## The CMC's review

We note that the Crime and Misconduct Commission's (CMC) review is being conducted pursuant to s 49 of the *Police Powers and Responsibilities Act 2000* (the PPRA), which requires the CMC to review the use by police officers of the move-on powers as contained in Part 5 of Chapter 2 of that Act.

We also note, from the CMC's review paper published in December 2008, that in examining the use of move-on powers by police the CMC will consider whether those powers are *"being used properly, fairly and effectively by Queensland police".*

It is our submission, based on the experience of our clients, that in many instances police move-on powers are not being used properly and fairly and that their use further isolates already marginalised people in our society through criminalising their conduct.

Further, we query the effectiveness of the use of move-on powers by police in preventing and or reducing crime and enhancing public safety, and invite the CMC, in its review, to closely examine the available data and in turn the current validity of those purported rationales that have been relied on during the introduction of move-on powers and particularly their 2006 state-wide expansion. We believe move-on powers are an unnecessary, unsophisticated and inappropriate response to the issues they supposedly seek to address.

In light of our clients' experiences of the unfair and discriminatory impact of these powers, we submit that unless it can be clearly demonstrated that the powers are highly effective in achieving crime prevention or reduction, and enhancing public safety, there is no proper basis for their retention.

## Legal Aid Queensland

Legal Aid Queensland (LAQ) provides legal help to disadvantaged Queenslanders. We are an independent statutory body that operates under the *Legal Aid Queensland Act 1997*, funded by

the state government to provide legal assistance in state law matters, and by the federal government for federal law matters.

LAQ's mission is to achieve fair outcomes in the justice system. Our vision is to be part of a fair justice system in Queensland that responds to the diverse needs of disadvantaged people, by working with other legal service providers to deliver quality legal services where they are needed and advocating for changes to the justice system that will benefit our clients.

LAQ provides legal information, advice and representation in family, civil and criminal law across the State, through our Brisbane and 13 regional offices located in Cairns, Townsville, Mt Isa, Mackay, Rockhampton, Bundaberg, Toowoomba, Maroochydore, Caboolture, Inala, Ipswich, Woodridge and Southport.

LAQ purchases legal services pursuant to federal and state government funding priorities. Legal services are provided by in-house lawyers and preferred supplier law firms around the state, to maximise the legal services available to disadvantaged people. In 2007–08, LAQ worked with about 400 preferred suppliers to deliver legal aid services to clients. Grants staff assess individual legal aid applications by applying relevant means and merit tests and manage the funding arrangements for cases where aid is approved.

**Criminal law services**

We are the state's largest criminal law defence practice[1]. Our Criminal Law Services and Counsel divisions represent children and adults charged with criminal offences before all courts in Queensland, from Magistrates Court duty lawyer services to complex trials and appeal cases in the higher courts.

In 2007-08, 23,659 applications for legal aid were received for representation in criminal law matters, an increase of 3% from the year before. Of those, 21,823 were approved. 5,039 criminal cases were conducted by in-house LAQ lawyers, representing over 23% of the total number of criminal cases where legal aid was granted in 2007-08.

*Legal Advice*

Additionally, legal advice in criminal law matters was provided to 14,582 people across Queensland over the 2007-08 financial year.

[1] Approximately 105 lawyers, including the team of in-house Counsel led by the Public Defender, provide criminal law representation around the state.

*Duty Lawyer services*

Duty lawyer services are provided by in-house solicitors and solicitors from private firms, private barristers or other legal service providers. In the last financial year, 65,150 children and adults were represented by a duty lawyer.

In-house duty lawyers represented 29,224 defendants in 2007–08, conducting 67 sessions in the Magistrates and Childrens Courts each week, including services on Saturdays and public holidays.

**Legal Assistance in criminal law matters**

LAQ's decisions around providing legal assistance in criminal law matters are governed by several different considerations. LAQ is created by and operates under the terms of the *Legal Aid Queensland Act 1997* (the Act), which sets out how legal assistance can be provided to people.

A further consideration is LAQ's funding agreements[2] with both State and Commonwealth governments to provide legal services to disadvantaged people. The State and Commonwealth Governments provide funds and set priorities for the delivery of legal aid in Queensland. The State priorities (in order of priority) in criminal law are:

1. Prescribed Criminal Proceedings
    - District and Supreme Court criminal proceedings;
    - indictable offences in the Children's Court at every stage;
    - appeals to the Court of Appeal or the High Court;
    - references to the Mental Health Court;
    - committal proceedings in the Magistrates Court in respect of charges for which the maximum penalty exceeds 14 years;
    - breaches of probation, community service and suspended sentences in District and Supreme Courts; and
    - bail
2. Committal Proceedings generally
3. Committal proceedings in the Brisbane and Ipswich Magistrates Court during the Committals Pilot Project.
4. Summary Criminal Prosecutions

[2] "legal assistance agreements" – see s 7 of the Act

5. Pleas of Guilty in the Magistrates Court

Any matter where a person seeks legal representation after being charged with a criminal offence under Commonwealth law is a Commonwealth legal aid priority.

Most LAQ services are provided subject to applicants meeting a means test. The purpose of the means test is to ensure that our limited services are directed to people who can least afford the services of a private solicitor. The means test considers each applicant's income and assets to determine whether the person can be given assistance without cost; or with an initial contribution towards the cost of their assistance; or is ineligible for assistance. Applicants who rely on Centrelink payments for their income are deemed to be eligible under the income test.

**Obtaining legal aid in summary matters**

It is important, in the context of the current review, to appreciate the limited funding that LAQ is able to provide in respect of summary criminal matters.

As noted above, the majority of our services are provided subject to the applicant meeting our means test, which examines their assets and income. In applying the assets test, assets taken into account include real estate (houses, land), cash, shares, debentures or other investments, and the assets of any person who helps the applicant financially. We do not include:

- the house an applicant lives in (if the equity is $255,000 or less)
- cash an applicant has saved to buy a home or land they own (if the equity is $255,000 or less); they must have signed a contract to buy or build a home before they knew about their legal problem for this cash or land to be exempt under the means test
- household furniture (unless it is exceptionally valuable)
- tools need by the applicant for their job (unless they are exceptionally valuable)
- the applicant's car or cars (unless they have over $16,000 in equity).

If an applicant has assessable assets that are more than $930 (or $1880 if they receive financial help from another person), they may not be eligible for aid or may be required to make a contribution towards their legal costs.

Turning to the income aspect of the means test, for a single person in the workforce, who has no children, a contribution towards their legal costs is payable where the applicant's gross income exceeds $370 per week. Aid is not normally granted where a client's income exceeds

the maximum income threshold, which is $1010 per week for an applicant in these circumstances. Higher contribution and maximum thresholds apply for couples, and/or where there are dependent children etc.

As can be seen, the means test operates to direct the granting of aid towards those who can least afford private legal representation.

Additionally, in the area of summary crime, our funding situation is such that a merit test is ordinarily applied in making decisions about granting aid. There is no "as-of-right" entitlement to legal aid funding by financially eligible applicants for legal representation in relation to a summary charge. Our relevant policy for granting aid to defend a summary charge provides:

> *Where the applicant has a reasonable defence to the charge and the charge does not involve a minor traffic prosecution or regulatory offence, aid may be approved if one (1) of the following criteria apply:*
>
> - *conviction would be likely to result in imprisonment, or*
> - *conviction would be likely to have a detrimental effect on the defendant's livelihood or employment (actual or prospective ), or*
> - *the defendant suffers from a disability or disadvantage which prevents self representation or,*
> - *There are reasonable prospects of acquittal, and the applicant is a child.*

In the context of move-on powers, we note that one of the potentially relevant offence provisions, that of contravening a police direction[3], is punishable by a fine. Accordingly, there can obviously be no likelihood of imprisonment resulting from a conviction for such an offence. In applying our merit test, it would be rare for LAQ to fund the defence of such a charge.

When an applicant wishes to plead guilty to a summary charge, aid is not usually granted when a plea is taken in a court where there is a duty lawyer scheme operating, unless it would be unreasonable to expect the duty lawyer to enter the plea.

The following are some common examples in which it may be unreasonable to expect the plea to be handled by the duty lawyer:

- When an interpreter is required.

[3] s 791 of the PPRA

- When Social Security offences involved more than $2,000 and there are no mitigating circumstances.
- When the defendant suffers from a mental or physical disability.
- When, having regard to all the circumstances surrounding the incident including prior convictions, a conviction will result in a term of imprisonment being imposed.

Our duty lawyer services are not means tested. Within our financial constraints, it remains a priority for us to provide a free duty lawyer service to all defendants appearing unrepresented before Magistrates Courts and Childrens Courts in Queensland. Duty lawyer services are only provided for:

- simple pleas of guilty (including pleas in indictable matters disposed of summarily, and note the above guidance)
- breaches of probation
- breaches of bail
- extradition proceedings
- remands
- applications for bail

Duty lawyers do not appear in simple traffic matters or drink driving cases where there has been no or only one prior conviction, nor on full hand-up committals or on any summary hearing, no matter how simple.

Our legal advice and information services can be accessed by all, as they are not means tested. However, these services are only able to provide limited assistance to clients.

In summary, the constraints on our funding mean that the majority of summary matters are dealt with at the duty lawyer level. The means and merit tests that are applied in granting aid for summary pleas and trials significantly restrict our provision of representation, other than through the duty lawyer scheme, for many defendants.

**The Homeless Persons Court Diversion Program and Special Circumstances List**

In May 2006 a ‘special circumstances’ list was started in the Brisbane Magistrates Court, operating one day a week. The list runs in conjunction with the Homeless Persons Court Diversion Program; both are bail and sentence based diversion programs for defendants who are homeless. Clients on the special circumstances list also appear to suffer from impaired

decision-making capacity as a result of mental health problems, intellectual disability or brain/neurological disorders.

The diversionary program allows participating adult defendants who meet the eligibility criteria to be diverted into treatment and rehabilitation options at an appropriate stage in proceedings, as a condition of their bail or sentence. The program brings together health, justice and law enforcement systems to give participants the opportunity to resolve the problems that may be contributing to their offending, such as accommodation, health, and alcohol or drug dependence.

We have supported the diversionary program's development and operation through membership and contribution to the project's reference group, by providing duty lawyer support to the Special Circumstances Court and by representing many clients.

We support the program as it delivers positive outcomes for many of our most disadvantaged clients. We make further comments below about the experiences of our clients from this program and police move-on powers.

**Offence data**

We do not have specific data about the number of cases we conduct which involve police exercising, or purporting to exercise, move-on powers. However, as discussed further below, in our experience it is common for numerous other criminal charges, such as offences of public nuisance and obstructing police, to arise from incidents which may begin with the police seeking to exercise move-on powers. Many "move-on" incidents will not result in a contravention charge at all, instead other charges will be preferred.

## Move on powers issues

**Arrest data and the justification for move-on powers**

The general area of police powers was examined in great detail by the then Criminal Justice Commission (the CJC) in the early 1990s. The CJC reported on this exercise in a series of public reports, and recommended that police not be given general move on powers, on the basis that any powers that the police needed to maintain public order and the peace already existed. Despite this, police were given general move on powers under the 1997 Act, with those powers being extended under the 2000 version, and in 2006 further extended state-wide to all public places.

Move-on powers allow police to issue a direction where they consider the relevant circumstances set out in the PPRA exist. The direction requires the person to leave the area and not return within a stated time, of not more than 24 hours. The police can then enforce compliance, by charging the recipient of the direction with a contravene direction offence, if they consider that there has been a failure to comply. It is unnecessary, under the PPRA, for the recipient of the move on direction to have actually committed any offence. A move on direction can be issued on the basis that the officer reasonably believes a person's behaviour is causing another anxiety.

As was foreshadowed in previous submissions by LAQ on this issue, the enactment of move on powers has resulted in the criminalisation of behaviour which was previously lawful. It has consistently been LAQ's position that, as noted by the CJC years ago, the police have sufficient powers available to deal with criminal behaviour and breaches of the peace in public places, without the addition of move on powers.

At the time of the introduction and expansion of police move on powers in Queensland no research had been undertaken to evaluate the potential impacts of move on powers upon police behaviour and crime rates. LAQ raised this as a concern and argued there was no evidence that move on powers would lead to any reduction in public nuisance and other street offences. Despite this, move on powers were consistently touted as offering police a means of intervening in incidents before they escalated to the point where an offence had been committed and an arrest was necessary. However, an examination of police statistics for street offences since the introduction of move on powers suggests that, contrary to those claims, public nuisance and other street offences have increased exponentially.

**Table 1 Disobey move on direction, public nuisance and other street offences 2004-05 to 2007-08**

| Offence | 2004-05^ | 2005-06 | 2006-07* | 2007-08 |
|---|---|---|---|---|
| Disobey move on direction | 645 | 944 | 1586 | 1714 |
| Resist, hinder etc | 13,591 | 15,158 | 16,849 | 19,860 |
| Public nuisance | 16,434 | 18,593 | 22,413 | 26,112 |
| TOTAL | 30,670 | 34,695 | 40,848 | 47,686 |

Source: Queensland Police Service *Annual Statistical Reviews* 2004-05 to 2007-08
^ This is the first year that disobey move on direction offence data was reported.
* Move on powers were extended to all public places across Queensland in this year.

Table 1 shows that charges for disobeying a move on direction increased by 165% in the three years from 2004-05 to 2007-08. At the same time, offences for resisting or hindering police increased by 46% and public nuisance offences increased by 58%. These offence increases go against the overall crime trends in Queensland for this period, with rates of reported offences such as offences against the person (which include homicide, assault and sexual offences[4]), robbery and other property offences all decreasing over the same period. These figures suggest that — rather than assisting police to manage public order issues before situations deteriorate — the introduction of move on powers has contributed to an escalation of incidents, resulting in more street offence and public nuisance charges. An alternative interpretation of these data is that the introduction of move on powers has been the catalyst for a more aggressive style of policing in public spaces that has resulted in police laying more charges of this type.

This latter suggestion is supported by a comparison of Queensland and interstate crime data. Crime data from Victoria Police, show significantly lower rates of street and public nuisance-type offences compared with Queensland. Victoria police only report under two categories of these types of offences, "regulated public order" and "behaviour in public" offences. For the 2007-08 financial year, these offences were recorded at the rate of 39.5 and 62.6 respectively per 100,000 population.[5] By contrast, Queensland offence rates for the same period were 40 per 100,000 for "disobey move on direction" offences; 465 per 100,000 for "resist/hinder" offences; and 611 per 100,000 for "public nuisance" offences.[6]

New South Wales crime data show similar disparities from Queensland in the number of recorded street and public nuisance offences. The New South Wales data are reported on a calendar year basis and are not presented as a rate per 100,000 population. However, comparisons can still be made on the basis of the number of offences. From January to December 2007, New South Wales police recorded 7,025 offensive conduct offences and 5,728 offensive language offences. In Queensland for the 2007/08 financial year police recorded 26,112 public nuisance offences. Over the same reporting periods New South Wales police recorded 7,359 "resist or hinder officer" offences compared with 19,860 recorded in

[4] It should be noted that sexual offences and drug offences increased during this period.
[5] *Victoria Police 2007/2008 Crime Statistics*, Summary of Offences Recorded, Victoria.
[6] Queensland Police Service, *Annual Statistical Review 2007-08.*

Queensland.[7] On both of these offence comparisons, Queensland recorded more than twice as many offences than New South Wales, even though New South Wales has a significantly larger population.

In view of these data, we would suggest that the review undertake a thorough examination and comparison of offence data between Queensland and other comparable jurisdictions and seek to identify possible explanations for the disparities in the rates and number of street-type offences.

Whatever the reasons for the Queensland offence levels, the data described above provides clear evidence that police move on powers have failed to deliver the benefits they were championed for — making our streets and public spaces safer.

Other negative impacts of the introduction of move on powers across the State are:

- More members of the community are acquiring criminal histories from minor incidents that, in the past, would not have amounted to a criminal offence and no action would have been taken by police.
- The Magistrates Court is increasingly burdened with prosecutions for matters that do not involve any real criminal behaviour except the failure of a person to obey a police direction. In the few cases where these exercises of police powers have been challenged in the courts, they have found that the powers have been abused and/or misused by police.

The community is now burdened with move on powers that have been worthless, in terms of achieving safer outcomes for the community. At the same time, these powers have significantly eroded the basic human rights of many people who use our public spaces and increased the workload and operational costs of the justice system.

**The unfair and discriminatory impact of move on powers**

There are some general problems applying to move-on powers. First, they enable the police to themselves determine and impose their own view of what they deem to be the standard of acceptable behaviour in a public place.

[7] New South Wales Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics 2007*, Table 1.2, p.13.

Secondly, move on powers unfairly target people who are the regular users of public space and civil amenities. Our duty lawyer experience confirms that the young, the Indigenous, the homeless and people with mental illness and/or intellectual disabilities, are at risk of being unfairly targeted and possibly also criminalised by the use of these powers.

*Case example: LAQ acts for a juvenile client (aged 15 years) who lives in a regional area. Our client and friends were camping at a designated camping area. Police attended, and alleged the client and friends were intoxicated and yelling and swearing.*

*At approximately 3.00am police gave our client a move-on direction requiring him to immediately collect his belongings and leave the camping reserve and not return for 24 hours. The camping area was at least 15 kilometres from town and in a remote location. Our client was later charged with contravening the move-on direction. Legal aid has been granted (as the client is a juvenile) and the matter is listed for trial.*

Public areas are used on a regular basis by the above groups. Move-on powers have the potential, through their direct application and the enforcement provisions, to drive these people out of the more populated (and policed) public areas. For the reasons set out below, we consider that any such effect, be it intended or not, is unfair, counter productive and inconsistent with broader social policy.

In 2005 the Crime and Misconduct Commission said the following about the use of move-on powers against people affected by the misuse of volatile substances (VSM, or 'chroming'). The Commission's remarks are also of significant application to the general use of move-on powers:

> *The move-on powers do not authorise police to take a person into custody. Rather, they allow police to direct a person to move away from a designated area (PPRA, s. 39). Such a direction may be based on a person's behaviour or presence causing anxiety or concern to others. While this may achieve the goal of removing VSM affected individuals from public sight in public spaces, it does nothing to address the problem of VSM itself. The Commission can see little use in simply moving a VSM-affected person from one public space to another.*

*The Commission reiterates that any response to VSM must not only address the issue of maintaining public safety and public amenity, but also, and more importantly, must address the issue of the safety and welfare of affected people.*

*Move-on powers are, at best, only a partial response to the former and provide no assistance for the latter. The Commission believes that VSM needs to be regarded as more than a public nuisance issue. Instead, it should be understood as symptomatic of deeper problems that need to be dealt with by way of social services, health care and community development.*[8]

Young people, particularly those under the age of eighteen years, tend to be frequent users of public space like the parks and the major streets of cities and towns. Their use of such public spaces differs from adults. Obviously, young people are restricted from using licensed premises and generally have less financial resources available to them than adults do. So, many young people use public spaces, particularly the areas of inner cities and towns which are in close proximity to major transport hubs, to congregate and socialise. They have a right to do this, and a right to themselves be safe in their use of public space, as much as anyone else.

*Case example: Our client is a 13 year-old female. On a weekday morning she was at the local shopping centre with other young people. Police from the police beat saw the group of young people near the entrance to the shopping centre and directed them all to move on and not return for 24 hours. No reason was given for the direction and it was confirmed in the police brief that there had been no complaint about the children or their behaviour. Police enquired specifically of client why she was not at school, she advised that she was not required to attend school, having been excluded from the school some days prior. Police said that she had to go to school, and called for a paddy wagon.*
*The wagon arrived and took the client to school. The client went into school, explained the situation to the principal and was permitted to leave. The client walked back to her boyfriend's house through the carpark of the shopping centre about an hour and a half later.*

[8] Crime and Misconduct Commission, *Police Powers and VSM: A Review – Responding to Volatile Substance Misuse,* September 2005, pp. 6-7

*Case example continued*

*Police from the police beat patrolling the carpark recognised the client from the earlier encounter and approached her. The client continued walking through the carpark. It is not disputed that she was walking away from the shopping centre. Police told her not to walk away from them. When she continued walking they forcibly restrained her. They told her that she had given a direction not to return. She said she was only walking through the carpark and was not going to the shopping centre.*

*The police advised she would be issued a Notice to Appear for contravening a direction. The girl became abusive and went to walk away, but was held by the police and handcuffed. She was taken back to the police beat where her mother was called and she was issued with a Notice to Appear. Ultimately the charges were dropped after a submission from LAQ identifying the absence of any grounds for the original move on direction and for forcibly transporting the child to school. The submission referred to the decision of the Court of Appeal in Rowe v Kemper [2008] QCA 175.*

It also appears that public areas where Aboriginal and Torres Strait Islander people routinely gather are regularly policed, leading to the exercise of move-on powers. Aboriginal and Torres Strait Islander people are protected from discrimination on the attribute of race, under section 7(g) of the Queensland *Anti-Discrimination Act 1991*. That legislation also makes discrimination unlawful if it occurs on the basis of other attributes, such as age or impairment (for example, mental illness and intellectual disability). We suggest that the people most at risk from move-on powers are those who possess one or a number of these attributes.

If people are asked to move on because of an attribute such as their race, rather than their behaviour, they are entitled to make complaints of direct discrimination. Complainants would need to demonstrate that they had been treated differently to someone without the attribute in the same circumstances.

We also note s 11 of the above Act which prohibits 'indirect' discrimination, such as may exist by the imposition of unreasonable terms or conditions with which, for example, an Aboriginal or Torres Strait Islander person does not or is not able to comply, but with which a higher proportion of people of a different race do or can comply.

Legal Aid Queensland has a particular concern about the potential implications of move-on powers upon young Indigenous people, already a very marginalized group in our society. It is our perception that move-on powers are disproportionately used against young, and in particular young Indigenous, people.

*Case example:* *The CMC will be aware of a recent case where LAQ acted for a young Indigenous person in the defence of a charge of obstruct police arising from incidents occurring at Southbank. The allegations against our client, in part, were that Southbank security officers rendered assistance to a young female who had collapsed from intoxication. Our client was one of a number of youths waiting with their friend until the Queensland Ambulance Service arrived. Police purported to give move-on directions and in due course the incident escalated into a physical altercation, with police using a Taser on our client. Our client was acquitted of the obstruct police charge at trial (no charge of contravene direction was laid). A complaint about the use of the Taser upon her remains before the CMC. This matter has attracted significant publicity.*

Similarly, we are also aware of incidents involving young African migrants. We are informed by services such as the Logan Youth Legal Service, that young people from the African community believe they are being targeted by police because they are black — that police assume they are committing offences or are members of a gang if they are in a public space in a group. They perceive move on powers as a tool for racial discrimination and abuse by police.

This is a particularly disturbing development, especially considering many of those young people have come from countries where the police are used as instruments of State oppression and are responsible for atrocities committed against members of the public. Negative incidents involving Queensland police only serve to reinforce the fear and mistrust of police among these groups. It can lead to migrant communities becoming isolated from the mainstream community and prevents members from coming forward when criminal activity occurs within their community of origin.

*Case example:* *Our duty lawyer client, of Sudanese heritage, had been given a move-on direction by police in a major regional city. The circumstances surrounding the direction indicated it had been properly given and the client complied with it. However, he later returned to the area to ask the relevant police officer for his particulars. He was arrested and charged with a contravene direction offence.*

It is trite to comment that the homeless, by very definition, have no personal 'private space' to retire to, in the manner of those who do enjoy reliable and safe accommodation. They have no choice other than to spend much of their time in public space. For these people, daily life is a regular struggle – to maintain their personal safety and find food and accommodation.

The causes of homelessness are diverse, but it is clear from research that the homeless have a higher than average prevalence of mental illness, substance abuse issues and trauma – such as being the victims of sexual and/or physical abuse, and usually on multiple rather than isolated occasions.

In 2005 Legal Aid Queensland released a report upon its Homelessness and Street Offences Project conducted earlier that year. That report noted:

> Like other service providers, Legal Aid Queensland has found homeless people often enter the criminal justice system as victims rather than perpetrators. When homeless people are brought before the courts to answer charges, it is often for minor charges, some of which arise simply from the realities of homelessness. During 2004, lawyers and other staff noticed an increase in the number of homeless people appearing in the Magistrates Court on "street offences", such as public nuisance. Objective data supported more street offences were coming before the courts…
>
> With a growing awareness about homelessness and increased street offence charges, Legal Aid Queensland became concerned that as a client group, homeless people were systematically over-represented in the courts. There was also concern homeless people were being charged for relatively minor matters, in circumstances where the result for the individuals would be unhelpful at best, and disproportionately punitive at worst.[9]

The following was noted in the findings arising from the project:

[9] Legal Aid Queensland, *Final report of the Homelessness and Street Offences Project,* August 2004, pp.1-2.

> The experience of this project has been that people living in public spaces will not simply go away. Homeless people use public spaces for a variety of activities, some of which are activities that would routinely occur within the confines of a home for most people.
>
> The project has found that police intervention has postponed or relocated the potential for further objectionable behaviour. This report suggests the community and in particular the police and the courts, should view public space activities as a social issue and not as a criminal issue.
>
> A more positive response would be the acceptance of a range of uses of public spaces and for tolerance of unusual behaviour. This should be balanced with a system of providing support and information to homeless people about acceptable behaviour in public spaces.[10]

The Law and Justice Foundation of NSW, in examining the legal needs of homeless people in that state, said the following about the criminal law issues that the homeless face; which is also apposite to the current CMC review:

> The criminal law issues they face reflect their living situation: public transport fines and street offences are a result of them being particularly visible to police and other enforcement officers responsible for regulating the use of public space; drug and alcohol-related crime, assault, and theft. Their interaction with the criminal law should be viewed within its context of serious homelessness.[11]

Through their high level of use of public space and consequent visibility to other members of the public and police, homeless people are at significant risk of being subjected to the unfair exercise of move on powers. Our experience with the Homeless Persons Court Diversion program underlines that many homeless people perceive that they are unfairly targeted by police. In those circumstances, interaction with police can readily lead to incidents and the referral of criminal charges.

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[10] Ibid, p.27
[11] Law and Justice Foundation of NSW, *Access to Justice and Legal Needs (Vol 2): No Home, No Justice? The Legal needs of Homeless People in NSW,* July 2005, p.105

The case noted in the CMC's Review Paper – *Rowe v Kemper* [2008] QCA 175 stands as a striking and very unfortunate example of this risk and the devastating consequences that can ensue for disadvantaged individuals when police exercise these powers in an unreasonable manner.

It must also be understood that many vulnerable people, such as the young, the homeless and the mentally ill, often have little capacity to properly understand (and hence comply with) the details provided to them by a police officer giving a move-on direction. By implication it is difficult for these people to understand whether a direction has been given lawfully, or to later recount all relevant detail, for the purpose of potentially defending any resulting charge. The potential for misuse of move-on powers is heightened in these circumstances.

Many people who are young, or homeless, or Indigenous, or who have psychiatric issues, currently connect with services such as health, crisis support and other welfare services (including some involving Council) in the areas covered by the proposed notifications. Relationships and understandings have been established, over a period and in challenging circumstances. Move-on powers provide a means of driving these groups away from these locations. This has the potential to affect, adversely, the capacity of the relevant agencies to deliver these services to people clearly in need. The intended recipients become less visible and may not connect with necessary support services. The delivery of inclusive, existing services can be ended or at the least disrupted.

Move-on powers do nothing to address the underlying factors which have led to these people being in need of support services. They do nothing to address criminal offending, which is stated to be the concern justifying the enactment of the move-on powers. Disconnecting people from helpful services can only be expected to lead to detrimental outcomes, for those people and the community at large if offending levels escalate as a consequence (which could readily happen, if feelings of alienation and injustice arise as a result of the exercise of move on powers). Move-on powers exacerbate, rather than effectively address, many of the problems these groups face.

**Increased criminalization**

Our experience establishes that move-on powers have the potential to criminalise many people who previously would not have had criminal charges preferred against them, and can lead to the further entrenchment of others in the criminal justice system.  As we have noted, incidents

involving police exercising move-on powers may not necessarily only result in the comparatively minor charge of contravene police direction resulting. As the Southbank case noted above illustrates, more serious charges can often result.

While the simple offence of contravene direction does not attract a sentence of imprisonment, it is unarguable that the accrual of such minor convictions will ultimately narrow sentencing options on future charges relating to public order offences, and increase an individual's prospects of ultimately receiving a sentence of imprisonment.

In 1999, Professor Chris Cunneen produced a report for the then Aboriginal and Torres Strait Islander Commission titled *Zero Tolerance Policing: Implications for Indigenous People.* That report was concerned with the growing political and policing interest in Australia in the policy of "zero tolerance policing" adopted in New York during the 1990s and purportedly attributable to a decrease in offending in that city. Zero tolerance policing is a strategy directly aimed at increasing arrest rates for minor offences such as public drunkenness, offensive language and behaviour, loitering and other similar offences. Cunneen was asked to write a report on the implications of a policy of zero tolerance policing for Indigenous people. He found:

> Nationally, nearly one in three Indigenous people placed in police custody are there because of intoxication in public, irrespective of whether it is a criminal offence or not. Zero tolerance policing will make any reduction in this number difficult to achieve and will likely lead to an increase in police custody for public drunkenness.
>
> Nationally, nearly half of all people placed in police custody for public order offences (excluding public drunkenness) are Indigenous. The focus of zero tolerance policing on increasing arrests for public order offences will have a dramatic and discriminatory effect on Aboriginal and Torres Strait Islander people.
>
> The increase in the number of Indigenous people arrested and held in custody will cause an increase in the number of Indigenous deaths in police custody.
>
> The increase in the number of Indigenous people arrested will flow through the criminal justice system with increases in court appearances, fine defaults, imprisonment and deaths in prison custody.
>
> The increased criminalisation of Indigenous people will further exacerbate their social and economic marginalisation.

> The international experience strongly suggests zero tolerance policing leads to an increase in the incidence of police misconduct, including violence and a corresponding rise in complaints against police. This is likely to result in a serious deterioration of Aboriginal - police relations. [12]

These findings are equally applicable to other marginal groups in the community such as the homeless and those with mental health and substance abuse issues. For members of these groups, a fine may be beyond their capacity to pay. Charges resulting from move-on powers can result in such people becoming entrenched in the criminal justice system.

*Case Example: We appeared as duty lawyer for a female client, aged in her late twenties. She had travelled into the Brisbane CBD area to celebrate Christmas with her colleagues at a club. She went outside the venue at one point to get some air and have a cigarette and got into an argument with another person. Police approached and ordered her to move-on. She denied being advised about any street names as boundaries of the relevant area, and was not, in any event, familiar with the CBD. She was afraid to be left on her own, given the time of year and the large number of people on the street. She later attempted to return to the club to alert her friends to her situation and to find a colleague with whom she might travel home, in order to split the cab fare of approximately $100. She was arrested and charged with a contravene direction offence.*

*We were instructed by the client she wishes to defend that charge and would represent herself, as she was unable to afford private representation and was not eligible for legal aid.*

*Prior to this charge she had no criminal history.*

[12] Executive Summary of the report.

*Case example: Our duty lawyer client had been out at licensed premises in a regional city. While at a cab rank he became involved in an argument with another person and was given a move-on direction by attending police. He was requested to go to another cab-rank, which was probably reasonable in the circumstances given the altercation leading to police attendance. Our client then walked the streets for some time, ultimately realising that due to the hour there was in fact only the one cab rank operating in the city. He returned to that rank as he had no other means of getting home. The police arrested him for a contravene direction offence.*

*Case example: A young female client was out socialising in the Brisbane CBD when she became involved in an argument that attracted police attention. She was given a move-on direction and told not to come within the boundaries of certain streets. She proceeded immediately to the nearest cab rank to go home. Shortly after police arrested her for contravene direction, as the cab rank was within the boundaries specified in the direction. Prior to this charge she had no criminal history.*

*Case example: Our duty lawyer client was a male person aged in his twenties was attending a club with friends. As a result of incidents inside the club he was escorted from the premises by security staff. He wanted to return to the club to advise his friends of his position, but also to retrieve his jacket, which was of some value. Police arrived and gave him a move-on direction. He later attempted to return to the club and was arrested. The following day he visited the club to try and locate his jacket. Staff advised they had no knowledge of the jacket.*

*Case example: Our duty lawyer client was a male aged in his twenties. He and a friend were in the CBD area. The friend became involved in a dispute with security officers at some premises. Police attended and the incident escalated, with the friend becoming involved in a physical altercation. Our client, distressed in the belief his friend was being assaulted, attempted to intervene. A move-on direction was issued. The client stopped attempting to actively intervene but remained at the scene to observe what was happening to his friend. He was charged with contravene direction. His friend was transported to hospital due to his injuries.*

*Our client advised he will self-represent and defend the charges. He is unable to afford private representation and is not eligible for legal aid.*

## Conclusions and recommendations

Offence data relating to public nuisance, other street offences and disobeying a move on direction show a dramatic increase in these offences since the Statewide introduction of move on powers. Instead of making public spaces safer, these powers appear to have contributed to an escalation of street offences and "proactive" or punitive policing. Move on powers have not delivered the benefits they were touted as offering the community and instead have contributed to the criminalising of people who use public spaces and a clogging of the courts with matters that prior to the introduction of move on powers would not have been offences.

**Recommendation 1:** Based on data showing a significant increase in street offences since the Statewide introduction of move on powers, there is no policy or public safety basis for these powers to be retained in Queensland. Further, it is now clear that the move-on laws increase the likelihood of police misusing and abusing their powers, especially against certain marginalized and ethnic groups in our community. In the circumstances, LAQ recommends that move on powers be repealed.

Based on our casework experience and research by respected academics such as Professor Chris Cunneen, it is likely that move on powers have contributed to an increase in the misuse or abuse of police powers. This situation has resulted from the evidentiary difficulties associated with defending successfully these types of cases (which often involve only the alleged offender's word against that of several police), but is also exacerbated by LAQ's funding limitations that have resulted in very few of these matters being funded for trial in the

Magistrates Court. Without access to appropriate legal representation to defend street offences that have been inappropriately brought, the usual processes for ensuring accountability within the system do not operate, allowing greater opportunity for abuses and misuse of these powers to continue unchecked.

In the event that, against all of the evidence, police move-on powers are to be retained, we make the following recommendations:

**Recommendation 2:** It is recommended that section 47 of the PPRA be repealed so that the only basis for exercising move-on powers can be actual behaviour by a person that reasonably causes some anxiety, interference, disruption or constitutes some type of threat or offence, within the provisions of s 46, rather than the mere presence of a person in a place.

In our submission, a person's mere presence in a regulated or public place, in the absence of anything further, should not justify police interference with their otherwise lawful rights to use that space.

It is difficult to envisage a situation where it would be reasonable to issue a move on direction solely on the basis of a person's presence in a place, in the absence of any additional concerning conduct. The power to issue a move-on direction on the basis of mere presence is clearly one prone to misuse and discriminatory and unfair application against the already marginalized groups we have mentioned above.

Subsections 47(b) and (c) make direct reference to and describe conduct that goes beyond mere presence and constitutes "behaviour". These provisions describe conduct that includes "unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place" and "disrupting". All of these descriptions require more than mere presence; they require a deliberate act or behaviour.

The proponents of move-on powers often cite the example of a person appearing to superficially passive but standing to obstruct a doorway in a shop, claiming that their "presence" is in itself sufficient to justify the issuing of a move-on direction. However, in that case the problem is not specifically caused by the person's presence. If the person stood somewhere else in or near the premises and were not doing anything offensive except looking a bit different or unkempt and a shopkeeper thinks that is interfering with trade — that should not be a basis for a complaint or exercise of the power. Rather, it is the person's behaviour in standing in the

specific spot that constitutes the interference with trade or business. Such behaviour can be readily brought within s 46.

The effective redundancy of s 47 is illustrated also in the subsection (5) provision that states *"for this part, the person's presence is the **relevant act**,"* with that term defined in the PPRA's dictionary as *"**relevant act** means conduct of a kind mentioned in section 46 or 47"* (emphasis added).

**Recommendation 3:** Police should be issued with field recorders and be required to record all directions given when exercising move on powers. This would provide an independent record of the way the power was exercised and the information provided to the defendant about the reason for a move on direction. This would operate as some type of safeguard against misuse of these powers.

**Recommendation 4:** The Queensland Police Service should provide increased police training regarding the issues affecting marginalised and vulnerable groups in the community, and encourage the adoption of more appropriate social support responses rather than the exercise of police powers.

**Recommendation 5:** Considering the negative consequences of alienating particular ethnic and cultural groups in our community through the heavy-handed exercise of police powers, the Queensland Police Service should adopt processes for monitoring the rates of public nuisance, disobey a move on direction and other street offences in each policing district. This monitoring could occur through the regular Operational Performance Reviews process of the QPS. Senior officers should be required to explain increases in street offences, especially where this occurs against other offence trends.

**Recommendation 6:** That a reduction in public nuisance, disobey move-on direction and other street offences should be adopted as a key performance indicator by the Queensland Police Service.