

Police Powers and Responsibilities and Other Legislation Amendment Bill 2023

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
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Submitted via email lasc@parliament.qld.gov.au

Dear Committee Secretary,

Police Powers and Responsibilities and Other Legislation Amendment Bill 2023

Introduction

1. Thank you for the opportunity to provide feedback on the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2023*.
2. The Queensland Human Rights Commission (The Commission) is a statutory body established under the Queensland *Anti-Discrimination Act 1991* (AD Act). The QHRC has functions under the AD Act and the *Human Rights Act 2019* (HR Act) to promote an understanding and public discussion of human rights in Queensland and to provide information and education about human rights.
3. Subject to an override declaration by parliament at the time a bill is passed,¹ section 48(1) HR Act applies to all statutory provisions, whenever enacted. It requires that all statutory provisions must, to the extent that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
4. Public entities are required to act and make decisions compatibly with human rights, and to give proper consideration to human rights when making decisions.² Public entities having involvement in enacting legislative changes, most relevantly the Queensland Police Service, will be subject to human rights obligations in discharging their functions.
5. As contained in the *Human Rights Act 2019* (HR Act), a decision or action is compatible with human rights if the action or decision either:
 - a. does not limit a human right, or

¹ *Human Rights Act 2019* s 43.

² *Ibid* s 58(1). Although it does not apply where to a public entity if it could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law: *Human Rights Act 2019* s 58(2).

- b. limits a human right only to the extent that is reasonably and demonstrably justifiable in accordance with section 13.³
6. A human right may be subject under law to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁴

Expansion of Police Drug Diversion Program

Adults

7. The Bill proposes to enhance the Police Drug Diversion Program. The Commission supports the expansion of diversionary options for minor drug offences through the introduction of drug diversion warnings (warning), initial drug diversion assessment programs (initial diversion) and subsequent drug diversion assessment programs (subsequent diversion).
8. International human rights law views personal drug use and possession as a health issue. Given this, people who possess drugs for personal use should be afforded the opportunity to cease their behaviour and rehabilitate, prior to having formal contact with the criminal justice system through the courts.
9. The approach taken in the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2023*, is more compatible with the approach to illicit drug use taken by the United Nations, who advocate for a less punitive approach based on harm reduction and a treatment-based approach.⁵
10. Under the HR Act, every person has the right to access health services without discrimination.⁶ This right is applicable to all people who use and are dependent on drugs, irrespective of their drug use.
11. As recently as 1 March 2023, the United Nations Deputy High Commissioner stated:-

Harsh and punitive drug control measures, based on the unrealistic notion of a “drug free world”, hinder access to health treatment and harm reduction services, and they contribute to 1.2 million unnecessary drug-related deaths per year. It also creates stigma and exacerbates discrimination.⁷

³ *Human Rights Act 2019* s 8.

⁴ *Human Rights Act 2019* s 13(1), (2).

⁵ United Nations Office on Drugs and Crime, *Political Declaration and Plan of Action on International Cooperation Towards and Integrated and Balanced Strategy to Counter the World Drug Problem*, Commission on Narcotic Drugs (Vienna, 11 -12 March 2009)
<https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_52/Political-Declaration2009_V0984963_E.pdf>

⁶ *Human Rights Act 2019* s 15, s 37.

⁷ United Nations Deputy High Commissioner, ‘High Level Side Event on a Human Rights Approach to Drug Policy’ (Speech, Global Commission on Drug Policy, Geneva, 1 March 2023).

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12. This shift towards a less punitive regime for minor drug offenders promotes the right to access health services and encourages treatment through the referral to drug diversion programs. It may also encourage drug users to individually seek out treatment, by removing some of the stigma associated with minor drug offending.
 13. Further, allowing three minor drug possessions before a criminal charge recognises that people are not infallible and may relapse or find it difficult to cease using drugs. These amendments provide more opportunities for an individual to change their behaviour before having contact with the court system, where they could potentially become entrenched.
 14. The Commission supports the requirement that police must offer a warning, an initial diversion and a subsequent diversion to someone who commits a minor drug offence. This requirement goes towards ensuring that the law is applied fairly and equally to all people, consistent with the right to recognition and equality before the law.⁸
 15. Further, diverting minor drug offences away from the court will alleviate pressure on the court and criminal justice system, thereby ensuring a more timely and efficient administration of justice.
 16. The proposed s 378A states that, amongst other things, for an offender to be eligible for a warning, initial diversion or subsequent diversion, a police officer must reasonably believe each minor drugs matter subject to the minor drug offence was for the person's personal use.
 17. While the term 'reasonably believes' is not uncommon for police exercising discretionary power, in this context, it could result in unequal application of this provision. For the Bill to achieve its purpose, it would be preferable for as many eligible people to be diverted. An inconsistent application of the law could result in a limitation on an individual's right to recognition and equality before the law.⁹
 18. The Commission submits that the legislation should be clear that there is a presumption in favour of issuing a warning or diversion, unless there is evidence of commerciality or other disqualifying features apply.
 19. This could be achieved by amending s 378A(d) to read:

a police officer does not believe the minor drugs matter the subject of the minor drugs offence was for a commercial purpose.
 20. This removes the potential perceived onus on the offender to prove the drug was for personal use and makes it clear that diversionary options should be offered unless there is evidence of commerciality.

<<https://www.ohchr.org/en/statements-and-speeches/2023/03/high-level-side-event-human-rights-approach-drug-policy>>.

⁸ *Human Rights Act 2019* s 15.

⁹ *Human Rights Act 2019* s 15.

Inconsistency with Penalties and Sentences Act 1992

21. This Bill defines *minor drug offence* as including offences under s 10A(1)(a)(b) and (c) of the *Drugs Misuse Act 1986* (DM Act). This includes being in possession of property (other than a dangerous drug, hypodermic syringe or needle) reasonably suspected of:
- a. having been acquired for the purpose of committing an offence defined in part 2 of the DM Act;
 - b. having been used in connection with the commission of such an offence; or
 - c. having been furnished or intended to be furnished for the purpose of committing such an offence
22. Currently, offences under s 10A(1)(a)(b) and (c) are not included in the meaning of *eligible drug offence* in s 15D of the *Penalties and Sentences Act 1992*. Therefore, they are unable to be diverted by the court through the illicit drugs court diversion program.
23. Therefore, the effect of the proposed s 378B in the Bill would be that an offence of possessing suspected property could be referred by police to drug diversion, but a court would not have the same ability to refer the offence, despite the content of both police and court drug diversion sessions being the same.
24. To avoid this inconsistent approach, it is recommended that s 15D(c) of the *Penalties and Sentences Act 1992* be amended to mirror the wording of s 378B(1)(B) proposed in the Bill.

Children

25. While the proposed legislation requires that a police officer must offer a warning, initial diversion or subsequent diversion to an eligible adult offender,¹⁰ it is discretionary as to whether a child is offered the same opportunity.¹¹
26. The Convention on the Rights of a Child calls for the best interests of a child to be a primary consideration.¹² Similarly, children are entitled to protection that is their best interests under the HR Act and be treated without discrimination.¹³
27. Whilst it is true that a child could be cautioned or warned for a minor drug offence in lieu of receiving a warning, initial diversion or subsequent diversion, this legislation would conceivably allow a child to be charged for a first minor drug offence, where a similarly placed adult would be given three chances before being charged for the

¹⁰ *Police Powers and Responsibilities and Other Legislation Amendment Bill 2023* s 378C(2), s 379(2), s 379A(2).

¹¹ *Police Powers and Responsibilities and Other Legislation Amendment Bill 2023* s 378C(3), s 379(3), s 379A(3).

¹² United Nations Convention on the Rights of the Child, GA Res 44/25, UN Doc A/RES/44/25 (20 November 1989) art 3.

¹³ *Human Rights Act 2019* s 26(2), 15.

same offence. This risks the law being imposed on an inequitable basis and not in their best interests.

28. This legislation could potentially disadvantage children, who would still be subject to police discretion, and contravenes a fundamental principle that young people in the criminal justice system should not be treated more harshly than adults.
29. The Commission recommends that the bill be amended to reflect that a police officer must offer an eligible child a warning, initial diversion or subsequent diversion, unless the matter is resolved under s 11(1)(a), s 15 or s 22 of the *Youth Justice Act 1992*.
30. This would ensure that children get the benefit of the proposed amendments in the Bill, whilst retaining the protections of other diversionary options under the *Youth Justice Act 1992*.

Increasing Maximum Penalty for Trafficking

31. This Bill would increase the maximum penalty for the offence of trafficking from 25 years to life imprisonment. The purpose of this legislative amendment is to reflect the seriousness of the offence and deter offenders from committing the offence.
32. The statement of compatibility correctly identifies that this amendment engages the right to liberty and security of person under the HR Act.
33. Increasing the maximum penalty of an offence may achieve the purpose of demonstrating the serious and harmful nature of an offence. However, page 4 of the statement of compatibility accepts that it is not possible to quantify whether raising the maximum penalty will have a deterrent effect.
34. Human rights may be subject to reasonable limitations. Factors to consider when determining whether any limitations are reasonable include the relationship between limitation and purpose, including whether the limitation helps to achieve the purpose.¹⁴
35. The Commission agrees that a significant maximum penalty should attach to the charge of trafficking. However, if deterrence of offenders is an intended purpose, there is no information provided in the Statement of Compatibility to demonstrate increasing the penalty from 25 years to life achieves its stated purpose.
36. To ensure compatibility with human rights, it is recommended that more information be provided demonstrating that this limitation on rights will achieve the intended purpose of deterrence.

¹⁴ *Human Rights Act 2019* s 13(c).

Introduction of a Circumstance of Aggravation – Evade Police

37. Similarly, the purpose of amendments to s 754 of the *Police Powers and Responsibilities Act 2000* is to provide stronger penalties and deter offenders.
38. Whilst an increase to a maximum penalty may provide a stronger penalty, it is accepted on page 7 of the statement of compatibility that it is impossible to quantify or guarantee the effectiveness of increased penalties in deterring this criminal activity.
39. The risk to the community caused by offenders driving and seeking to evade police is significant and this should be reflected in the penalty, however the Statement of Compatibility does not provide justification as to how these amendments will achieve their intended purpose.
40. If the Bill seeks to rely on the purpose of deterrence as a reason why limitations to rights are justified, more information should be provided that the amendments limiting human rights will achieve that purpose.

Recommendations

41. The Commission broadly supports the expansion of the police drug diversion program. However, we recommend:-
 - a. That s 378A make it clear that the presumption is that an eligible offender must be offered available diversionary options for a minor drug offence, unless the offence is for a commercial purpose;
 - b. That eligible children must be offered a warning, initial diversion and subsequent diversion for a minor drug offence unless police deal with the offence through a diversionary option under the *Youth Justice Act 1992*.
42. It is recommended that s 15D of the *Penalties and Sentences Act* be amended to add offences under s 10A(1)(a)(b) and (c) to the meaning of *eligible drug offence*.
43. To ensure compatibility with human rights, the Commission recommends further information be provided to show amendments to s 5 of the *Drugs Misuse Act 1986* will achieve the intended purpose of deterring offenders.
44. Similarly, to ensure compatibility with human rights, the Commission recommends further information be provided to show amendments to s 754 of the *Police Powers and Responsibilities Act 2000* will achieve the intended purpose of deterring offenders.