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Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021

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Legal Affairs and Safety Committee
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Legal Affairs and Safety Committee

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All web address references are current at the time of publishing.

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Abbreviations

Bail Act	*Bail Act 1980*
Bill / Efficiencies Bill	Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021
committee	Legal Affairs and Safety Committee
Cdec	Commissioner for Declarations
FDAQ	Firearms Dealers Association – Qld Inc
HRA	*Human Rights Act 2019*
JP	Justice of the Peace
Justice Legislation Bill	Justice Legislation (Covid-19 Emergency Response – Permanency) Amendment Bill 2021
LSA	*Legislative Standards Act 1992*
NATA	National Association of Testing Authorities
Oaths Act	*Oaths Act 1867*
Oaths Regulation	Oaths Regulation 2021
PPRA	*Police Powers and Responsibilities Act 2000*
PSAA	*Police Service Administration Act 1990*
QCCL	Queensland Council for Civil Liberties
QLS	Queensland Law Society
QPS	Queensland Police Service
Shooters Union	Shooters Union Queensland
SIFA	Shooting Industry Foundation of Australia
SoC	Statement of Compatibility
Weapons Act	*Weapons Act 1990*
YAC	Youth Advocacy Centre
Youth Justice Act	*Youth Justice Act 1992*

Chair's foreword

This report presents a summary of the Legal Affairs and Safety Committee's examination of the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Queensland Police Service for their assistance with this inquiry.

I commend this report to the House.

Peter Russo MP

Chair

Recommendation

Recommendation **3**

The committee recommends the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Women and the Prevention of Domestic and Family Violence
- Police and Corrective Services
- Fire and Emergency Services.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019* (HRA)
- for subordinate legislation – its lawfulness.[2]

The Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly and referred to the committee on 16 September 2021. The committee is to report to the Legislative Assembly by 1 November 2021.

1.2 Inquiry process

On 20 September 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. Seven submissions were received.

The committee received a public briefing about the Bill from the Queensland Police Service (QPS) on 29 September 2021. A transcript is published on the committee's web page; see Appendix B for a list of officials.

The committee received written advice from the QPS in response to matters raised in submissions.

The committee held a public hearing on 15 October 2021; see Appendix C for a list of witnesses.

The submissions, correspondence from the QPS, and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The key objectives of the Bill are to improve the delivery of policing services; reduce administrative processes; increase productivity; improve the detection, prevention and disruption of crime; and 'free up valuable police frontline time' by optimising existing systems and processes.[3] These objectives will be achieved by:

- creating the Oaths Regulation 2021 (Oaths Regulation) to enable 'senior police officers' to witness specified affidavits of other police officers

1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

3 QPS, correspondence, 23 September 2021, p 1; QPS, public briefing transcript, Brisbane, 29 September 2021, p 2; explanatory notes, p 1.

- expanding when a Supreme Court judge or magistrate can make a digital access order requiring the provision of passwords or assistance to access digital devices
- ensuring the Police Commissioner is able to authorise special constables and non-State police officers to exercise any or all powers available to a Queensland police officer
- amending the meaning of 'critical incident' for the purposes of triggering alcohol and targeted substance testing of police officers and certain public service officers
- enhancing the targeted substance testing scheme for police officers and certain public service officers by providing for saliva testing as an alternative to urine testing
- extending the timeframes under which an appropriately licensed person can temporarily hold a weapon on behalf of another weapons licensee from 3 months to 6 months
- enabling a non-sworn authorised technical officer to utilise evidentiary certificates in relation to the categorisation of a weapon
- enabling an authorised officer from QPS - Weapons Licensing to approve a licensed firearms dealer to retain and deal with a firearm or prescribed thing anonymously surrendered under the permanent firearms amnesty.[4]

The Bill will achieve its policy objectives by creating the Oaths Regulation and amending the following:

- *Oaths Act 1867* (Oaths Act)
- *Police Powers and Responsibilities Act 2000* (PPRA)
- *Police Service Administration Act 1990* (PSAA)
- *Weapons Act 1990* (Weapons Act).[5]

1.4 Government consultation on the Bill

The explanatory notes state that feedback was sought on the consultation draft of the Bill from:

- the Chief Justice
- the Chief Judge
- the Chief Magistrate
- the State Coroner
- Crime and Corruption Commission
- Bar Association of Queensland
- Queensland Law Society (QLS)
- Aboriginal and Torres Strait Islander Legal Service (ATSILS)
- Legal Aid Queensland
- Queensland Council for Civil Liberties (QCCL)
- Queensland Human Rights Commission
- the Information Commissioner
- the Chief Customer and Digital Officer
- Queensland Police Union of Employees
- Queensland Commissioned Officers' Union of Employees.[6]

[4] QPS, correspondence, 23 September 2021, p 1.

[5] Explanatory notes, p 7.

[6] Explanatory notes, p 12.

As a result of stakeholders' comments, the Bill was amended to restrict the level of police officer who can take an affidavit for prescribed documents to a 'senior police officer'.[7] The explanatory notes state:

> This will reinforce the importance of ensuring the contents of the affidavit are truthful and accurate and ensuring that the oath or affirmation is properly administered when witnessing the signing of the affidavit. QPS policy will specify the obligations on senior police officers who [are] able [to] witness affidavits. Furthermore, QPS policy will ensure there is no conflict of interest by restricting a senior police officer who was involved in the investigation, or a witness to the events set out in the affidavit, from witnessing the affidavit.
>
> Additionally, the Bill has been further amended to limit the witnessing of objection to bail affidavits under the Bail Act and the Youth Justice Act by audio visual link to circumstances where it is not reasonably practicable to take the affirmation and witness the documents in the physical presence of the deponent officer.[8]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation

The committee recommends the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 be passed.

7 Explanatory notes, p 12.

8 Explanatory notes, p 12.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

2.1 Amendments relating to the *Oaths Act 1867* and creation of the Oaths Regulation 2021

2.1.1 Authorising senior police officers to witness specified affidavits

The explanatory notes state that 'thousands of hours of police officers time is consumed by officers having to locate and attend before a Justice of the Peace (JP) or a Commissioner for Declarations (Cdec) to swear an oath of service or declare or affirm the veracity of information contained in a document'.[9] The Bill would authorise 'senior police officers' to witness affidavits made by other police officers in relation to:

- proving the service of documents
- bail proceedings under the *Bail Act 1980* (Bail Act) and the *Youth Justice Act 1992* (Youth Justice Act)
- sworn applications made in compliance with s 801(4)(a) (Steps after issue of prescribed authority) of the PPRA.[10]

The Bill would achieve its objective in relation to this through its creation of an Oaths Regulation. The explanatory notes state that the Bill [subject to Parliament passing the Oaths Act amendments contained in the Justice Legislation (Covid-19 Emergency Response – Permanency) Amendment Bill 2021 (Justice Legislation Bill) which is currently the subject of inquiry by the State Development and Regional Industries Committee] would amend the Oaths Act and create the Oaths Regulation to:

- Restrict the witnessing function of police officers to a 'senior police officer' who is:
  - an officer-in-charge of a station or establishment or watchhouse or a police officer nominated to be in charge of a police station or establishment or watchhouse in the absence of the officer-in-charge
  - a watchhouse manager
  - a police officer of, or above the rank of, sergeant.
- Prescribe 'senior police officers' as persons who can witness the affidavits of another police officer in particular circumstances as listed above
- Enable the witnessing of prescribed affidavits:
  - on a physical document
  - in the form of an electronic document, including the use of electronic signatures
  - by audio visual link.
- Restrict the use of witnessing via audio visual link for affidavits used in bail proceedings under the Bail Act and the Youth Justice Act to circumstances in which it is not reasonably practicable for the 'senior police officer' to witness the document in the presence of the deponent officer.[11]

QPS advised that the police witnessing amendments contained in the Bill would:

> make permanent, certain temporary measures introduced during the COVID-19 pandemic, including document reforms allowing for electronic signing and witnessing via video link for documents such as

[9] Explanatory notes, p 1.

[10] Explanatory notes, p 2.

[11] Explanatory notes, pp 7-8.

> affidavits, statutory declarations, general powers of attorney for businesses, deeds and particular mortgages.[12]

The explanatory notes provide an example of potential time savings for police officers in relation to bail affidavits if this amendment was made:

> Affidavits used in bail proceedings are completed by arresting officers to inform the court of information relevant to determining whether a person should be bailed or remanded in custody.
>
> In 2020, a time and motion study was undertaken with plain-clothes units to identify the time taken to locate an available JP to finalise bail documentation. This analysis of 6,321 bail affidavits revealed that the time taken to locate and attend a JP ranged from 30 minutes to 2 hours, with an average of 60 minutes to have a document sworn and signed. The impact for policing in remote localities is often more significant. On some occasions an officer's entire shift is spent driving to a regional centre to have the objection to bail documents witnessed. Enabling a senior police officer to witness the objection to bail affidavit would potentially save between 5,491 and 21,924 hours of officers' time annually.[13]

During the public briefing, QPS further explained the time-saving potential for QPS in relation to the witnessing of affidavits if the Bill is passed:

> Every day police serve a sizeable number of documents as part of a variety of court processes, and proof of service, which is a fundamental part of that process, is generally required by way of an affidavit. In the affidavit what the police are simply swearing to is that they served the document and the circumstances under which it was served.
>
> …
>
> To give the committee some idea of the scope of this work, I can tell you that in the calendar year 2019 some 10,982 bail affidavits were completed by Queensland Police. By enabling senior police officers, which will include a watch house manager, to witness bail affidavits, as this bill proposes, we have calculated it has the potential to save almost 22,000 hours of police time annually.[14]

2.1.1.1 Stakeholder comments and department response

The Youth Advocacy Centre (YAC) was opposed to the Bill's provisions to enable 'senior police officers' to witness bail affidavits authorised under the Youth Justice Act and stated that an 'independent judicial officer' should continue to undertake this role:

> YAC further notes that affidavits relating to service are straightforward and contain very clear facts. Affidavits relating to information gathered by police with respect to bail for children is entirely different. The affidavit contains hearsay evidence (such as reported conversations with parents) and other evidential matters which may be open to challenge by the defence. The officer making the affidavit has a discretion about what they put into the document and the manner in which they present the information. Refusal of bail has serious consequences for the children involved. These issues should be acknowledged by maintaining the role of an independent judicial officer in the swearing of the affidavit to ensure that the officer has properly considered its contents and understands the consequences of it being a sworn document.
>
> It is YAC's view that the proposed mechanism not be adopted in relation to bail affidavits under the *Youth Justice Act 1992*.[15]

YAC stated that if this recommendation was not accepted, 'senior police officers' needed to be appropriately trained:

> … YAC submits that the rank of Sergeant does not seem to be particularly "senior" and, in many cases, could simply be the swearing officer's supervisor. JPs, Commissioners for Oaths and solicitors are all

[12] QPS, correspondence, 23 September 2021, p 1.

[13] Explanatory notes, p 2.

[14] QPS, public briefing transcript, 29 September 2021, p 2.

[15] Submission 7, pp 1-2.

> required to undergo training in relation to the swearing of affidavits. If officers of Sergeant level and above are to undertake this role, training should be a mandatory component for the Sergeant's exams, and, in the meantime, all current relevant officers should be required to complete the Commissioners of Oaths training before being able to make use of the provisions.[16]

In response to a) YAC's opposition to a senior police officer being able to witness an affidavit of another police officer for bail affidavits authorised under the Youth Justice Act; b) YAC's comments that the rank of sergeant is not sufficiently 'senior' and could simply be the swearing officer's supervisor; and c) YAC's recommendation that officers of sergeant level and above should be required to complete the Commissioners of Oaths training before being able to make use of the witnessing provisions, QPS stated:

> Section 10 (Prescribed condition - Act, s 31S) of Schedule 1 of the Bill limits the witnessing of objection to bail affidavits under the Bail Act and the Youth Justice Act by audio visual link to circumstances where it is not reasonably practicable for the 'senior police officer' to witness the affirmation and sign the document in the physical presence of the deponent officer.
>
> On average, it takes about 60 minutes for officers to leave the watch-house, locate an available JP and have the bail affidavits witnessed, then return to the watch-house to lodge the paperwork. This timeframe can be considerably longer for police in rural or remote communities.
>
> Enabling 'senior police officers', which includes a watch house manager, to witness bail affidavits has the potential to save 21,924 office hours annually.
>
> The QPS will develop a policy framework to guide senior officers in the performance of the new witnessing functions. The policy will stipulate procedures to be undertaken and will include a prohibition against exercising the functions in circumstances that are a conflict of interest.
>
> The policy framework will be included in one of the QPS Service Manuals, that are Commissioner's directions for the purposes of s 4.9 of the PSAA. A breach of a direction given by the Commissioner under s 4.9 of the PSAA is grounds for disciplinary action in accordance with s 7.4(1)(e)(iii) of the PSAA.
>
> Enabling 'senior police officers' to witness objection to bail affidavits retains the existing offences in s.193 (False verified statements), s.194 (False declarations), s.123 (Perjury) and s. 123A (Perjury-contradictory statements) of the Criminal Code applying to a police officer who makes a false declaration to a police officer witnessing the statutory declaration or affidavit in the same way that they apply to a person who makes a false declaration or false affirmation to a JP.
>
> The QPS will also initiate an independent review of the police witnessing amendments, once they have been in operation for a period of 12 months.
>
> By comparison, in Victoria, police provide sworn evidence in support of an objection to bail. All other jurisdictions require police to prepare a document for the defendant's first appearance that outlines police objections to bail; however, the document is not required to be in the form of an affidavit.[17]

YAC also argued that the Bill's amendments relating to the witnessing of specified affidavits could be applied to JPs and magistrates to assist in time savings:

> With respect to the swearing of affidavits by police in certain situations before a senior police officer, it is noted that the provision is made for the document to be witnessed by the senior officer by use of an electronic document; inclusion of electronic signatures; and by audio visual link. It is therefore arguable that these options could also be used by Justices of the Peace (JPs) and Magistrates, which would presumably assist in terms of time.[18]

[16] Submission 7, p 2.

[17] QPS, correspondence, 19 October 2021, pp 10-11.

[18] Submission 7, p 1.

In response, QPS stated that the proposed amendments enabling a senior police officer to witness objection to bail affidavits of another officer does not restrict a police officer from attending before a JP or Cdec to witness the affidavit.[19]

QPS clarified that the amendments do not change the current situation where the act of witnessing the affidavit affirms the veracity of the contents of the document and does not involve a qualitative assessment of the document's contents.[20] QPS stated that 'under the proposed amendments senior police officers will be able to perform the same witnessing function for objection to bail affidavits as is performed by a JP or Cdec' and that the police witnessing statements should be considered in the context of the Justice Legislation Bill which does not empower all JPs or Cdecs to witness documents via audio visual link.[21] QPS continued:

> That function is limited to Special Witness, which can include JPs and Cdecs in the following circumstances:
>
> - a JP or Cdec approved by the Chief Executive of the Department of Justice and Attorney-General for this purpose;
> - a JP or Cdec employed by a law practice that prepared the document; or
> - for a document prepared by the public trustee – a JP or Cdec who is an employee of the public trustee.[22]

2.1.1.2 Committee comment

The committee notes YAC's comments about the Bill's proposed amendments to authorise senior police officers to witness specified affidavits. The committee is satisfied with QPS's response that the amendments would not restrict a police officer from attending before a JP or Cdec to witness the affidavit, nor would the Bill change the current situation where the act of witnessing the affidavit (currently by a JP or Cdec with the Bill extending that to a 'senior police officer') affirms the veracity of the contents of the document and does not involve a qualitative assessment of the document's contents.

In regard to comments about the appropriate seniority of the police officer in this circumstance, the committee notes that QPS will introduce a policy framework to guide senior officers in undertaking their new witnessing duties and that QPS will conduct an independent review of the amendments after 12 months.

Given that the purpose of the provision is to reduce the number of police hours spent locating and attending before a JP for the purpose of witnessing specified affidavits, the committee is satisfied that extending the power to senior police officers achieves this purpose.

2.2 Amendments to the *Police Powers and Responsibilities Act 2000*

2.2.1 Additional amendments to s 801 (Steps after issue of prescribed authority) of the PPRA

While a police officer can apply for a prescribed authority by phone, fax, radio, email or another similar facility if the officer considers it necessary because of urgent circumstances or the officer's remote location, prior to the application being sworn, the issuing authority is limited in how the approved authority is sent to the applicant police officer. Currently it must be faxed, or if a facsimile is not available the issuing authority must tell the officer the terms of the authority, with the officer writing down the terms of the authority. The explanatory notes stated that 'this is inconsistent with most

[19] QPS, correspondence, 19 October 2021, pp 8-9. See also: QPS, correspondence, 23 September 2021, p 2.

[20] QPS, correspondence, 19 October 2021, p 9.

[21] QPS, correspondence, 19 October 2021, pp 9-10.

[22] QPS, correspondence, 19 October 2021, pp 9-10.

other Queensland Acts dealing with remote or urgent issue of search warrants, which enable the emailing of the relevant authority'.[23]

In this regard, the Bill proposes to amend s 801 (Steps after issue of prescribed authority) of the PPRA to:

- enable the issuing authority to send a copy of the prescribed authority to a police officer or law enforcement officer by email and other forms of electronic communication in addition to facsimile
- ensure that a copy of a prescribed authority sent by electronic communication has the same effect as if it was the prescribed authority signed by the issuing authority
- enable a copy of an electronically sworn application for a prescribed authority pursuant to s 800(4) of the PPRA to be sent to the issuing authority.[24]

In addition, as a consequence of the inclusion of the term 'electronic communication' in s 801 of the PPRA, the Bill will insert the meaning of the term 'electronic communication' into Schedule 6 (Dictionary) and replace the term 'electronic means' with 'electronic communication' in s 53BAC (Police power for giving official warning for consorting) and s 599 (Coroner's search warrant).[25]

2.2.2 Access orders for seized digital devices

Under the PPRA, the police have various powers in relation to Power to examine seized things (s 618) and the extent of Power to examine seized things (s 619). However, QPS stated that 'technology has enabled new methods of offending' including that 'enhancements in encryption and electronic storage of information have made it easier to conceal and prevent access to evidence'.[26]

The PPRA provides certain powers to a magistrate or a Supreme Court judge, including:

- to Order in search warrant about device information from digital devices (s 154), which enables a magistrate or a Supreme Court judge to make an access order for a digital device in a search warrant they are issuing. The access order requires a specified person to provide access information (eg a password or encryption code) to a digital device to enable access to information stored on the digital device or accessible from the device.
- to Order after digital device has been seized (s 154A), which enables a magistrate or Supreme Court judge to make an access order for a digital device in circumstances where the digital device was seized under the search warrant 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.
- to Order about digital device at or seized from a crime scene (s 178A), which enables a Supreme Court judge or a magistrate to make a digital access order in relation to a digital device situated at a crime scene or seized from a crime scene. The order authorises police officers to exercise the powers in relation to evidence of a crime scene threshold offence which is an indictable offence for which the maximum penalty is at least 4 years imprisonment or an offence involving deprivation of liberty. A judge or magistrate may make the order only if satisfied there are reasonable grounds for suspecting that device information from the digital device may be evidence of the commission of the offence for which the crime scene was, or is to be, established.[27]

[23] Explanatory notes, p 3.

[24] Explanatory notes, p 8.

[25] Explanatory notes, p 8.

[26] Explanatory notes, p 4.

[27] Explanatory notes, p 3.

However, the current digital access order scheme does not permit a magistrate or Supreme Court judge to make an order where a digital device is seized under a search warrant issued by a JP or otherwise lawfully seized under the PPRA. Furthermore, if a magistrate or a Supreme Court judge makes an order in a search warrant but, for reasons beyond police control, the digital device is seized under a provision of the PPRA not the search warrant, police cannot apply for a further access order.[28]

The explanatory notes explain further the reasons behind the proposed amendments to access orders for seized digital devices in the Bill:

> Section 223 (Distributing intimate images), s 227A (Observations or recordings in breach of privacy) and s 227B (Distributing prohibited visual recordings) of the Criminal Code are offences predominately existing in the digital environment and help to illustrate the issues with obtaining digital access orders. For example, if police locate a person using a mobile phone to take unauthorised pictures of another person in a communal change room and lawfully seize the mobile phone at that location, they cannot apply for a digital access order.
>
> Furthermore, if police were exercising crime scene powers and as result of their investigations reasonably suspected that the person was using a digital device to commit any of the three abovementioned offences, they would not be able to apply for a digital access order as the offences only have a maximum penalty of 3 years imprisonment and therefore are not crime scene threshold offences.
>
> The inability to obtain an access order where devices are seized other than under a search warrant issued by a magistrate or Supreme Court judge adversely impacts the investigation of offences. Currently, it is irrelevant how serious the offence is, how well the grounds are addressed, or how urgent the circumstances are, a magistrate or Supreme Court judge is not empowered to issue an access order.
>
> In many serious investigations the suspects do not remain at the scene and actively avoid being located by police. In some instances, suspects have been located in the vicinity, but not at the location specified in the search warrant issued by a magistrate. Police take the person into custody and lawfully seize their digital device under various provisions of the PPRA but cannot apply for a digital access order.
>
> Other examples include instances where police intercept a person in relation [to] a matter and subsequently discover drugs, firearms and multiple mobile phones. Although the digital devices were lawfully seized, the[y] were not seized under a search warrant issued by a magistrate or Supreme Court judge and an access order cannot be sought.[29]

In this regard, the Bill proposes the following amendments to s 154A (Order after digital device seized) of the PPRA to:

- enable a police officer to apply to a magistrate or Supreme Court judge for an access order where the digital device was lawfully seized under a provision of the PPRA including under a search warrant issued by a JP.
- enable a magistrate or Supreme Court judge to make an access order where they are satisfied there are reasonable grounds for suspecting that device information from the digital device may be evidence of a crime scene threshold offence or an offence against the Criminal Code sections:
  - 223 (Distributing intimate images)
  - 227A (Observations or recordings in breach of privacy)
  - 227B (Distributing prohibited visual recordings).[30]

2.2.2.1 Stakeholder comments and department response

The QLS expressed reservations about how the proposed amendments regarding access orders for seized digital devices might be used in practice, stating:

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28 QPS, correspondence, 23 September 2021, p 6.

29 Explanatory notes, p 4.

30 Explanatory notes, p 9.

> Whilst we are supportive of the judicial oversight which has been implemented into the proposals, in our view, any expansion to the power to compel people to unlock electronic storage systems should be approached with caution.[31]

Two of the key concerns for stakeholders was the impact of the provision on an individual's right to privacy and the privilege against self-incrimination. While QCCL expressed the view that these provisions would 'assist the administration of justice', QCCL was concerned any expansion of these powers would 'infringe upon an individual's right to personal privacy and the privilege against self-incrimination'.[32] Similarly, QLS commented that access to a digital device may facilitate access to the private information of third parties, who may have no connection with any offending, and to information which may be privileged or subject to commercial confidentiality.[33] QLS noted the right to privacy is preserved in s 25 of the HRA where it states that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with.[34]

QLS submitted that 'it is these competing interests which necessitate appropriate oversight, management of and restraints to police access to digital devices'. QLS called for the committee to consider 'whether a tighter framework is needed around the seizure of devices without a warrant to ensure that current laws reflect the depth of information which is now accessible via a device'.[35] QLS summarised its position relating to these provisions during the public hearing:

> As a starting point, the society fully understands that the police have a really tough job with competing demands and they need the powers to do that job. As you have just heard and as we would all well understand, our mobile phones contain an enormous amount of personal, confidential and private information and an access order allows a police officer to obtain all of that information. We can understand that in certain circumstances that is necessary in order to investigate serious criminality, but in the absence of proper safeguards there is a risk that that balance is not being struck and that the police power is too broad.
>
> The example the police gave, which is a good example of when an access order might be needed after a phone is seized, is when someone is, say, filming inappropriately or the invasion of someone's privacy and the police want access to that phone so they seize it. Then they need an access order to get the image or the film that might have been occurring. That is entirely understandable and we do not oppose that kind of extension of the power in that situation. However, at that point the police do not just have access to the person's recent video or image files; they have access to everything. If they choose, they can download all of the text messages and search years of communications with people and look for drug terms or look for anything else that might not be the subject of the investigation originally. It is a really wide and broad power and there should be appropriate measures in place in order to ensure that power is being used appropriately.

In this regard, QLS recommended the following safeguards if the Bill was to proceed as is:

> For example, if there is to be that invasion of privacy, some of the safeguards that we recommend would include that an application to a magistrate or a judge needs to specify what within the phone is sought as opposed to a broad access power. Secondly, at that point the defendant or the suspect is already aware that their phone is in the police's possession. There is no reason that person should not have a right to be heard in that application before a court so that they can ensure the order that is granted is appropriately framed and not that broad access power. Thirdly, when the police actually access the phone it is very easy for the police to do a short report swearing as to what they actually accessed. That would give the community confidence that the police have not abused the power for ulterior purposes, and that

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31 Submission 6, p 2.

32 Submission 1, p 1. The submission also references the *Human Rights Act 2019* s 25(a), in relation to personal privacy, and *Rochfort v Trade Practices Commission* (1982) 153 CLR 135, 150 (Murphy J, in relation to the privilege against self-incrimination.

33 Submission 6, p 2.

34 Submission 6, p 2.

35 Submission 6, p 2.

> can be filed at the court. If those things were done, the view of the society is that this significant invasion of privacy is appropriately balanced with the necessity for the police to investigate these kinds of crimes.[36]

QCCL supported QLS's view that the Bill be amended to include a safeguard requiring police, as part of their brief disclosure obligations, to provide the Court with a short report sworn by the officer when police are granted an access order.[37] QCCL suggested the report to the Court which issued the access order include a statement about whether or not the order was executed and setting out the results of the execution or setting out the reasons why the order was not executed. QCCL stated 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', which is consistent with New South Wales.[38]

According to QCCL, this additional oversight would 'assist in ensuring that the scope of information accessed will be limited by the offence for which the digital device was seized' as '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'.[39]

Similarly, QLS stated the Bill should limit access orders to what is demonstrably justified to access the evidence of the suspected criminal offence. For example, if the suspect criminal offence is 'recording in breach of privacy', the access order permits police to view recent photos and videos (as opposed to a wide scale search of all communications by a person).[40]

In general, the QLS recommended that access be limited 'to the breadth of information which is accessible from a digital device'. QLS suggested the committee consider the example of cloud-based data to ensure it is 'not accessed merely as a result of the device's connection to the internet rather than any connection to a relevant offence'.[41]

QLS also suggested the Bill be amended to allow for 'keeping detailed records of the data which is examined and constraining the ability to make complete copies of device information which may (or may not be) relevant evidence but could still be accessible at a later date'.[42]

QCCL recommended that the Public Interest Monitor (PIM) should also be authorised to appear in relation to applications for access orders. QCCL explained further:

> 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 issue. 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.[43]

QCCL explained that amending the Bill to include additional safeguards '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 protections'.[44] YAC commented that

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36 Public hearing transcript, Brisbane, 15 October 2021, p 4.

37 QLS, correspondence, 18 October 2021, pp 1-2.

38 Submission 1, p 2.

39 Submission 1, p 2.

40 QLS, correspondence, 18 October 2021, pp 1-2.

41 Submission 6, p 2.

42 Submission 6, pp 2-3. QLS references the following journal article in relation to this suggestion: Raj, Matthew and Marshall, Russ, 'Examining the Legitimacy of Police Powers to Search Portable Electronic Devices in Queensland', *University of Queensland Law Journal*, 38 (1) <http://www8.austlii.edu.au/au/journals/UQLJ/2019/5.pdf>, p 122.

43 Submission 1, p 2.

44 Submission 1, pp 2, 3.

the Human Rights Statement accompanying the Bill accepts that the provisions have an impact on the rights to property, privacy and against self-incrimination and, in this context, expressed its support for the safeguards advocated by QCCL.[45]

In addition, both QCCL and YAC were of the view that the proposed amendments would likely disproportionately affect vulnerable and disadvantaged people, including children who come into contact with police.[46] YAC contended:

> It seems that too often the impact on such groups is not adequately considered when legislation is being prepared even though we are aware that vulnerable and/or disadvantaged groups are overrepresented in contact with the police and the criminal justice system.[47]

QLS also provided a jurisdictional comparison in relation to access orders and noted that most jurisdictions do not permit access orders in the circumstances proposed in the Bill.[48]

In regard to stakeholder concerns that clause 8 of the Bill (Order after digital device has been seized) may impact an individual's rights to property and privacy, QPS advised that human rights, including sections 25(a) 'right to privacy' and 24(2) 'property rights' of the HR Act, have been addressed in the State of Compatibility (SoC) accompanying the Bill. QPS advised that the SoC concludes the Bill 'is compatible with human rights under the HR Act because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.'[49] QPS continued:

> The purpose of the amendments is to allow for the effective investigation of serious criminal offences by enhancing the ability of police to retrieve evidence that is stored on a digital device.
>
> Pursuant to s 618 (Power to examine seized things) and s 619 (Extent of power to examine seized things) of the *Police Powers and Responsibilities Act 2000* (PPRA), police already have a power to seize, examine and search a digital device.
>
> The current digital access order scheme does not permit a magistrate or Supreme Court judge to make an order where a digital device is seized under a search warrant issued by a Justice of the Peace (JP) or otherwise lawfully seized under the PPRA.
>
> The inability to obtain an access order where devices are seized other than under a search warrant issued by a magistrate or Supreme Court judge adversely impacts the investigation of offences. Currently, it is irrelevant how serious the offence is, how well the grounds are addressed, or how urgent the circumstances are, a magistrate or Supreme Court judge is not empowered to issue an access order.
>
> The effective investigation of crime is a proper purpose under s 13(2)(b) of the HR Act. The amendments achieve the purpose by allowing police officers to apply to a magistrate or Supreme Court judge to obtain an access order in circumstances where a digital device has been seized under a warrant issued by a JP or where the device is otherwise lawfully seized under the PPRA. The amendment only expands the capacity for police to apply for an access order in these circumstances.
>
> …
>
> The information sought via an access order is limited to that sufficient to access the digital device. As police already have seized the device and have the authority search/examine the device, an access order is only sought when there is no reasonably available and less restrictive way of achieving access to information on or accessible from the device.

45 Submission 7, p 1.

46 Submission 1, p 1. NB: in-text references have been removed; submission 7, p 1.

47 Submission 7, p 1.

48 QLS, correspondence, 18 October 2021, p 2.

49 QPS, correspondence, 15 October 2021, p 2.

> Concerns about a person's human rights are also mitigated as access orders are only available for the investigation of serious offences.[50]

In regards to concerns that the provision will expand powers that may infringe upon the privilege against self-incrimination, QPS stated:

> Under existing provisions in s 154B and s 178B of the PPRA a person is not excused from complying with an access information order on the ground that compliance may tend to incriminate the person. The exclusion of the privilege against self-incrimination is consistent with like provisions in Queensland legislation such as s 205A (Contravening order about device information from digital device) of the Criminal Code.
>
> The access order provisions are akin to requiring a person to open a filing cabinet or a safe. Access orders do not require the person to provide or direct police to any electronic document, record or communication which may be evidence of the person's involvement in the offence. Nor does it enable police to require the person to provide the meaning of coded terminologies used in communications, such as is frequently used in illicit drug transactions.
>
> Passwords and access information are matters that are peculiarly within the knowledge of the person to whom the access order is directed and are extremely difficult, if not impossible, to establish by any alternative means.
>
> Any potential for self-incrimination is minimised and is justified in order to ensure that police can effectively investigate offenders who are increasingly using encryption, passwords and remote storage to avoid detection. For example, the Bill provides that an access information order may only be granted where the digital device has been obtained through a search warrant issued by a JP or otherwise seized lawfully under relevant provisions of the PPRA. This requires either consideration of a search warrant by a justice or the lawful application of the PPRA by a police officer.[51]

In response to QLS's comments that access to digital devices facilitates access to private information of third parties and that therefore competing interests necessitate appropriate oversight, QPS stated that while 'any search undertaken whether in the physical or digital realm may involve access to private information of third parties, may be privileged or subject to commercial confidentiality', the Bill does not allow access orders to be made in relation to any digital device or for any offence, only permitting the making of 'access orders where a magistrate or Supreme Court judge is satisfied that there are reasonable grounds for suspecting that there is evidence on the digital device of a crime scene threshold offence or an offence against s 223, s 227A and s 227B of the Criminal Code'.[52]

QPS stated further that safeguards exist to protect the confidentiality of information located by police as a result of the search of digital devices:

> Section 10.1 (Improper disclosure of information) of the PSAA creates an offence, with a maximum penalty of 100 penalty units, for the improper disclosure of information which has come to the officer's knowledge through the exercise, performance or use of any power, authority, duty or access had by the officer in their employment in the QPS. The officer may also by subject to section 408E (Computing hacking and misuse) of the Criminal Code which has a maximum penalty of 2 years imprisonment and an aggravated penalty of 5 or 10 years imprisonment depending on the circumstance of aggravation.
>
> The QPS has developed policy and procedures to be undertaken where an access order is granted for a digital device and the person claims that the device contains information which is subject to legal professional privilege.[53]

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50 QPS, correspondence, 15 October 2021, pp 2-4.

51 QPS, correspondence, 15 October 2021, pp 5-6.

52 QPS, correspondence, 15 October 2021, p 10.

53 QPS, correspondence, 15 October 2021, p 11.

QPS explained further:

> The proposed legislation will enable us to put the evidence before the court. We still have to lawfully seize it, whether it is under the PPRA or under a JP's warrant. The level for us to get it is far higher than if we went to the magistrate or the judge in the first place, because it has to be that crime scene threshold offence rather than an offence. It is still getting judicially considered. It is at a higher level which I think increases the safeguards around it. There is still that judicial overviewing of it. Then once we do have it, we have a range of protections and safeguards in place to protect the confidentiality of the information.
>
> If a police officer saw an inappropriate photo on a phone and released it, they have then committed an offence for either unlawful disclosure, misconduct, or even computer hacking around unlawfully accessing the seized device where they could face imprisonment. Misconduct can also come into a whole range of things.
>
> It is a higher threshold going in, but we would have protections around as it would if we seized the device under the magistrate's warrant to protect the privacy of that information anyway.[54]

In response to QCCL's recommendations for a report to contain information about the access order and the use of the PIM, QPS stated:

> The Bill 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 JP or where the digital device was lawfully seized under a provision of the PPRA.
>
> Any application for the additional access order would naturally include information about why it is needed.
>
> …
>
> The primary functions of the Public interest Monitor (PIM) relate to the application and exercise of highly invasive powers by law enforcement, such as covert search warrants and surveillance device warrants. In these instances, the subject of the exercise of these powers may never be aware they were undertaken. By comparison, the subject person is aware of the seizure of digital device either under a search warrant or otherwise under the PPRA and is provided with the access order requiring the person to provide passwords etc. to enable police to access the device.
>
> Under the proposed amendments an access order may only be granted where the digital device has been obtained through a search warrant issued by a JP or otherwise seized lawfully under relevant provisions of the PPRA. This requires either consideration of a search warrant by a justice or the lawful application of the PPRA by a police officer.
>
> …
>
> The powers are still subject to the existing PPRA safeguards provided under Chapter 20 (Standard safeguards) and Part 3 (Dealing with things in the possession of police service) of Chapter 21 (Administration). These include s 622 (Receipt for seized property), s 623 (Right to inspect documents), s 637 (Supply police officer's details), s 691 (Return of relevant things), s 692 (Application by owner etc. for return of relevant things) and s 695 (Application for order in relation to seized things).[55]

QPS provided the following response to QLS's comments regarding adopting a tighter framework around the seizure of devices without a warrant and additional protections to limit the breadth of information which is accessible from a digital device under such an order:

> A review of search and seizure powers is outside the scope of this Bill.
>
> However, it is worth noting that *the Police Powers and Responsibilities and Other Legislation Amendment Act 2020* amended the access order powers to clarify that accessing information on or through electronic devices will apply to the access of any device information, within the terms of the access order, including information accessible through social media and email accounts. This clarification of powers was

[54] QPS, public briefing transcript, 29 September2021, p 7.

[55] QPS, correspondence, 19 October 2021, pp 6-8; QPS, correspondence, 15 October, pp 8-10.

> necessary for police to access information on or through digital devices to ensure the QPS keeps up to pace with criminal elements who would conceal a range of crimes including homicide; sexual assault; drug trafficking, cybercrime, such as fraud and revenge pornography; and terrorism related offences.
>
> The scope of information accessed on or through a person's digital device will be limited by the offence for which a digital device has been seized and the terms of the access order granted by the magistrate or Supreme Court judge. For example, if a police officer seizes a device on a reasonable suspicion it contains child exploitation material, the officer would not be able to apply for an access order requiring passwords for a specified person's bank accounts.[56]

In regard to the impact of this provision on vulnerable and disadvantaged people, QPS responded:

> The serious offending likely to be associated with applications for digital device access orders is not akin to low level crimes, such public order offences, for which vulnerable people or disadvantaged people are often disproportionately affected or come into contact with police and the criminal justice system.[57]

2.2.2.2 Committee comment

The committee notes stakeholder concerns regarding the Bill's proposed amendments to access orders for seized digital devices but is satisfied with QPS's responses to those concerns, being:

- that the amendments will allow for the effective investigation of serious criminal offences
- that police already have a power to seize, examine and search a digital device but that the Bill will extend this to include the power for a magistrate or Supreme Court judge to make an order where a digital device is seized under a search warrant issued by a JP or otherwise lawfully seized under the PPRA
- the Bill only permits the making of access orders where a magistrate or Supreme Court judge is satisfied that there are reasonable grounds for suspecting that there is evidence on the digital device of a crime scene threshold offence or an offence against s 223, s 227A and s 227B of the Criminal Code
- the information sought via an access order is limited to that sufficient to access the digital device.

In regards to stakeholder comments that the provision will expand powers that may infringe upon the privilege against self-incrimination, the committee is satisfied with QPS's response that excluding this privilege is consistent with like provisions in Queensland legislation and that the access orders do not require the person to provide or direct police to any electronic document, record or communication which may be evidence of the person's involvement in the offence. Further, the committee notes QPS's statement that 'any potential for self-incrimination is minimised and is justified in order to ensure that police can effectively investigate offenders who are increasingly using encryption, passwords and remote storage to avoid detection'.[58]

In relation to protecting the confidentiality of information that may be accessed on a device, the committee notes QPS's advice that the PSAA creates an offence for the improper disclosure of information which has come to the officer's knowledge through their employment in the QPS. The committee also notes that QPS has developed policies and procedures for when a digital device access order is granted and the person claims the device contains information that is subject to legal professional privilege.

The committee is satisfied with QPS's response to matters raised by QCCL and QLS, including stakeholder recommendations to amend the Bill to require a police officer to provide a report to the Court with details of the order; limit access to the breadth of information which is accessible from a

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56 QPS, correspondence, 15 October 2021, pp 13-14.

57 QPS, correspondence, 19 October 2021, p 2.

58 QPS, correspondence, 15 October 2021, pp 5-6.

digital device; authorise the PIM to appear in relation to applications for access orders; and implement a tighter framework around the seizure of devices without a warrant.

The committee notes that YAC and QCCL questioned how the provision might impact vulnerable and disadvantaged people. The committee is satisfied with QPS's advice that the provision relates to serious offending and not crimes for which vulnerable people or disadvantaged people typically come into contact with police and the criminal justice system.[59]

2.3 Amendments to the *Police Service Administration Act 1990*

2.3.1 QPS alcohol and targeted substance testing

The Bill proposes amendments relating to testing a relevant person (police officers and certain unsworn staff) under the PSAA when they are involved in a 'critical incident'. The explanatory notes state that it has been identified that '"critical incident" is too limiting when the need for oversight of an officer's actions is legally required and/or necessary to ensure public confidence in police' and that it also 'does not capture the situation where a police officer accidently discharges a firearm in circumstances that caused, or could have caused, injury to a person'.[60]

The explanatory notes further highlight that substances can be detected in urine days to weeks after consumption (commonly referred to as a lifestyle test) and that current technologies allow police to conduct an oral fluid (saliva) test which provides an immediate indication of the presence of certain dangerous drugs with further follow up testing being completed following a positive indication.[61] The benefits of saliva testing are that it is:

- more effective in revealing recent drug use with saliva testing's shorter detection timeframe providing a better indication of potential impairment within a specific timeframe. This is commonly referred to as an incident specific test.
- quicker and less invasive on an officer who has just been involved in a critical incident.
- will reduce impacts on Covert Operations in relation to periodical testing of operatives. An operative will not have to travel to another location to provide a urine sample. An officer, authorised by the Commissioner to take saliva samples, will be able to take and test the samples discretely.[62]

QPS expanded on the benefits of saliva testing in a 'critical incident' situation:

> With the testing of police officers in relation to a 'critical incident', urine testing causes delays in the testing of officers as nursing staff and the QPS Alcohol and Drug Testing Coordinator based in Brisbane are required to travel to the scene of the incident. Delays are exacerbated when the incident occurs in a remote location. Current requirements also incur significant costs and place imposts on officers who may be required to moderate their eating, drinking and use of bathrooms while waiting for testing staff to arrive. Delays are also experienced as urine samples are required to be sent for laboratory testing with results unavailable for 48 hours.[63]

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59 QPS, correspondence, 19 October 2021, p 2.

60 Explanatory notes, pp 4, 5. A 'critical incident' is defined as including the discharge of a firearm in circumstances that caused or could have caused injury to a person; a death of a person in custody; a vehicle pursuit; or a workplace incident at a police station or police establishment where a person dies or is admitted to hospital for treatment of injuries' – QPS, correspondence, 23 September 2021, p 7.

61 Explanatory notes, p 5.

62 Explanatory notes, p 5.

63 QPS, correspondence, 23 September 2021, p 8.

Because of its timely nature, a saliva test will also provide assurances to individual police officers involved in critical incidents:

> If I may just add, the individual police officer who is involved in these critical incidents has to be acknowledged in these processes. They need the assurance that we do not think they are intoxicated as well. So we have the ability to be able to say to someone very quickly, 'Thank you for that saliva test. Just relax. We know you do not have any recency with respect to intoxicating substances.' I have to emphasise that point because in the media attention to incidents like this, people often forget the stress and the trauma that it causes to the officers involved, and anything that we can do to give them comfort that we do not think they are abusing substances and that has led to poor judgement has to be acknowledged.[64]

QPS also advised that saliva testing will not replace urine testing[65] but that a saliva test is important in a situation where a critical incident has occurred:

> When you have a critical incident, we are not so much worried about whether the person may have taken something a week ago; it is whether they are impaired now. Where we have a police officer who wants to become an undercover officer and is applying to undertake the course, we want to see if this person has any history of drug use. We will go to the urine to see what their lifestyle characteristics are. Different times dictate the different usage.[66]

The Bill will achieve its objective by focusing on improving 'the effectiveness and efficiency' of the PSAA and:

- amending s 5.16 (Special Constables) and s 5.17 (Authorisation of non-State police officers) to ensure that the Commissioner is able to authorise a special constable or non-State police officer to exercise any or all powers available to a Queensland police officer.
- amending the meaning of 'critical incident' for the purposes of triggering alcohol and targeted substance testing under Part 5A (Alcohol and drug tests) to:
  - include deaths occurring in the course of, or as a result of, police operations (to align with the definition of reportable death in s 8(3)(h) of the *Coroners Act 2003*
  - include incidents where a person suffers from injuries consistent with the Criminal Code definition of 'grievous bodily harm' while in police custody or in the course of, or as a result of, police operations
  - include the accidental discharge of a firearm in circumstances that caused, or could have caused, injury to a person
  - exclude the use of less than lethal rounds which are currently captured by subsection (a) of the definition of 'critical incident'. (Where the use of less than lethal rounds resulted in the death of a person, or the person suffered injuries consistent with the definition of 'grievous bodily harm', the officer would be subject to alcohol and targeted substance testing).
- providing for the use of saliva testing as an alternative to urine testing for the purposes of targeted substance testing under Part 5A.
- amending the Police Service Administration Regulation 2016 supports the Act changes providing for saliva testing as an alternative to urine testing for the purposes of targeted substance testing under Part 5A.[67]

In regard to the amendment of the definition of 'critical incident', QPS explained further:

> Clause 17 of the Efficiencies Bill replaces the definition of critical incident in section 5A.2 (Definitions for pt 5A) of the PSAA. The new definition includes incidents that cause grievous bodily harm and extends

64 QPS, public briefing transcript, Brisbane, 29 September 2021, p 6.

65 QPS, public briefing transcript, Brisbane, 29 September 2021, p 5.

66 QPS, public briefing transcript, Brisbane, 29 September 2021, p 6.

67 Explanatory notes, p 9.

the types of incidents where death or grievous bodily harm may occur to include any operational activity of the police service. The definition of 'critical incident' also captures a workplace incident at a police station or establishment where a person dies or suffers grievous bodily harm or is admitted to hospital for treatment of their injuries. A definition of grievous bodily harm is included and refers to the Criminal Code, schedule 1 which means:

(a) the loss of a distinct part or an organ of the body; or

(b) serious disfigurement; or

(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available

Examples of what might constitute an operational activity of the police service the purposes of critical incident include vehicle pursuit for the purposes of apprehending a person or an evacuation. These examples are a guide and do not limit what might be considered an operational activity.[68]

2.3.2 Special Constables and non-State police officers to be able to be approved to exercise all or some of the powers available to Queensland police officer

Clauses 15 and 16 of the Bill amend s 5.16 (Special constables) and s 5.17 (Authorisation of non-State police officers) of the PSAA to clarify that special constables and non-State police officers are able to exercise the powers of a Queensland police officer, subject to the limitations imposed by the Commissioner. The purpose of the amendments is to remove any confusion about the role of officers from other jurisdictions when they come to Queensland to assist with major events, disasters, or terrorism incidents.[69]

2.4 Amendments to the *Weapons Act 1990*

The purpose of the proposed amendments to the Weapons Act is to streamline the operation of the permanent firearms amnesty that Queensland currently has in place.[70] QPS explained further:

The current firearms amnesty framework does not allow for firearms dealers to retain firearms or other prescribed things that have been surrendered to them anonymously. There is a process in place where you can identify who the owner of the weapon is. This amendment seeks to deal with the circumstances where there is no identity because it has been anonymously handed in. Obviously, we are encouraging all weapons to be handed in. If they come in anonymously, this amendment proposes a framework to deal with that more efficiently.

This will mean that participating firearms dealers must take any anonymously surrendered firearms to a police station; that is the current arrangement. This approach creates unnecessary risk due to the transport of the firearms—we believe it is an unnecessary process—but it also adds to the complexity for police because then we have to store the firearms at the police station and deal with them. This is a potential barrier for some people for the ongoing participation in the permanent amnesty, particularly licensed firearms dealers. They do not want to participate when there is anonymous firearms handed in because they then have that responsibility sometimes to travel quite some distance to engage with police at a police station. As I said, it creates an unnecessary operational burden on local police stations, many of which are quite remote and have very small staff numbers.

In previous amnesties most firearms that have been surrendered to dealers and, consequently, the broad participation—and this is a very welcome participation from firearms dealers—is a consideration; we think it is critical for the success of that permanent amnesty we have in place. The amendments contained in the bill will allow licensed firearms dealers to retain the firearms that are surrendered to them

68 QPS, correspondence, 23 September 2021, p 7.

69 QPS, correspondence, 23 September 2021, p 9.

70 QPS, public briefing transcript, Brisbane, 29 September 2021, p 3.

> anonymously under the amnesty in circumstances where approval is provided to them by an authorised officer from the Queensland Police Service's Weapons Licensing branch…[71]

The proposed amendments to the Weapons Act are considered in detail below.

2.4.1 Extending time period for the temporary possession of weapons to six months

Clauses 32 and 33 of the Bill propose to extend the 3 months temporary possession period to 6 months to provide the unlicensed owner with an appropriate time to address the reason for temporary storage — such as when a person's weapons licence expires, is suspended due to court or serious health matters, or during the administration of deceased estates — before administrative processes are reinstituted.[72]

The Bill proposes to do this by amending s 35 (Acquisition of weapons) and s 36 (Sale or disposal of weapons) of the Weapons Act to extend the timeframes under which an appropriately licensed person can temporarily hold a weapon on behalf of another weapons licensee from 3 months to 6 months.[73]

2.4.1.1 Stakeholder comments and department response

The Shooters Union Queensland (Shooters Union) supported the extension of the time for temporary storage 'on the basis that a new licence can take quite some time to be obtained, particularly in light of the eligibility requirements which must be achieved prior to licence application'.[74] The Shooting Industry Foundation of Australia (SIFA) also supported the amendment to extend the timeframe as 'it is in the public interest for firearms to be stored safely, and that there should be as few impediments to that outcome as possible'.[75]

However, the Shooters Union was concerned about the impact of the amendment on the service standard for issuing licences and that higher fees may have to be paid by licensees,[76] stating:

> Sometimes, temporary storage will be with a licensee's friend or family member. Currently, when that 3 months period expires, the firearms must be surrendered to a licensed firearm dealer for storage, which involves a fee which can vary from dealer to dealer according to individual commercial arrangements. Weapons Licensing Branch has 42 days after expiry to decide an application for renewal of a licence and after that period, the person is unlicensed and must also surrender their firearms to a licensed dealer for storage. With 8000 licences outstanding, some of which must be the result of late renewals and the amendment proposing an extension of storage to 6 months and licences not even being assessed until 5 months have passed, it would seem that the service standard for the issue of licences by Weapons Licensing Branch is already far exceeding the 3 months temporary storage requirements.[77]

The Firearms Dealers Association – Qld Inc (FDAQ) expressed similar concerns stating that while it 'appreciated the proposed extension' for temporary storage, it should be accompanied with shorter processing times for the issuing of a new licence.[78] SIFA held similar views: 'extending the timeframes permitted for temporary storage must not have the effect of extending the time taken to process routine licensing applications'.[79] SIFA added:

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71 QPS, public briefing transcript, Brisbane, 29 September 2021, p 3.

72 Explanatory notes, p 6.

73 Explanatory notes, p 10.

74 Submission 2, p 4.

75 Submission 4, p 2.

76 Submission 2, pp 4-5.

77 Submission 2, pp 4-5.

78 Submission 3, p 3.

79 Submission 4, p 2.

> The committee should ensure that this provision is not confused with situations where the nominated safe storage address for the firearm differs from the firearm owner's residential address. These are permanent arrangements, not temporary.[80]

QPS acknowledged the support of the Shooters Union, FDAQ and SIFA in relation to extending the timeframe for temporary storage of firearms.[81]

In response to stakeholder comments, QPS stated that there was no correlation between the processing time of new license applications and the proposed increase in temporary storage timeframes in the Bill.[82] QPS advised that 'new licence application timeframes fluctuate from week to week' but acknowledged that they have broadly increased over the past 18 months, stating that this was due to a variety of factors including recruitment and the effects of COVID-19 on the workforce, as well as the 'significant increase in applications being received'. In addition, QPS advised that it was 'implementing a number of strategies to address the increased processing timeframe for new licence applications'.[83]

2.4.1.2 Committee comment

The committee is satisfied with QPS's advice that the proposed increase in temporary storage timeframes contained in the Bill is not related to increased processing times for new licence applications and that the agency is addressing the increased timeframes for processing new licence applications.

2.4.2 Civilian technical officer to issue evidentiary certificates for the *Weapons Act 1990*

Clause 34 of the Bill amends s 152 (Approved officers) of the Weapons Act giving power to the Police Commissioner to appoint police officers and public service officers who have the necessary experience or expertise as approved officers for the Weapons Act.[84] The amendment reflects 'that an officer of the public service is now referred to as a public service officer'.[85] The explanatory notes state that there is no change in policy in this regard.[86]

Clause 35 of the Bill proposes to amend s 163 (Evidentiary provisions) of the Weapons Act to allow a non-sworn technical officer, who is an approved officer, to prepare a document to be produced as evidence as to the category of a weapon. The explanatory notes state that 'the approval supports provisions of the Weapons Act which enable the Commissioner to appoint police officers and public service officers who have the necessary experience or expertise as approved officers for the *Weapons Act*' and that the amendment would 'enhance the management of workloads in the QPS Ballistics Section'.[87]

2.4.2.1 Stakeholder comments and department response

The Shooters Union was of the view that the evidentiary provisions in the Bill relating to the Weapons Act were not 'needed at all':

> The traditional position is that that has been handled with outside consultation and then working with the commissioner. We believe that there is simply not the expertise within the weapons branch to cover all of those. That is not criticism; that is a fact. It is a very complex area. It is very technical. The use of outside consultants from different areas is traditional for a reason. It did not happen for any one group's

80 Submission 4, p 2.

81 QPS, correspondence, 15 October 2021, p 14.

82 QPS, correspondence, 15 October 2021, p 14.

83 QPS, correspondence, 15 October 2021, p 14.

84 QPS, correspondence, 29 September 2021, p 10.

85 Explanatory notes, p 21.

86 Explanatory notes, p 21.

87 Explanatory notes, pp 6, 7, 10.

> or another's advantage. It happened to get an even-handed result. We do not believe it is needed. In fact, the federal government's amnesty program is there for this reason, which is allowing referral to that. If that were addressed, it would give a consistent approach around the country. We do not see the need for it.[88]

The Shooters Union also expressed concern that 'a statement made by a public service officer does not have to be confirmed by anyone, not even a police officer, and can be accepted as evidence in a court proceeding'. In this regard, the Shooters Union suggested:

> that a licensed dealer or armourer should confirm statements made in relation to firearms by approved officers, particularly in regard to the location of serial numbers, configurations and categories. It is almost impossible for all knowledge of all firearms to reside in any one individual and where cases are brought to a court, it may be that several opinions are required before a statement can be considered to be accurate.[89]

While SIFA was not opposed to a non-sworn technical officer producing evidentiary material, SIFA held the view that evidentiary material should be produced by the most technically competent person available as the act of swearing an oath does not enhance a person's technical knowledge of firearms, and that an approved officer should have specialist and in-depth firearms knowledge.[90] During the public hearing, SIFA stated further:

> There are no formal qualifications for firearms technical people in Australia. I make the general observation, though, that most of the people working in this space come to the space from a tool-making or metalworking background. That does not necessarily translate into an in-depth knowledge of the way firearms are constructed and how they work.[91]

FDAQ held similar views and was also concerned that the approved officer would not have to prove the contents of the evidentiary material were true and an opinion from a licensed firearm dealer should be sought in relation to identifying a firearm:

> Our concern with this amendment is that a public service officer will be permitted to sign a document that in itself will be considered evidence in court, without having to prove that the contents of the document are true. Since this section appears to relate to particular firearms, we would like to see an opinion sought of a licensed firearm dealer or armourer. Serial numbers on firearms are often concealed under stocks and forends, most military rifles have rack numbers and/or multiple serial numbers on them and many serial or model numbers on old firearms are difficult to read. Model numbers are often included in serial numbers, which further confuses firearm identification. It would seem reasonable to include a provision for the expertise of industry to be sought as confirmation of statements made before admission to court.[92]

In response to stakeholders' queries about whether a non-sworn technical officer would have the appropriate knowledge and expertise to prepare a document for evidence, QPS stated:

> The Bill amends s 163 (2) to require, a copy of a document stating the classification of the weapon to be signed by a police officer or public service officer and including their qualifications and experience; that the officer has been appointed by the commissioner as an approved officer, to be served on the person charged within 14 clear days before the hearing of the complaint is evidence of what the document states.
>
> However, the document is not evidence of what it states if the person charged gives notice in writing at least 3 clear days before the hearing that the police officer or public service officer is required to be called as a witness.

88 Public hearing transcript, Brisbane, 15 October 2021, p 2.

89 Submission 2, p 5.

90 Submission 4, pp 2, 3.

91 Public hearing transcript, Brisbane, 15 October 2021, p 3.

92 Submission 3, p 4.

> Subsection (3) will enable the court, even if the accused does not give the notice, to call the officer as a witness in the interests of justice.
>
> The Ballistics Unit is accredited by the National Association of Testing Authorities (NATA) as meeting the requirements specified by the Australian and International Standard for the competence of forensic laboratories (AS ISO/IEC 17025 - Testing and AS 5388 - Forensic Analysis). This accreditation requires a technical review process by another approved officer of case files and reports issued.
>
> Examiners are appropriately trained prior to becoming an approved officer. Approved officers and authorised officers perform different functions under the Weapons Act. Approved officers are responsible for examining weapons under Section 163(2) of the Weapons Act and classifying them as per the Weapons Categories Regulation 1997. Approved officers are only contained within the Ballistics Unit, QPS.[93]

2.4.2.2 Committee comment

The committee notes stakeholders' concerns relating to whether a civilian technical officer authorised to issue evidentiary certificates for the Weapons Act, as proposed in the Bill, will have the necessary expertise to undertake such a task. In this regard, the committee is satisfied with QPS's response that the Bill enables the Commissioner to appoint police officers and public service officers with the necessary experience or expertise as approved officers for the Weapons Act and that a copy of a document stating the classification of the weapon which is signed by a police officer or public service officer will include their qualifications and experience.[94]

In addition, the committee notes that examiners are 'appropriately trained' before becoming an approved officer; that approved officers are only contained within QPS's Ballistics Unit; and that the Unit is accredited by NATA.[95]

In relation to a stakeholder concern that the approved officer would not have to prove that the content of the evidentiary material was true, the committee is satisfied with QPS's advice regarding this as outlined above.

2.4.3 Enabling approved licensed firearms dealer to retain and deal with an anonymously surrendered firearm or prescribed thing

Currently, registered firearms dealers, who are approved to participate in the permanent firearms amnesty in Queensland (which commenced on 1 July 2021), are not able to retain firearms and other prescribed things that have been surrendered anonymously, which means they must transport them to a police station which 'creates unnecessary risks' and imposes 'unnecessary operational burdens on local police station, many of which are in regional and remote communities with smaller staffing establishments'.[96] The explanatory notes state that 'registered firearms dealers may view this is a barrier to their ongoing participation in the permanent amnesty'. QPS acknowledged that, in previous amnesties, 'most firearms have been surrendered to dealers' and, as such, 'the broad participation of firearms dealers in the permanent amnesty is considered critical to its success'.[97]

In this regard, clause 36 of the Bill proposes to amend s 168B (Amnesty for firearms and prescribed things in particular circumstances) and s 168C (Dealing with surrendered firearm of prescribed thing) of the Weapons Act to allow a licensed firearms dealer to retain and deal with an anonymously

93 QPS, correspondence, 15 October 2021, pp 15-16, 21.

94 QPS, correspondence, 15 October 2021, p 15.

95 QPS, correspondence, 15 October 2021, p 16.

96 Explanatory notes, p 7.

97 Explanatory notes, p 7.

surrendered firearm or prescribed thing, in circumstances where an authorised officer from Weapons Licensing approves the licensed dealer to do so in writing.[98]

In addition, subclause (2) replaces subsection 168B(4) to ensure that an approved licensed dealer does commit an offence where the dealer has the approval of an Authorised Officer of the QPS to deal with the firearm or thing under new s 168D(2) (Authorisation to deal with surrendered firearm or prescribed thing). Subclause (2) also creates a reasonable excuse exemption for failing to surrender the firearm or prescribed thing.

Clause 38 of the Bill inserts new s 168D (Authorisation to deal with surrendered firearm or prescribed thing) which enables a QPS Authorised Officer to authorise an approved licensed dealer to deal with a firearm or prescribed thing that was surrendered under the amnesty, including an anonymously surrendered firearm or thing.[99]

2.4.3.1 Stakeholder comments and department response

SIFA supported the amendments to sections 168B and 168C 'on the basis that they facilitate the anonymous surrender of illegitimate firearms to licensed firearm dealers in Queensland and it incentivises dealers to support the national amnesty initiative'. SIFA stated further that 'under the current legislation, these key items are deficient and thus are roadblocks to a successful Amnesty.'[100]

The Shooters Union expressed an alternate view that these amendments would significantly undermine the purpose of the legislation and the amnesty and suggested a 'blanket approval' for firearms dealers to accept amnesty firearms rather than relying on individual authorities from Weapons Licensing.[101] The Shooters Union explained:

> Our concern here relates to an understanding that each surrendered item will require its own individual authority from Weapons Licensing Branch. This largely renders the amnesty an exercise in bureaucratic paper recycling. Firearm dealers are the ones who administer the initial registration of all firearms. The paperwork requirements already far exceed what could be considered efficient management procedures. They have the expertise, the licences, the experience and the knowledge to perform the essential service of removing of illegal firearms from the community in a safe and efficient environment. If an approval separate to the formally agreed provisions of the Amnesty is required, and we do not believe it is, then it is much more efficient and effective to create a blanket approval, if not for all licensed dealers, then at least for each individual dealer so that he can accept all amnesty firearms without further complications.[102]

QPS responded to the Shooters Union's comments stating that the 'proposed amendments to the amnesty provide a reasonable and balanced risk approach to managing the amnesty'.[103] In relation to the issuing of individual authorities as opposed to a 'blanket approval', QPS highlighted the importance of continued provenance checks for firearms, with these checks relying on the items being individually assessed:

> The QPS values the critical role approved firearms dealers play in firearms amnesties; however, there continues to be a requirement for provenance checks to occur on every firearm surrendered, particularly given this is a permanent amnesty and not a short-term amnesty such as the 12 week amnesty in 2017.
>
> Whilst QPS recognises the expertise and experience of approved firearms dealers, provenance checks can only be conducted by QPS due to the requirement to access restricted information.

98 Explanatory notes, p 10; QPS, correspondence, 23 September 2021, p 10.

99 QPS, correspondence, 23 September 2021, p 11; explanatory notes, pp 21, 22.

100 Submission 4, p 3.

101 Submission 2, p 5.

102 Submission 2, p 6.

103 QPS, correspondence, 15 October 2021, p 17.

> The QPS is committed to the amnesty model agreed to at the Firearms and Weapons Policy Working Group (FWPWG). This model requires jurisdictions to ensure firearms surrendered to dealers are checked against respective police systems to ensure they are not being laundered.
>
> For the period 1 July 2021 to 7 October 2021, of the 1,409 surrendered firearms and weapons processed by QPS, 4 stolen firearms have been identified. These firearms would not have been identified had individual checks not occurred, which highlights the importance of the expanded requirement for anonymously surrendered items to be individually released.[104]

The Shooters Union also contended the Bill would create a situation 'where dealers are unlikely to accept Category R firearms under amnesty because those firearms have to be transported to local police stations' — as the Bill does not provide for dealers to retain this category of firearms.[105] The Shooters Union stated that it was therefore 'extremely unlikely' that dealers would accept these firearms but rather refer them to the nearest police station, which will 'defeat the purpose of the amnesty'.[106]

FDAQ held a similar view in relation to the Bill and Category R firearms:

> Dealers should be able to accept ALL categories of firearms. A dealers licence allows a person to buy, sell or otherwise dispose of firearms. It has no bearing on whether or not a person can shoot the firearms, so there is no point in restricting a dealer to specific categories, providing their storage requirements are up to the standard to house the categories of firearms surrendered.
>
> …
>
> The firearms that everyone, including the police, are most seriously concerned with removing from the community, ie Category R (machine guns), will not be accepted by dealers because they can't be retained in their premises until clearance to dispose/transfer is obtained. Those firearms must go the police, so why would a dealer take the time and effort to accept an amnesty firearm which must go directly to the police? In the case of rural dealerships, many of which are sole traders, delivery to local police would entail closure of the business for the period of time it takes to attend a police station. Most dealers will direct the person to take it to the police directly. So a dealer, who has multiple licences, approved secure storage and the appropriate paperwork to handle these, is permitted under these proposals to send a person with an illegal firearm and no licence for it, back out into the community with what is arguably the most important category of firearm to remove from the community.[107]

QPS confirmed that the proposed amendments do not apply to Category R firearms, but that the Bill's amendments do not change the current legislative framework that allows dealers to accept Category R weapons and firearms, whether anonymously or with personal details being provided, and then arrange for them to be delivered to a police station. QPS advised that between 1 July 2021 and 7 October 2021, 4 Category R firearms were surrendered in Queensland.[108] QPS advised that while it did not support Category R firearms being retained by dealers while provenance checks were conducted, 'existing processes are in place to enable a licenced armourer to collect a surrendered Category R item from police following provenance checks in order to make the item inoperable or for other lawful purposes.'[109]

While FDAQ stated that 'the amendments go some way towards rectifying' the viability of the current firearms amnesty legislative framework, it expressed the additional following concerns in relation to these provisions of the Bill:

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104 QPS, correspondence, 15 October 2021, pp 17-18.

105 Submission 2, p 6.

106 Submission 2, p 6.

107 Submission 3, pp 4, 5.

108 QPS, correspondence, 15 October 2021, p 18.

109 QPS, correspondence, 15 October 2021, pp 18, 19.

- A dealer required to direct a person wishing to hand in a firearm anonymously to a local police station facilitates the person in holding illegal firearms. Persons wishing to surrender firearms to dealers want to do so because of the anonymity of the transaction. Not so at the local police station.
- Our members inform us that although the clearance from police to dispose of an amnesty firearm was received fairly quickly when the amnesty commenced, the time has now extended to several months in some cases, and is often only issued when the dealer follows up.[110]

In response, QPS stated:

> The QPS acknowledges the support of the Firearms Dealers Association of Queensland in identifying the proposed amendments go some way towards rectifying issues with existing legislation.
>
> The QPS recognises the important role approved firearms dealers play in minimising barriers to the surrender of firearms, particularly for individuals who may seek to avoid contact with police.
>
> The submission raises concerns regarding timeframes of seeking approvals from police to dispose of surrendered firearms, suggesting the timeframe has now extended to "several months". Given the amnesty has only been operational for three months and two weeks, the QPS is not aware of any extended delays with processing amnesty firearms; however, can advise processes are in place to ensure dealers are advised of the release of firearms following provenance checks in a timely manner.[111]

The Shooters Union sought a review of the proposed amendments to the Weapons Act prior to the legislation being considered any further and that consultation with licensed firearm dealers be undertaken as part of that process.[112] FDAQ shared the view that the Bill should only proceed with amendment and further expert advice being obtained as the amnesty provisions of the Bill would 'fail to deliver' community safety.[113]

The Shooters Union spoke further during the public hearing about the lack of consultation on amendments relating to the Weapons Act:

> Our overall objections are really rooted in the lack of consultation on these amendments which has led, we believe, to poorly worded legislation that can be—and should already have been, to be honest—fixed so easily because there is not overall great argument about it. We suggest that the Weapons Act portions of this bill be sent back to the police minister's advisory committee for discussion and approval before they resubmit it as final legislation.[114]

While supportive of the amendments, SIFA raised the matter of inconsistency across jurisdictions in regard to the categorisation of firearms and noted:

> that Queensland has failed to adopt the nationally consistent amnesty model which was agreed to at the Firearms and Weapons Policy Working Group. Had they done so, and had these amendments been geared towards achieving and maintaining national consistency, the data clearly shows that the Queensland amnesty would have been more effective in removing illicit firearms from the community from the start of the initiative.[115]

QPS stated that 'both current and proposed legislation support the amnesty model as agreed'.[116] QPS continued:

> For the information of the Committee, the amnesty model states: "This model is designed to be adapted to individual state and territory requirements. The model aims to assist in achieving national consistency

110 Submission 3, p 4.

111 QPS, correspondence, 15 October 2021, pp 18-19.

112 Submission 2, p 7.

113 Submission 3, p 5.

114 Public hearing transcript, Brisbane, 15 October 2021, p 1.

115 Submission 4, p 3.

116 QPS, correspondence, 15 October 2021, p 21.

across the seven amnesty components, while allowing flexibility for states and territories to implement their own jurisdiction-specific frameworks."[117]

2.4.3.2 Committee comment

The committee is satisfied with QPS's response that the Bill's provisions to allow a licensed firearms dealer to retain and deal with an anonymously surrendered firearm or prescribed thing would support the firearms amnesty by reducing the unnecessary risks and business impacts associated with transporting such items to a police station.

The committee notes a stakeholder suggestion to introduce a 'blanket approval' for firearms dealers to accept amnesty firearms rather than relying on individual authorities from QPS's Weapons Licensing Unit. However, the committee supports QPS's view that individual authorities from Weapons Licensing is the best approach to ensure the provenance of firearms continues to be established for surrendered firearms, which can only be done by Weapons Licensing as they have access to restricted information, and to information across jurisdictions.

The committee notes stakeholder comments regarding Category R weapons and that firearms dealers may not accept these weapons under the amnesty as they must transport them to a police station rather than have the ability to retain and deal with them. However, the Bill does not change the existing legislation that allows dealers to accept Category R weapons and firearms and then arrange for them to be delivered to a police station. The committee notes that following provenance checks, a licenced armourer can collect a surrendered Category R item from police in order to make the item inoperable or for other lawful purposes.

[117] QPS, correspondence, 15 October 2021, p 22.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

3.1.1.1 Access orders for seized digital devices

The Bill proposes to expand the circumstances in which a magistrate or Supreme Court judge may grant an access order for a seized digital device.[118]

Currently, a magistrate or Supreme Court judge cannot make a digital access order where a digital device is seized under a search warrant issued by a justice of the peace or otherwise lawfully seized under the PPRA. Further, if a magistrate or a Supreme Court judge makes an order in a search warrant but the digital device is seized under a provision of the PPRA instead of the search warrant, the police cannot apply for a further access order.[119]

During his introductory speech, the Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Hon Mark Ryan MP (Minister) outlined the proposed amendments as follows:

> Another significant reform being introduced by this bill is the expansion of the circumstances where a magistrate or Supreme Court judge may issue a digital access order, which requires a person to provide a password or encryption code to enable police to access information stored on, or accessible from, a digital device such as a mobile phone. This would apply, for example, to circumstances involving upskirting and revenge porn …[120]

Under the proposed amendments, an access order would only be able to be made if the magistrate or judge is satisfied there are reasonable grounds for suspecting that device information from the digital device may be evidence of a crime scene threshold offence or another specified offence.[121]

The Minister described the effect of the proposed amendments:

> Under the proposed amendments, police will now be able to seek digital access orders in circumstances where they suspect offences against the Criminal Code including: distributing intimate images; observations or recordings in breach of privacy; and distributing prohibited visual recordings. For example, if police locate a person using a mobile phone to take unauthorised pictures of another person in a communal change room and lawfully seize the mobile phone at that location, they will be able to apply for a digital access order to gather evidence of the offending behaviour. The bill will amend section 154A of the Police Powers and Responsibilities Act to enable a police officer to apply to a magistrate or

[118] Bill, cls 7, 8, 9 (PPRA, amended ss 149A, 154A, 163A); explanatory notes, p 15.

[119] Statement of compatibility, p 3.

[120] Hon Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Queensland Parliament, Record of Proceeding, 16 September 2021, p 2803.

[121] Statement of compatibility, pp 3, 10.

> Supreme Court judge for an access order where the digital device was lawfully seized under a provision of the Police Powers and Responsibilities Act, including instances where the search warrant was issued by a justice of the peace.[122]

This requirement on a person to provide their password or encryption code so that police can access information stored on, or accessible from, a digital device raises issues of fundamental legislative principle relating to the rights and liberties of individuals.[123] Specifically, the right to privacy[124] and protection against self-incrimination.[125]

Protection against self-incrimination

Legislation should provide appropriate protection against self-incrimination.[126]

With respect to the privilege against self-incrimination, the explanatory notes provide:

> The proposed amendments will not provide police with unfettered access to information on a person's storage device as the scope of information accessed will be limited by the offence for which a storage device has been seized. For example, if police seize a device due to a reasonable suspicion it contains child exploitation material, they would not be able to apply for an access order requiring passwords for a specified person's bank accounts. Judicial oversight will ensure the access sought and granted is relevant to the offence/s being investigated.
>
> Under existing provisions in s 154B and s 178B of the PPRA a person is not excused from complying with an access information order on the ground that compliance may tend to incriminate the person. The exclusion of the privilege against self-incrimination is consistent with like provisions in Queensland legislation and other jurisdictions, for instance access information provisions under s 465AAA(6) of the *Crimes Act 1958* (Victoria).
>
> Departure from fundamental legislative principles is justified as the objective of the provisions cannot be achieved unless police can access all information relevant to offences.[127]

The committee considers the removal of the protection against self-incrimination is justified.

Right to privacy

The right to privacy is relevant to a consideration of whether a Bill has sufficient regard to the rights and liberties of individuals.[128]

The scope of the right to privacy is very broad and includes personal information,[129] such as that would be found on a digital device (for example, a phone).

The right to privacy is addressed in the statement of compatibility in the context of human rights.

The statement of compatibility advises that the purpose of the amendments relating to access orders for seized digital devices is 'to allow for the effective investigation of serious criminal offences by

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122 Hon Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Queensland Parliament, Record of Proceeding, 16 September 2021, p 2803.

123 See *Legislative Standards Act 1992* (LSA), s 4(2)(a).

124 See Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC Notebook*, January 2008, pp 95, 113.

125 LSA, s 4(3)(f).

126 LSA, s 4(3)(f). See also, OQPC, *Fundamental legislative principles: the OQPC Notebook*, p 52.

127 Explanatory notes, pp 10-11.

128 See OQPC, *Fundamental legislative principles: the OQPC Notebook*, pp 95, 113.

129 Statement of compatibility, p 9.

enhancing the ability of police to retrieve evidence that is stored on a digital device'.[130] Further justification for the amendments is provided:

> The inability to obtain an access order where devices are seized other than under a search warrant issued by a magistrate or Supreme Court judge adversely impacts the investigation of offences. Currently, it is irrelevant how serious the offence is, how well the grounds are addressed, or how urgent the circumstances are, a magistrate or Supreme Court judge is not empowered to issue an access order.[131]
>
> … The expansion of the capacity to apply for an access order to these circumstances will make it more likely that police will be able to retrieve evidence of a crime scene threshold offence or a specified technology-based offence. …[132]
>
> … access orders are only available for the investigation of comparatively serious offences.[133]

At the public briefing on the Bill, QPS advised that there are a range of safeguards in place to protect the privacy of individuals, including:

- if the QPS wishes to retain a seized device for longer than 30 days, an application must be made to a magistrate
- there are significant penalties for police officers who disclose anything learnt in the course of carrying out their duties.[134]

The committee considers the limitation on the right to privacy for the proposed expansion to access orders for seized digital devices is justified.

3.1.1.2 Extension of powers of special constables and non-State police officers

At present, the commissioner of the police service (commissioner) may appoint persons to be special constables, and, in certain circumstances, the commissioner may authorise non-State police officers[135] to exercise the powers of a police officer under the PPRA.[136]

Special constables

Special constables are generally interstate police officers but sometimes another person may be appointed as a special constable.

> While special constables are primarily interstate police officers who, because of their work location (e.g. close proximity to the Queensland border) or the type of work they are involved in (e.g. joint investigations or special operations), require authorisation to enable them to carry out their duties effectively, there are others who are not. For example, during the Gold Coast Commonwealth Games, 12 Queensland Corrective Services officers were appointed to allow them to perform offender management duties to receive and transport offenders.[137]

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130 Statement of compatibility, p 9.

131 Statement of compatibility, p 9.

132 Statement of compatibility, p 10.

133 Statement of compatibility, p 10.

134 Public briefing transcript, Brisbane, 29 September 2021, p 8.

135 A 'non-State police officer' is a police officer of a police force or service of another State or a federal police officer: *Police Service Administration Act 1990* (PSAA), s 5.17(17).

136 PSAA, ss 5.16, 5.17.

137 Explanatory notes, p 11.

There is currently some uncertainty about the powers of special constables. The Minister advised that the existing provision in the PSAA regarding special constables 'is ambiguous as to the scope of powers that can be exercised by special constables'.[138]

The Bill would amend the PSAA to provide that a special constable has the powers and duties of an officer, under the PSAA or another Act, as specified in the special constable's instrument of appointment.[139]

The explanatory notes acknowledge that the amendment to the powers of the special constables could potentially impact on the rights and liberties of individuals.[140]

The explanatory notes provide the following justification for any breach of fundamental legislative principles:

> To safeguard to the potential impact on the rights and liberties of individuals in the Queensland community, the Commissioner will be able to limit the type of powers to be exercised by a special constable.
>
> The QPS also has internal policy to cover the application and appointment process for special constables which includes a character fitness test and explanation of the requirement for appointment. The length, terms and conditions of appointment are determined on a case by case basis and limited to what is necessary to allow the person to carry out their prescribed responsibilities. Processes are also in place to ensure a regular review is conducted of all officers currently appointed as special constables to ensure the appointment remains justified.[141]

Noting that the amendments relating to special constables are intended to clarify the powers of special constables, and that there are safeguards in place to provide for suitable appointments of special constables, the committee is satisfied that the proposed amendment relating to special constables has sufficient regard to the rights and liberties of individuals.

Non-State police officers

The commissioner may authorise a non-State police officer to exercise certain powers of a Queensland police officer if the commissioner reasonably believes:

- a terrorist act has been committed or there is an imminent threat of a terrorist act, and
- the help of a non-State police officer is urgently needed to enable the Queensland Police Service to continue to perform its functions effectively while responding to the terrorist act or threat
- it is impracticable in the circumstances to appoint the officer as a special constable.[142]

At present, non-State police officers are limited to exercising the police powers in the PPRA and the *Public Safety Preservation Act 1986*. While most police powers are contained in these Acts, police powers in other Acts (eg *Terrorism (Preventative Detention) Act 2005* and the *Disaster Management Act 2003*)[143], which may be necessary in responding to a terrorist incident, are not available to them.[144]

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138 Hon Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Queensland Parliament, Record of Proceeding, 16 September 2021, p 2804. See also statement of compatibility, p 4 and explanatory notes, p 11.

139 Bill, cl 15 (PSAA, amended s 5.16).

140 Explanatory notes, p 11.

141 Explanatory notes, p 11.

142 PSAA, s 5.17. See also statement of compatibility, p 4.

143 Statement of compatibility, p 4.

144 Explanatory notes, p 6.

The Bill proposes to increase the powers available to non-State police officers by enabling the commissioner, in certain circumstances, to authorise non-State police officers to exercise the powers of a Queensland police officer under specified police Acts or all police Acts.[145]

The authorisation issued by the commissioner would specify the extent of the powers to apply, the time in which they apply, and any conditions.[146]

While the explanatory notes address the impact of the appointment of special constables on fundamental legislative principles (see above), they do not address the extension of the powers that may be granted to non-State police officers.

Given that there are safeguards in section 5.17 of the PSAA (eg the authorisation may be limited to stated powers and to a stated time) and the annual report must include information relating to the authorisation of non-State police officers, the committee is satisfied that the proposed amendments relating to non-state police officers have sufficient regard to the rights and liberties of individuals.

3.1.1.3 Targeted substance testing

The Bill proposes to amend the targeted substance testing regime to include saliva testing.[147] It also broadens the circumstances in which police officers and certain QPS staff members can be directed to provide samples under the regime.[148]

As noted above, the right to privacy is relevant to a consideration of whether a Bill has sufficient regard to the rights and liberties of individuals.[149]

The statement of compatibility acknowledges that the amendments relating to targeted substance testing may limit the right to privacy because the provision of saliva for testing would reveal the bodily condition of the person, and that the amended definition for critical incidents expands the range of circumstances in which the drug and alcohol testing regime applies.[150]

According to the statement of compatibility, drug and alcohol testing of police officers is required because of their role in society:

> A robust drug and alcohol testing regime is required as police officers are, due to their position, entrusted to protect others and are authorised to use force in the performance of their duties. Police officers with substance abuse problems are more likely to engage in poor decision-making and poor behaviour adversely impacting upon their professionalism and effectiveness.[151]

The benefits of saliva testing, as compared with urine testing, include the quickness of the test and the speed at which a result is returned (a saliva test provides an immediate indication of the presence of certain drugs), its effectiveness at revealing recent drug use, and that it is less invasive.[152] It would

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145 The Bill defines 'police Act' as a Queensland Act that confers a power on a police officer: Bill, cl 16(6) (PSAA, amended s 5.17(17)).

146 Bill, cl 16(1) (PSAA, new s 5.17(2)), PSAA, s 5.17(4).

147 See Bill, cls 17-24.

148 Bill, cl 17 (which amends the definition of 'critical incident' in PSAA, s 5A.2). If relevant persons (police officers and certain unsworn staff) are involved in a 'critical incident', they may be required to provide samples for alcohol and targeted substance testing: explanatory notes, p 4. The Bill proposes to amend the definition of 'critical incident' to include incidents where a person suffers grievous bodily harm while in police custody or in the course of, or as a result of, police operations: explanatory notes, p 9.

149 See OQPC, *Fundamental legislative principles: the OQPC Notebook*, pp 95, 113.

150 Statement of compatibility, p 11.

151 Statement of compatibility, p 11.

152 Explanatory notes, p 5.

also reduce impacts on covert operations by not requiring operatives to travel to provide a urine sample. (An authorised officer will be able to take and test the samples.)[153]

In the statement of compatibility, the Minister expresses the view that the inclusion of saliva testing in the PSAA:

> … does not significantly impact upon a subject's human rights as it is simply an alternative testing process to that currently employed in the QPS drug and alcohol testing regime. Saliva testing will improve this regime as it is a superior method of sampling when compared to urine testing. Saliva testing is more efficient, and more convenient than urine testing and may be considered to be less invasive or stressful to the relevant person.[154]

In regard to the extension of the targeted testing regime, the explanatory notes state:

> Police officers are given extensive powers and use of force options to assist them to carry out their duties. There is a community expectation that QPS members are not adversely affected by alcohol or other substances when making decisions or taking action during critical incidents. This amendment will ensure that in instances where a person dies or suffers injuries consistent with the definition of 'grievous bodily harm' while in custody or in the course of or as a result of police operations that timely action is taken to obtain the necessary samples.[155]

Given that saliva testing offers an alternative targeted substance testing option and can be considered less invasive and more convenient, the committee is satisfied that any breach of fundamental legislative principles is justified.

The committee is also satisfied that any limitation on an officer's right to privacy by the extension of the targeted testing regime is justified, having regard to the community expectation that QPS members are not adversely affected by alcohol or other substances whilst carrying out their duties.

3.1.1.4 Presumption of innocence

Legislation should have sufficient regard to the rights and liberties of individuals.[156] These rights include common law rights and rights that arise out of Australia's treaty obligations.[157] The presumption of innocence is a fundamental principle of the common law and is contained in the International Covenant on Civil and Political Rights (to which Australia is a party),[158] and the *Human Rights Act 2019* (HRA).[159]

Under the presumption of innocence, the prosecution has the burden of proving a charge. The presumption of innocence guarantees that no guilt can be presumed until a charge has been proved beyond reasonable doubt.[160]

The Bill potentially fails to have sufficient regard to the rights of individuals because it contains a provision which operates counter to the presumption of innocence.

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153 Statement of compatibility, p 4.

154 Statement of compatibility, p 12.

155 Explanatory notes, p 11.

156 LSA, s 4(2)(a).

157 OQPC, *Fundamental legislative principles: the OQPC Notebook*, p 95.

158 Australian Government, Attorney-General's Department, 'Presumption of innocence: public sector guidance sheet', https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/presumption-innocence, accessed 8 October 2021.

159 See HRA, s 32(1).

160 Australian Government, Attorney-General's Department, 'Presumption of innocence: public sector guidance sheet'.

That is, the Bill provides that if a relevant person[161] fails to provide a required specimen of urine or saliva, that person is taken to have been tested for a targeted substance and to have been found to have had evidence of a targeted substance in the person's saliva or urine (whichever is relevant).[162]

In circumstances in which a relevant person is found, or deemed to have been found, to have evidence of a targeted substance in their saliva or urine, the commissioner may take one or more actions including:

- suspending the relevant person from duty until the person is no longer over the relevant alcohol limit or no longer has evidence of a targeted substance in the person's urine or saliva
- requiring the relevant person to undergo counselling or rehabilitation
- requiring the relevant person to attend a government medical officer for a medical examination of the person's fitness to continue to perform the person's current duties
- after considering a report of a government medical officer about a medical examination, directing the relevant person to perform other duties for the time the commissioner considers necessary
- take disciplinary or other action against the relevant person under the PSAA or the *Public Service Act 2008*.[163]

The explanatory notes do not address this potential breach of fundamental legislative principles.

The committee is satisfied however that the impact on the presumption of innocence attributable to the deeming provision is justified, having regard to the community expectation that QPS members are not adversely affected by alcohol or other substances whilst carrying out their duties.

3.1.2 Institution of Parliament

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

3.1.2.1 Presuming another Bill will be passed without amendment

The definition of 'electronically sworn' in clause 11 of the Bill[164] relies on the assumption that the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 (Justice Legislation Bill) will be passed without amendment. This is because the provision refers to sections 16C and 31F of the Oaths Act, which are proposed to be inserted by the Justice Legislation Bill. Similarly, in schedule 1, many of the provisions refer to provisions of the Oaths Act, which are proposed to be inserted by the Justice Legislation Bill. This issue is not explored within the explanatory notes.

Committee comment

The committee notes that clause 11 of the Bill is contingent on provisions in the Justice Legislation Bill being passed in its current form which does not take into account that amendments can be made during consideration in detail of a Bill or that Parliament may not pass a Bill.

The committee notes, however, that should amendments for the Justice Legislation Amendment Bill be made during consideration in detail or should that Bill not pass, any consequential legislative

[161] Section 5A.3 of the PSAA provides that a 'relevant person' is an officer or a particular staff member whose duties include performing functions in a critical area or a watch-house officer or a police radio and electronics technician or a recruit.

[162] Bill, cl 20 (PSAA, new s 5A.15). The section does not, however, apply to a relevant person who is unable to provide the required specimen because of a medical condition.

[163] PSAA, ss 5A.16, 5A.17.

[164] PPRA, amended s 801(7).

changes needed to the police powers impacted by this Bill will come before the committee and/or the House and hence the Bill can be considered to have sufficient regard to the Institution of Parliament.

3.1.2.2 External document

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.[165]

The definition of 'standard' in clause 29 of the Bill refers to the joint Standards Australia and Standards New Zealand standards AS/NZS 4308: 2008 and 4760:2019 (standards).

This incorporation by reference of an external document in a Bill may mean that the Bill does not have sufficient regard to the institution of Parliament because it effectively delegates law-making to an outside body.[166]

The committee notes that the Legislative Assembly does not have the ability to change the standards, nor are changes in these external documents brought to the attention of the Assembly. In addition, the standards are not typically freely available so members of the public or stakeholders may be unable to access them due to the cost.

However, the committee also notes that the incorporation of Australian Standards is common practice in State and Commonwealth regulation as the standards are subject to periodic review and are kept up to date through the issue of amendments or new editions as necessary. If the (often highly technical) content of the standards was incorporated into Queensland legislation, then every time the standard was changed (eg due to a technological efficiency or new process) the legislation would be at risk of being obsolete before the change came before the House again. Therefore, the most prudent and practical solution is to have subordinate legislation reference the appropriate Australian and New Zealand standard rather than incorporate it. For these reasons, the committee considers the potential inconsistency with fundamental legislative principles is justified.

3.1.2.3 Scrutiny of the Legislative Assembly

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.[167]

Clause 4 of the Bill provides that a regulation made by the proposed Police Legislation (Efficiencies and Effectiveness) Amendment Act 2021 (proposed Act) is subordinate legislation but Part 6 of the *Statutory Instruments Act 1992* does not apply to the regulation. This means that procedures after making subordinate legislation, such as notification, tabling and disallowance, will not apply to the regulation.

However, if the only regulation made by the proposed Act is the Oaths Regulation 2021, that regulation is brought to the attention of the Legislative Assembly by schedule 1 of the Bill, and therefore is considered by the House in the Bill debate.

Consequently, the committee is satisfied that, as regards to the Oaths Regulation 2021, clause 4 of the Bill has sufficient regard to the institution of Parliament.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

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165 LSA, s 4(4)(a).

166 See OQPC, *Fundamental legislative principles: the OQPC Notebook*, pp 148-149.

167 LSA, s 4(4)(b).

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[168]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA.[169]

The HRA protects fundamental human rights drawn from international human rights law.[170] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

4.1.1 Clause 8: Amendment of s 154A (Order after digital device has been seized)

4.1.1.1 Nature of the human right

The 'nature' of the right refers to the fundamental interests it protects and the values it embodies.[171] The reforms in the Bill relating to the expansion of the circumstances where a Magistrate or Supreme Court judge may issue a digital access order - which requires a person to provide a password or encryption code to enable police to access information stored on a digital device such as a mobile phone - engage the consideration of the right set out in s 25 of the HRA. Section 25 prohibits unlawful or arbitrary interference with a person's privacy, family, home or correspondence. The section contains internal limitations by permitting lawful and non-arbitrary interferences with a person's privacy.

The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.[172] The UN Human Rights Committee has commented that the right to privacy right extends to 'interceptions of telephonic, telegraphic and other forms of communication'[173] - which is relevant to this aspect of the Bill.

The question becomes whether the interference with this right is unlawful or arbitrary. If an interference with a person's privacy or correspondence is lawful and not arbitrary, then it will not come within the scope of s 25(a), meaning the person's human rights have not been encroached upon.

168 HRA, s 39.

169 HRA, s 8.

170 The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

171 *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327 [335].

172 *Kracke v Mental Health Review Board* (General) (2009) 29 VAR 1; [2009] VCAT 646 [619]-[620].

173 UN Human Rights Committee, General Comment No. 16, [8].

4.1.1.2 Nature of the purpose of the limitation

The purpose of the limitation refers to the importance of the purpose behind the limitation of the relevant right.[174] The purpose behind limiting a right must relate to 'pressing and substantial' social concerns, and be aimed at achieving legitimate values and interests, in order to be sufficiently important to justify limiting a right.[175] The more pressing and substantial the purpose, the greater the limitation it will justify.[176]

The corresponding right to privacy in Article 8 of the European Convention on Human Rights expands on the circumstances where an encroachment on this right would be lawful and not arbitrary by providing that there shall be no interference by a public authority with the exercise of this right except:

- in accordance with the law,
- when necessary in the interests of national security, public safety or the economic well-being of the country,
- for the prevention of disorder or crime,
- for the protection of health or morals, or
- for the protection of the rights and freedoms of others.

The purpose of the particular reforms in the Bill is to enable some of the factors set out above including the effective investigation of serious criminal offences by enhancing the ability of police to retrieve potential evidence that is stored on a digital device, the prevention of disorder or crime, public safety and the protection of the rights and freedoms of others. The inability to obtain an access order where devices are seized adversely impacts the investigation of particular digital related offences according to the accompanying Statement of Compatibility.[177] The proposed reforms relate to accessing digital devices to seek evidence in suspected crimes relating to

- distributing intimate images of a person without their consent
- observing and recording someone without their consent in circumstances where a person would be expected to be afforded privacy, and
- distributing a visual recording of someone without their consent.

The reforms will assist police in potentially preventing crime, holding people accountable for committing such crimes and protecting the rights and freedoms of victims and survivors who have been subjected to these crimes. These reasons are arguably pressing and substantial and sufficiently important enough to justify limiting the right to a person's privacy in these circumstances.

4.1.1.3 The relationship between the limitation and its purpose

This relates to the relationship between the limitation (the means) and the purpose (the end it is seeking to achieve). To sufficiently demonstrate the relationship between the limitation and its purpose, the purpose must be rationally connected to and carefully designed to achieve the legitimate end.[178] If the limitation on the right is not rationally connected to the relevant purpose, it cannot be justified by that purpose, no matter how important the purpose is.

The limitation (the means) in this case is interfering with someone's privacy by accessing the content and information stored in their digital device and the purpose (the ends it is seeking to achieve) is being able to use this access to find potential evidence to support an investigation and to protect the

174 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [144].

175 *PJB v Melbourne Health*, 340; *Re Kracke and Mental Health Review Board*, 145.

176 *PJB v Melbourne Health*, 340; *Re Kracke and Mental Health Review Board*, 145.

177 Statement of Compatibility, p 9.

178 *PJB v Melbourne Health*; *Re Kracke and Mental Health Review Board*.

community from certain digital related crimes and promote their right to privacy. The relationship between the limitation and its purpose is therefore established.

4.1.1.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

Section 13(2)(d) has been interpreted as requiring the least restrictive means reasonably available when limiting a right.[179] The argument is that if less restrictive measures were reasonably available, which could have been used to achieve the purpose in question, then the measure chosen would be excessive and therefore disproportionate.[180] However, in some cases, courts have found it unnecessary for the limitation to be the least intrusive possible to give effect to the relevant purpose. Rather, the limitation in question must be within a range of reasonable alternatives.[181]

There are potentially other less restrictive means of getting information and evidence to support an investigation to a digital related crime such as through our online digital footprints, getting information from telecommunications or technology companies and metadata. However, seeking digital access to a phone in relation to the crimes of distributing intimate images without consent, recordings that have been made without consent and distributing prohibited visual recordings is a reasonable way to access potential evidence tying someone to a crime that is digital in nature. It is arguable that whilst accessing someone's digital device may not always be the least restrictive way to achieve this purpose, it falls within the range of possible and reasonable alternatives.

4.1.1.5 The importance of the purpose of the limitation

It is reasonable to expect police and courts to be able to access digital content that has been created without another person's consent from a digital device where it's likely to be stored. The purpose of the limitation to the right to privacy in these circumstances becomes important when weighed up with another person's rights and freedoms, the need to prevent and prosecute these kinds of crimes and the need to protect the community from these crimes. Image based abuse has severe impacts on the person including emotional distress, loss of job or income, strained relationships, humiliation, body shame and being more susceptible to blackmail.[14] There is a community expectation that people engaging in these crimes will be prosecuted, the community will be protected and their right to privacy protected.

4.1.1.6 The importance of preserving the human right

It is difficult to conceive of a sphere of privacy more intensely personal than that found in an individual's personal digital device or computer.[182] Our digital devices carry our innermost thoughts, intimate pictures, private messages and sensitive workplace, medical, financial and other personal documents. They hold "the privacies of life" that were stored in homes and offices in past generations.[183] Unwarranted, arbitrary access to, and broad intrusions of our digital devices undermine the public's confidence that personal communications, ideas and beliefs will be protected on their digital devices.[17] The right to privacy in relation to someone's information and content stored in a digital device is a fundamental and important right to preserve and protect.

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179 *PJB v Melbourne Health,* 352*; Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 [556].

180 *PJB v Melbourne Health*, 352; *Momcilovic v The Queen*, 556.

181 *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; [2008] VSC 346 [188]; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [158]-[160], citing *RJR-MacDonald v Canada* (1995) 127 DLR (4th) 1; [1995] 3 SCR 199, [160]). eSafety Commissioner, Image Based Abuse; Impacts and Needs; The Effects of Unlawful Revenge Porn, What exactly is image based abuse and why is it hurtful, Lifelong Impacts, accessed 26 September 2021.

182 *R v Fearon* [2014] 3 SCR 7621.

183 *Riley v California*, U.S., 134 S. Ct. 2473, 2490-95, 189 L.Ed.2d 430 (2014) (quoting *Boyd v. United States*).

17 *R v Fearon* [2014] 3 SCR 7621.

4.1.1.7 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

There is a need to balance the privacy of an individual suspected of committing the crimes in question and the right to privacy of the victim or survivor of digital based abuse, the need to protect the community, and preventing and prosecuting digital related crimes. Survivors are forever affected by digital based abuse.[184] There is a community expectation that people engaging in these crimes will be prosecuted, the community will be protected and their right to privacy protected.

If the bill passes, the courts and police will be provided with a legal and operating framework for circumstances where the right to privacy can be limited in certain situations. This limitation will mean that a warrant issued under this reform will be lawful, meaning the right to privacy is not engaged. However even if the interference with this right is lawful, it still needs to not be arbitrary or else the right to privacy will be engaged. For the interference to be considered arbitrary the particular circumstances should be capricious, unpredictable, unjust, unreasonable or disproportionate.[185]

On balance, the committee considers the requirement to seek a warrant before accessing the digital device is an important safeguard to ensure that the encroachment on privacy is lawful. To strengthen this safeguard and ensure that the lawful limitation is also not arbitrary, clause 8 of the Bill could include a provision that amends s 154A of the *Police Powers and Responsibilities Act 2000* so that it provides that a warrant can only be issued by the Magistrate or Judge if they are satisfied that the request is necessary, reasonable and justifiable (i.e. there are no other reasonable means of accessing the information sought). It should also ensure that the scope of the warrant is limited to searching for, and accessing, information relating only to the purposes for which the warrant was sought. This will prevent broad and unfettered access to someone's digital device. This will also ensure that access is not only lawful but not arbitrary.

The committee notes the following relevant precedents from Queensland and other jurisdictions:

- *Riley v California*, 573 US 373 (2014)
- *R v Peirson* [2014] QSC 134
- *R v N* [2015] QSC 91
- *Kracke v Mental Health Review Board (General)* (2009) 29 VAR 1; [2009] VCAT 646 [591]
- *PJB v Melbourne Health* (Patrick's Case) [2011] VSC 327 [85]
- *R v Fearon* [2014] 3 SCR 7621

4.1.1.8 Committee comment

The committee is satisfied that the human rights limitations identified are reasonable and are demonstrably justified, having regard to s 13 of HRA.

4.2 Statement of compatibility

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA. The statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

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184 eSafety Commissioner, Image Based Abuse; Impacts and Needs, accessed 26 September 2021.

185 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646*; DPP v Kaba* [2014] VSC 52 [154]*; ZZ v Secretary, Department of Justice* [2013] VSC 267 [85]); Raytheon Australia Limited (Human Rights) [2014] VCAT 1370 [109].

Appendix A – Submitters

Sub #	Submitter
001	Queensland Council for Civil Liberties
002	Shooters Union Queensland Pty Ltd
003	Firearm Dealers Association – Qld Inc
004	Shooting Industry Foundation Australia
005	Confidential
006	Queensland Law Society
007	Youth Advocacy Centre Inc

Appendix B – Officials at public departmental briefing

Queensland Police Service

- Deputy Commissioner Doug Smith, Strategy and Corporate Services
- Inspector Daniel Bust, Weapons Licensing, Operations Support Command
- Senior Sergeant Bob Utz, Legislation Branch, Policy and Performance Division

Appendix C – Witnesses at public hearing

Shooters Union Queensland (via videoconference)

- Mr Graham Park, President

Shooting Industry Foundation Australia

- Mr David Voss, Policy and Research Manager
- Mr James Walsh, Executive Officer

Queensland Law Society

- Ms Elizabeth Shearer, President
- Ms Binari De Saram, Manager and Solicitor, Legal Policy
- Mr Dan Rogers, Chair, Human Rights and Public Law Committee