

Your Ref:

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6 March 2009

Mr Robert Needham
Chairperson
Crime and Misconduct Commission
GPO Box 3123
BRISBANE QLD 4001

Email: moveonpowers@cmc.qld.com.au

Dear Mr Needham

CRIME AND MISCONDUCT COMMISSION REVIEW OF POLICE MOVE-ON POWERS

I refer to your letter dated 7 January 2009, requesting the Queensland Law Society's comments as to the Crime and Misconduct Commission's (CMC) review of police move-on powers under section 49 of the *Police Powers and Responsibilities Act 2000* (Qld) ('PPRA'). We commend the Commission for conducting a review on this important piece of legislation and hope that this will lead to reform.

The Queensland Law Society is the peak professional body for the State's legal practitioners. We lead a profession of more than 7,500 members from throughout Queensland. The QLS is a constituent body of the LCA and is comprised of several specialist committees who provide policy advice to the QLS Council on areas of concern to the profession. This response has been compiled with the assistance of the Society's Criminal Law Section who have a keen awareness of the issues affecting this area of the law and who have provided their expertise on the issue.

We note that our comments will focus on:

- whether police move-on powers are being used properly, fairly and effectively;
- the interaction of move on powers with Australia's human rights obligations; and
- recommendations regarding the existence or use of police move-on powers in Queensland.

Are police move-on powers being used properly, fairly and effectively?

Queensland police may lawfully issue move-on directions if an individual's behaviour or presence is considered anti-social. Such anti-social behaviour may include:

- causing anxiety to a person entering, at or leaving the place, reasonably arising in all the circumstances;
- interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place; and/or
- disorderly, indecent, offensive, or threatening to someone entering, at or leaving the place; or
- disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place.

A reasonable suspicion from the police officer is all that is required to issue a lawful move-on direction. The police officer may direct a person to:

- leave the place and not return for up to 24 hours;
- move from the location for a stated distance in a stated location and not return, for up to 24 hours.

A police officer's power to issue a move-on power direction is restricted. They must:

- provide reasons to the person/s to whom the direction is given; and
- must not give a direction that interferes with a person's right of peaceful assembly unless it is reasonably necessary in the interests of public safety, public order or the protection of the rights and freedoms of other persons.

The Society has many concerns with the existence and use of move-on powers. We question whether these powers are successful in achieving their aims and whether the powers are being applied properly, fairly and effectively by the Queensland Police Service.

The rationale for the implementation and extension of move-on powers was crime reduction and the enhancement of public safety. The Society questions whether move-on powers are successful in reducing crime. We believe that the application of these powers in public spaces in fact increases police interactions with public space users. Due to their high use of public spaces, homeless people are more vulnerable to being targeted by police. In the homeless person community, young people, people of Indigenous descent, and those with impaired capacity, such as people suffering from mental illness or acquired brain injury are over-represented and are more exposed to the use of these move-on powers. Therefore, the use of these powers in areas which these marginalised groups frequent; facilitate negative relationships with police, usually resulting in increased interactions with the criminal justice system. Due to the lack of empirical data however, it is difficult to monitor trends in the use of police move-on powers on the homeless person population. The Society calls for research into this area so that the true success of the PPRA in achieving its aims may be measured.

The Society is concerned about the potential abuse of move-on powers by police officers. While we understand that move-on directions must comply with the PPRA, we have received anecdotal evidence suggesting that move-on powers have not been lawfully exercised. I understand that the Queensland Public Interest Law Clearing House is aware of instances where individuals were:

- directed to move-on for more than 24 hours. There was one report in which an individual was told to not return until he had some money and some groups have been directed to 'never come back' which is not within the scope of the powers conferred by the PPRA;
- directed to move-on outside a prescribed place;
- directed to move-on for behaviour that could not reasonably have enabled the police officer to form the necessary "reasonable suspicion". In many instances the individuals that have been asked to move on are often known by police. Individuals may be stereotyped as trouble makers and subjected to police attention even though their behaviour and presence may not be considered anti-social to a reasonable person at the time the direction was given;
- directed to move-on as a means of provoking the individual to commit a criminal offence, such as; assaulting police, using insulting words or obstructing justice; and
- directed to move-on without providing any reasons.

This anecdotal evidence suggests that move-on powers are not always being used properly and fairly. Instead move-on powers are, at times, being misused by police officers as a discriminatory and provocative tool to target people who frequent public space, such as homeless people, young people and Indigenous Australians. These marginalised groups may have limited knowledge of the PPRA and as such would be unaware whether valid move-on directions were issued. The fact that it is a criminal offence to disobey a move-on direction is also a major concern as individuals with limited knowledge of the PPRA who contravene unlawful move-on directions will most likely been unaware they have been arrested unlawfully. The potential for abuse of move-on powers is exacerbated by the lack of knowledge of the persons who are most likely to be issued with move-on directions.

The interaction of move on powers with Australia's human rights obligations

The unlawful use of police move-on powers are a violation of customary international law and international treaty law. Due to the disproportionate effect of the PPRA on marginalised groups such as people experiencing homelessness, we argue that move-on powers interfere with:

- the right to life;
- the right to liberty;
- the right to security of the person;
- the right to be free from torture and cruel, inhumane or degrading treatment or punishment;
- the right to freedom from discrimination;
- the right to freedom from discrimination on the basis of social status;
- the right to freedom from discrimination on the basis of housing status;
- the right to freedom from discrimination on the basis of economic status;
- the right to freedom from discrimination on the basis of race;
- the right to freedom from discrimination on the basis of age;
- the right to freedom of expression;
- the right to freedom of association; and
- the right to a fair hearing and the administration of justice.

While the above rights are all important and inter-dependent, this submission will discuss the following rights in greater detail:

- the right to freedom from discrimination on the basis of race;
- the right to freedom from discrimination on the basis of age;
- the right to freedom of association; and
- the right to a fair hearing and the administration of justice.

The right to freedom from discrimination on the basis of race

The Preamble to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) states that, due to,

'the dignity and equality inherent in all human beings' States must, 'encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.'

The Society contends that police move-on powers have a racially discriminatory effect against Indigenous Australians. This racial discrimination is both indirect and direct. Indirect racial discrimination occurs due to the over-representation of Indigenous Australians in the homeless community. As stated earlier, homeless people are heavily dependant on public space. Therefore although the PPRA is not drafted in a discriminatory manner, the practical application of the legislation has a racially discriminatory effect.

The application of move-on powers by police is directly discriminatory. Direct discrimination occurs when:

- move-on powers are exercised in areas in which Indigenous Australians are known to reside or occupy; and
- move-on powers are selectively applied against Indigenous Australians.

This racial discrimination created constitutes a violation of our international obligations under the ICERD and the *International Covenant on Civil and Political Rights* (ICCPR) and a violation of our domestic obligations under the Queensland Aboriginal and Torres Strait Islander Justice Agreement.

The right to freedom from discrimination on the basis of age

The Preamble to the Convention on the Rights of the Child (CROC) states that,

'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'

Move-on powers indirectly and directly discriminate against children and groups of young people in public space. Like Indigenous Australians, young people are over-represented in the homeless community. Therefore for the same reasons mentioned with respect to Indigenous Australians, young people are discriminated against and disproportionately affected by the use of move on powers. It is argued that the selective application of move-on powers on young people does not afford children appropriate legal protection as mandated by CROC.

The right to freedom of association

ICCPR article 22(1) and CROC article 15 preserve the right to freedom of association. Article 22(2) of the ICCPR states that,

'No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.'

Move-on powers restrict the exercise of the right to freedom of association. Despite section 45 of the PPRA which states that the powers do not apply authorised public assemblies under the *Peaceful Assembly Act 1992*, we have received anecdotal evidence which suggests that groups partaking in innocuous activities have been subjected to move-on directions. Furthermore, the intent of the power is to disband groups of people in public space. We argue that that the use of these powers to dismantle groups of individuals who are not exhibiting anti-social behaviour is a violation of the right to freely associate and the right to equal access of public space.

The right to a fair hearing and the administration of justice

Article 14 of the ICCPR preserves the right to equal access to justice. As homeless persons are regular users of public space and move-on powers are used in areas frequented by homeless people, it is a natural consequence that homeless persons are more exposed to move-on directions. This exposure may lead to an increase in arrests for various offences, including contravention of a move-on direction. Due to the high numbers of Indigenous Australians experiencing homelessness, this may have implications for the recommendations made by the Royal Commission into Aboriginal Deaths in Custody. Furthermore, due to the nature of homelessness, people charged with failure to move-on or another criminal charge may not attend court or if they do, they may not receive adequate legal representation. Thus the right to a fair hearing and the administration of justice will rarely be respected.

Recommendations regarding the existence or use of police move-on powers in Queensland

1. We recommend that the blanket application of move-on powers be removed.
2. We recommend that section 47 of the PPRA be amended so that a person's actual behaviour and not their mere presence is the subject of a move-on direction.
3. We recommend that diversionary alternatives to arrest be provided so that contravention of a move-on direction is no longer a criminal offence or alternatively we recommend that additional requirements for arrest for the contravention of a move-on direction to mitigate the inherent subjectivity in the legislation.
4. We recommend that a 'vulnerable person provision' be inserted into the PPRA. This provision would involve a police officer cautioning or referring on a vulnerable person to a social or welfare service as opposed to arresting them.
5. We recommend that persons who contravene move-on directions be allowed to use the statutory defence of reasonable excuse.
6. We recommend that that fines imposed for contravening move-on directions be reduced. Alternatively, we contend that the court employ a means test to assess the burden that fine would impose on the individual. This would also have implications for the State Penalties and Enforcement Registry. The Queensland Police Service and other enforcement agencies should also have the discretion to waive the fines if an individual is deemed to be suffering from economic hardship.
7. We recommend that further research be conducted to quantify the manner, method and location of the use of move-on powers against groups of people. For example, young people, Indigenous Australians and people with impaired capacity.
8. We recommend that a 'Charter of Rights' be inserted into the PPRA based on the model established in the *Child Protection Act 1999* (Qld) which explicitly recognises and legally protects the rights of all public space users to enjoy Queensland's public spaces without fear of intimidation or harassment.
9. We recommend that an inquiry into policing among marginalised groups with a particular focus on harassment and use of excessive force be made.
10. We recommend that the Queensland Police Service receive better training to deal with marginalised groups who would be more exposed to the use of move-on powers.

11. We recommend that the Queensland Police Service maintain a register to document the use of move-on powers. This register should be accessible to the public and record the following information:
 - name;
 - age;
 - housing status;
 - whether they are of Aboriginal or Torres Strait Islander descent;
 - whether the individual had been issued with a direction in the past and the number of times the individual has been issued with a direction;
 - location of the issue of the direction; and
 - reasons for issue of the direction.

12. We recommend that a further review of the PPRA be conducted so that the disproportionate impact of the legislation of various groups may be mitigated.

Thank you for providing us with an opportunity to provide our comments to your review. We look forward to receiving your report. If you wish to discuss any of the issues raised in this letter we would be happy to liaise with you.

Yours faithfully



Ian Berry
President