandum, Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 (Qld) 3.

<sup>4</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 178A.

<sup>5</sup> Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 (Qld) cl 8(3).

<sup>6</sup> *Human Rights Act 2019* (Qld) s 25(a).

<sup>7</sup> *Rochfort v Trade Practices Commission* (1982) 153 CLR 135, 150 (Murphy J).



infringements are exacerbated by the high likelihood that vulnerable and minority groups are disproportionately affected by these laws.<sup>8</sup>

To remedy this issue, the Bill should require the police officer to furnish a report in writing to the Court which issued the access order stating whether or not the order was executed and setting out the results of the execution or setting out the reasons for why the order was not executed. The report should be provided within a reasonable time of the access order being issued to avoid undue delay in notifying the Court of the outcome of the access order. This is consistent with the position in New South Wales.<sup>9</sup> This additional oversight will also assist in ensuring that the scope of information accessed will be limited by the offence for which the digital device was seized. The authority provided by an access order should not be utilised in an unfettered manner that would allow police officers to obtain other irrelevant information about an individual.

A Public Interest Monitor (“PIM”) should also be authorised to appear in relation to applications for access orders.<sup>10</sup> It should also be able to review the conduct of operations involving the seizing of digital devices and the reports outlining the outcome of any access order issued. Empowering the PIM to have oversight over applications for access orders would assist in protecting individuals against arbitrary or unlawful interference with their property and privacy.<sup>11</sup>

These mechanisms would improve the accountability and transparency of access orders, particularly where an access order does not ultimately assist in the investigation of an offence or lead to any prosecutions. Ensuring strict adherence to the conditions attached to obtaining an access order to a digital device would also improve the administration of justice. In *George v Rockett*,<sup>12</sup> the High Court stated:

“It needs to be kept in mind that they authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislator’s concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.”

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<sup>8</sup> Carmel O’Sullivan and Mark Lauchs, ‘A Spoiled Mixture: The Excessive Favouring of Police Discretion over Clear Rules by Queensland’s Consorting Laws’ (2018) 42 *Criminal Law Journal* 108, 108-9.

<sup>9</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 74-74A.

<sup>10</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 740; Carmel O’Sullivan and Mark Lauchs, ‘A Spoiled Mixture: The Excessive Favouring of Police Discretion over Clear Rules by Queensland’s Consorting Laws’ (2018) 42 *Criminal Law Journal* 108, 117-8.

<sup>11</sup> Reetika Khanna, ‘Parliamentary Committee Reports on Trespass to Personal Rights and Liberties under Proposed Legislation for Cross-border Access to Data’ (2020) 31 *Public Law Review* 219, 222.

<sup>12</sup> (1990) 170 CLR 104, 110-11 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

As the nature of the amendments impinge on an individual's right to their property,<sup>13</sup> their privacy<sup>14</sup> and their privilege against self-incrimination,<sup>15</sup> the safeguards discussed above should be strictly enforced to support the investigation of crimes as well as protect individuals' personal information and liberties.

We thank QCCL intern Gabrielle Ong for her work in preparing this submission.

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope  
President  
For and on behalf of the  
Queensland Council for Civil Liberties  
9 September 2020

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<sup>13</sup> *Human Rights Act 2019* (Qld) s 24.

<sup>14</sup> *Ibid* s 25.

<sup>15</sup> *Candice Louise Wassmuth v Commissioner of Police* [2018] QCA 290 [29] (North J, Philippides JA agreeing at [1] and Henry J agreeing at [34]).