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CMC Review of Police Move-on Powers
GPO Box 3123
BRISBANE QLD 4001

By facsimile: 3360 6333

Dear Sir/Madam

RE: **CMC REVIEW OF POLICE MOVE-ON POWERS**

Indigenous Australians have suffered a long history of oppression in this country. Such oppression has manifested itself in the form of blatant violence and in more recent times, legislative discrimination. In an attempt to ensure equality before the law, Australia has enacted numerous pieces of legislation including the *Racial Discrimination Act 1975 (Cth)* and the *Anti-Discrimination Act 1991 (Qld)*. Despite these genuine measures, Indigenous Australians are still suffering various, less explicit forms of racial discrimination. Legislative discrimination in public space law is one such example. This submission will examine how Queensland's police 'move on' powers discriminate against Indigenous Australians. In doing so, any violations of both State and Federal anti-discrimination legislation will be considered. Accepting that the removal of move on powers from Queensland's statute book is unlikely, the writer will conclude by outlining some recommendations for improving the current application of the law.

This submission will demonstrate that all laws that discriminate on the basis of race have serious consequences. When speaking about the introduction of move on powers, a member of Queensland Parliament rightly put it, 'This issue is bigger than some of us believe it to be.'[1] It is the endeavour of this writer to demonstrate the seriousness of this legislative form of discrimination against Indigenous Australians.

[1] Mr Nelson (Independent Member for Tablelands), 'Police Powers and Responsibilities Bill 2000' *Queensland Parliament Hansard Transcription Debates*, 15 March 2000, 420-501, 439

The Police Powers and Responsibilities Act 2000 (Qld)

Move on powers have existed since 1997 under the then *Police Powers and Responsibilities Act 1997 (Qld)*. They were retained in much the same form in the current *Police Powers and Responsibilities Act 2000 (Qld)*. Until just recently, move on directions could only be given in prescribed places such as at a shop, school, ATM, licensed premises, railway or shopping mall. Other than those prescribed places, local councils could make applications to the Minister of Police and Corrective Services to have an area classified as a prescribed place. However, as a result of the recent *Police Powers and Responsibilities and Other Acts Amendment Act 2006 (Qld)*, a move on direction can now be given in any place throughout the State.

Section 46, 47 and 48 of the *Police Powers and Responsibilities Act 2000 (Qld)* (PPRA) dictates the application of move on powers in Queensland. Section 46 prescribes that a police officer can give a move on power if a person's behaviour is:-

- 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 the place;
- Disorderly, indecent, offensive, or threatening to someone entering, at or leaving the place;
- Disrupting the peaceable and orderly conduct of any event, entertainment or gathering.

Section 47 states that a police officer may give a move on direction in relation to a person's *presence* if a police officer reasonably suspects the person's presence is or has been:-

- Causing anxiety to a person entering 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;
- Disrupting the peaceable and orderly conduct of any event.

Further, section 48 provides that a direction may require a person to leave a place and not return within a stated reasonable time of not more than 24 hours.

The Government's Justification for 'Move On' Powers

In light of the significant public debate that has surrounded this law, the Queensland Parliament has had numerous opportunities to debate move on powers both at the time of its inception and as recent as last year when the move on power

was extended state wide. These debates provide the most useful insight into the Government's justification for this police power.

Public safety is a recurring theme in the parliament debates; 'Move on powers have been raised with me time and time again relating to public safety in general. I see it as a good power in that respect.'[2] According to another member of parliament, these laws 'give the police the tools by which they can make our society safer.'[3] In support of the laws, various members of parliament cited examples where the law is required. For example,

"I speak with a number of seniors groups and if there are 10 Hell's Angels sitting outside an ATM at nine o'clock at night when a little old lady is going down to withdraw some money, I strongly suspect that the presence of those 10 Hell's Angels could very well intimidate. Should that lady receive protection? Yes, absolutely."[4]

As a Queenslander, I have never seen a hardcore motorbike gang hanging around an ATM and therefore, I must question the reality of this example. However, despite the far-fetched examples provided by members of parliament, it is clear that the government is mindful of situations where seemingly unruly individuals may impede society's sense of safety and access to public spaces. In supporting move on powers, the government is clearly trying to create a perception of a safer society; 'perceptions of both public safety and freedom in public areas are important to the peaceful enjoyment of our communities and neighbourhoods.'[5]

Local councils have also been influential in promoting move on powers. The Brisbane City Council claims to support move on powers in response to 'members of the public expressing concern over the level of crime and disorderly conduct in the area adversely affecting the use and enjoyment of public space.'[6] Additionally, the council has cited instances of increased public graffiti, substance and alcohol abuse, abusive behaviour, assaults and maintenance requests.[7] The Council claims that move on powers will help preserve 'the right of all users to a sense of safety and security in public spaces, and encouraging wider public use of these areas.'[8]

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[2] Ibid, 440

[3] Mr Johnson (National Party Member for Gregory), 'Police Powers and Responsibilities and Other Acts Amendment Bill 2006' *Queensland Parliament Hansard Transcription Debates*, 11 May 2006, 1687-1765, 1703

[4] Mr English (Australian Labor Party Member for Redlands), 'Police Powers and Responsibilities and Other Acts Amendment Bill 2006' *Queensland Parliament Hansard Transcription Debates*, 11 May 2006, 1687-1765, 1708

[5] Mr Finn (Australian Labor Party Member for Yeerongpilly), 'Police Powers and Responsibilities and Other Acts Amendment Bill 2006' *Queensland Parliament Hansard Transcription Debates*, 11 May 2006, 1687-1765, 1710

[6] Anti-Discrimination Commission Queensland, 'Submission to Brisbane City Council regarding its Application for Declarations of notified areas at Kurilpa Point, King George Square and New Farm Park' (2005), 1-10, 1

[7] Ibid, 1

[8] Ibid, 2

The Discriminatory Application of 'Move On' Powers

The way in which move on powers are applied is a matter entirely in the hands of the members of the Queensland Police Service. A decision to issue a move on direction is entirely discretionary and parliament has recognised that the application of the law entails 'very subjective judgments.'[9] On their face, the 'move on' power laws do not demonstrate any signs of direct discrimination against aboriginal Australians. Therefore, the writer's claim of Indigenous discrimination rests primarily on how police are applying move on powers. The discriminatory application of the law is a result of a multitude of factors which must be individually considered.

Indigenous use of public space

Tamara Walsh of the University of Queensland comments, 'Whilst the powers may not be intended to target the young, Indigenous, the mentally ill and homeless, such is their practical effect, as it is these groups who are the most regular users of public spaces.'[10] Indigenous Australians have a well recognised cultural and social connection to the land. Therefore, the application of move on powers to this group is discriminatory as their use of public space is more prevalent than other groups. An aboriginal man subjected to a move on direction in Queensland has been quoted as stating, '[I was told by police that I was] not allowed to sleep in the park. But I was born outside – in a windbreak in the Eastern Tanami Desert... They can't move us. I like sleeping out.'[11] This quote reflects the spiritual and cultural connection that Indigenous Australians share with the land.

There are particular areas within Queensland where this is most evident. For example, the South Brisbane area of Queensland has been 'well documented as a meeting place for Aboriginal people since the first convict settlement was established in Queensland.'[12] The area is known to this group as Kurilpa. Due to its proximity to the Brisbane central business district, Kurilpa has undergone significant industrial and urban development in the past thirty years. The effect of this development is that Aboriginal people are now unable to afford housing in this sacred area. Consequently, they have either been displaced to other areas or forced to congregate in the few small public areas left untouched by this industrialization. In these areas they are 'noticed as a visible minority group by the greater public and by the police.'[13] This scenario is also true in other areas such as New Farm, the Fortitude Valley and East Brisbane.

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[9] Above n4, 1708

[10] Tamara Walsh & Monica Taylor, 'Nowhere to go: The Impact of Police Move On Powers on Homeless People in Queensland' (2006) *T.C. Beirne School of Law, University of Queensland in conjunction with the Queensland Public Interest Law Clearing House.*

[11] Ibid, 79

[12] Above n6, 5

[13] Above n6, 6

Indigenous rates of homelessness

Due to their frequent visibility in public spaces, homeless people naturally attract greater police attention. Queensland has the highest rate of homelessness compared to any other Australian state.[14] Discrimination against the homeless has serious consequences for Indigenous Australians because of their over-representation among the homeless community. A 2005 study conducted by the Australian Institute of Health and Welfare (AIHW) found that the rate for Indigenous homelessness was 18 per 1,000.[15] This figure is 3.5 times as high compared to non-indigenous Australians.[16]

There have been numerous studies conducted which have looked at the detrimental effects of move on powers on the homeless.[17] A joint study by the University of Queensland Law School and the Queensland Public Interest Law Clearing House observed that 'out of 132 [homeless] respondents surveyed, 101 had been told to move on one or more times in the last six months.'[18] This figure represents an alarming 77% of the study's sample. Furthermore, of the 132 participants in the study, it was the individuals suffering the worse levels of homelessness (sleeping on the street as opposed to in a shelter) that were subjected to move on directions the most.[19]

This same study also detailed personal accounts of homeless people who had experienced move on directions. These accounts provide a good insight into the discrimination faced by this group. Many respondents believed that they were being discriminated on the basis of their homelessness, minority status or Indigenous background.[20] One Aboriginal man stated that 'police officers deliberately victimized and targeted homeless people waiting for food vans.'[21] He explained his frustration at this discrimination; 'When you help with the street vans it is not OK for them to pull up and stir up all the homeless people.'[22] What this research and personal accounts show is that move on powers, through their discriminatory application against the homeless community, are affecting Indigenous peoples access to and use of public spaces.

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[14] Mission Australia, 'Homelessness: New Understanding, new responses' (2004) Macquarie Bank Snap Shot

[15] Australian Institute of Health and Welfare, 'Indigenous Housing Needs 2005, a Multi-measure Needs Model' (2005) *Australian Government*, 1-65, 44

[16] Ibid, 46

[17] Above n10

[18] Above n10, 54

[19] Above n10, 55

[20] Above n10, 59

[21] Above n10, 69

[22] Above n10, 69

Indigenous 'presence'

Section 47 of the PPRA has the effect of criminalising a person's presence. Most disturbingly, if a person presence is said to be causing mere anxiety it is sufficient grounds for a move on direction to be given. Therefore, move on powers are effectively criminalising society's negative perceptions of certain groups. This has serious consequences for Indigenous people; 'due to negative and sometimes racist stereotypes that exist in our society about Aboriginal and Torres Strait Islander peoples, it is a sad fact that in many circumstances certain people will feel threatened by an Aboriginal person, not because of their behaviour but by the very fact that they are Indigenous.'[23] The prejudices of some community members should not form the basis of coercive police powers.

Terry O'Gorman of the Queensland Council for Civil Liberties argues that the effect of section 47 of the Act is that police officers are asking themselves, 'Is this person, by the fact of who they are or what they look like, likely to cause anxiety to others.'[24] When making this determination, issues of race, apparel, state of cleanliness and social status are likely to come into play and work against minority groups such as Indigenous Australians. This over-policing of minority groups is supported by the fact that 72% of homeless people in the Brisbane district feel that 'the police gave them undeserved attention.'[25]

Indigenous discrimination

Discrimination can manifest itself in less subtle forms as already outlined in the preceding subsections. However, there is also evidence of blatant Indigenous discrimination in how move on powers are enforced by police. Tamara Walsh of the University of Queensland puts the extent of this discrimination in an appropriate context by stating, 'the most common legal issue that Indigenous homeless people present with is an arrest for failing to move on.'[26]

One aboriginal man was quoted as stating that the police 'target black people' and that 'when they have nothing else to do they come up to us and say if we are there next time they will arrest us.'[27] This personal account is also reflected in official statistics. A 2001 study by Paul Spooner looked at the ethnicity of people moved on.[28] Of the respondents to the study, they found that 37% of people moved on were Indigenous. At the relevant time, Indigenous Australians represented only 4%

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[23] Above n6, 6

[24] Terry O'Gorman, 'Move-On Powers Backgrounder' (2006), *Queensland Council for Civil Liberties*, 1-9, 2

[25] Tamara Walsh and Carla Klease, 'Down and out: homelessness and citizenship' (2004) 10(2) *Australian Journal of Human Rights* 87, 23-35, 31

[26] Tamara Walsh, 'Research shows homeless have justice issues' *UQ News Online*, 28 February 2006

[27] Above n10, 70

[28] Paul Spooner, 'Moving in the wrong direction: An analysis of police move on powers in Queensland' (2001) *Youth Studies Australia*, 20(1), 27-31

of the Australian population. The gross over-representation of Indigenous Australians being subjected to move on directions is clear discrimination.

'Move On' Powers as a Preventative Police Tool

In defending the existence of move on laws, the Queensland Government has argued that the law acts as a preventative tool that prevents arrests; 'Move on powers can be used as a tool of passive community policing, with a move on direction issued rather than arrest in order to resolve local situations.'[29] It is further claimed by the Government that 'the laws instill an ability to provide for contextual policing that avoids unnecessary arrest and provides for the facility for officers to defuse rather than escalate situations.'[30]

Despite this claim, there is research which suggests that a very significant proportion of move on directions result in arrests for either one or even more offences. Under the Act, all move on directions issued must be recorded in the Queensland Police Service Register of Enforcement Acts.[31] Compliance with this requirement is unknown and is often the subject of criticism.[32] Unfortunately, it is not a public registry and therefore, the unwillingness of the Queensland Police Service to release their statistics makes it difficult to gauge the number of move on directions which resulted in an arrest. However, Mr Finn, the Australian Labor party Member for Yeerongpilly, commented in parliamentary debates that he had viewed the figures in the nine month period leading up to December 2005.[33] He claimed that of the 2,000 directions recorded, 700 resulted in an arrest.[34] This figure undermines the government's claim that move on laws are a preventative tool.

Of those arrested, it is most common for people to be charged with failing to comply with the move on direction.[35] However, various studies have shown that the police interaction associated with the move on direction can often escalate into more serious charges being laid.[36] This is especially true when a person challenges the move on direction being given to them. Terry Sullivan effectively outlines how this can happen, '... a person is charged with what they call a trifecta. That is, in a situation that a move-on power is given, the young person disobeys it and they are charged. They are also charged with resisting arrest and abusive language because

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[29] Above n5, 1710

[30] Mr Fraser (Australian Labor Party Member for Mount Coot-tha), 'Police Powers and Responsibilities and Other Acts Amendment Bill 2006' *Queensland Parliament Hansard Transcription Debates*, 23 May 2006, 1766-1823, 1799

[31] *Police Powers and Responsibilities Act 2000 (Qld)*, Part 5

[32] Terry O'Gorman, 'Move On Powers' (2006) *Paper delivered to Seminar on Move On Powers, Parliament House, Brisbane*, 22 March 2006.

[33] Above n5, 1709

[34] Above n5, 1710

[35] Above n31, s47

[36] Nick Christie, 'Queensland police move on powers are over the top' (2006) *Online Opinion*, <www.onlineopinion.com.au

an argument ensues about whether the person should have to move on or not.'[37] This scenario is in stark contrast to the Government's claim that move on powers reduce the number of people coming before the criminal justice system. Lars Falcongreen, a lawyer for the Aboriginal and Torres Strait Island Legal Service, comments that these minor public space offences can 'lead to other more serious charges. Without police diplomacy, interactions with drunk, homeless or mentally ill people can easily escalate.'[38]

Indigenous access to legal representation

Once charged with failing or comply with a move on direction and/or other associated charges, Indigenous Australians are not provided with the appropriate support that they need in order to appear in court. In fact, 'most people appear unrepresented in court and plead guilty.'[39] This is occurring in spite of the fact that there are a number of potential bases upon which a defence can be raised. Such defences include a failure of the police officer to give reasons for why they are issuing a move on direction or a failure to provide a person with a reasonable opportunity to comply with the direction.[40] Research has found that up to 23% of move on directions given by police in the year 2006 did not comply with the provisions of the Act.[41] Another study found that '57% of respondents were given a direction not covered by the legislation (e.g. don't come back until you have some money).'[42] The unfortunate reality is that most Indigenous Australians are either too poor or too well-informed to adequately defend themselves.[43]

The result of Indigenous people's lack of legal representation is a huge number of guilty pleas. The duty lawyer in the Queensland Magistrates Courts will only represent someone for a guilty plea. Additionally, Legal Aid Queensland will not provide legal representation due to the unlikeliness that a defendant will be incarcerated if they plead guilty. Further, community legal centres across the State lack the financial resources to provide legal representation. The result is that Indigenous Australians are forced into a situation where they must plead guilty to their charges despite potential defences. Tamara Walsh parallels this court process as 'an assembly-line fashion with little more than one minute devoted to each.'[44]

Former Queensland District Court Judge Shanahan has recognised the problem of Indigenous Australians being forced into guilty pleas in otherwise defendable

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[37] Mr Sullivan (Australian Labor Party Member for Stafford), 'Police Powers and Responsibilities and Other Acts Amendment Bill 2006' *Queensland Parliament Hansard Transcription Debates*, 23 May 2006, 1766-1823, 1809

[38] Above n35, 2

[39] Andrew West, 'Sentencing for Vagrancy' (2000) 21(1) *The Queensland Lawyer* 12, 13

[40] Queensland Public Interest Law Clearing House, 'Homeless Persons Legal Clinic' available electronically at <hplc@qpilch.org.au

[41] Above n10, 66

[42] Above n28, 30

[43] Above n26, 1

[44] Tamara Walsh, ''Waltzing Matilda' One Hundred Years Later: Interactions Between Homeless Persons and the Criminal Justice System in Queensland" (2003) *Sydney Law Review*, 5, 1-25, 8

cases. He advocates that public space law offences, 'should be stayed until legal representation is obtained.'[45] This view is also in line with Article 14(3) of the ICCPR which states that everyone has the right to legal representation where the interests of justice so require.[46] Since being convicted of a failure to comply with a move on direction can result in a short period of imprisonment through a fine default, the interests of justice demand that Indigenous Australians be granted legal representation.

Effects of a conviction for Indigenous Australians

A conviction for a failure to comply with a move on direction has more severe consequences for Indigenous Australians than for the general population. Currently, there is unfortunately a void in terms of research which looks at what punishment is most common for a failure to comply with a move on direction. However, research looking at public nuisance laws (an allied public space offence) shows that 77% of convictions result in the imposition of a fine.[47] As at July 2005 in the Brisbane Magistrates Court, the average monetary value imposed was $212.[48] These figures are helpful as the severity of public nuisance laws has been paralleled with move on directions.[49] In fact, given the maximum penalty for a move on direction is $3,000 in comparison to only $750 for a public nuisance, the average fine for a failure to comply with a move on direction is likely to be higher.[50]

When you consider that a large percentage of Indigenous Australians are either homeless or living well below the poverty line, this form of punishment has a discriminatory effect through their simple inability to pay the fine. Non-compliance with a fine order can attract a period of incarceration.[51] Therefore, Indigenous Australians who simply can not afford to pay their fine are at risk of entering a Queensland correctional centre for what is considered to be a rather trivial offence. The seriousness of this scenario is coupled by the fact that Queensland Magistrates are not considering a defendant's ability to pay a fine when passing sentence. Tamara Walsh comments, 'It appears that, during the study period, Brisbane magistrate's decisions on whether a fine should be imposed for a 'public nuisance type offence' were not influenced by offenders' capacity to repay such a fine.'[52]

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[45] *Moore v Moulds* (1981) 7 QL 227, 231
[46] Above n44, 13
[47] Tamara Walsh, 'Won't Pay or Can't Pay: Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) *Current Issues in Criminal Justice*, 17(2), 217-238, 232
[48] Ibid, 233
[49] Monica Taylor, 'Public Space Issues and Street Offences' *Speech to the Homelessness Taskforce Policy Forum*, 23 November 2005
[50] See Above n31, s48 and *Summary Offences Act 2005 (Qld)*
[51] *Penalties and Sentences Act 1992 (Qld)*, Part 4, Division 2
[52] Above n45, 228

The research shows that police officers and Magistrates are not sensitive to the effects of a public space law conviction for Indigenous Australians. This lack of sensitivity does not reflect the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody, and the Queensland State Governments 10 Year Partnership with Indigenous people which aims to reduce Indigenous incarceration rates by half.[53] The move on power legislation is also ignoring the labeling effects associated with individuals coming into contact with the criminal justice system. Alarmingly, a large number of Indigenous people with a lengthy criminal history have, as their first conviction, a public space law offence.[54] Kevin Smith of the Aboriginal and Torres Strait Islanders Corporation for Legal Services claims that public space laws offences are 'invariably the first entry in many of our client's criminal histories.'[55] Move on powers are discriminating against Indigenous Australians by acting as a pathway into the criminal justice system and possibly, a criminal identity.

The Right to Freedom from Discrimination?

There are three key rights and freedoms which are violated by move on powers. They include the right to freedom from discrimination, the right to association and the right to enjoy and use public spaces. Such violations have already been alluded to in the preceding subsections. These violations demonstrate the discriminatory application of move on powers. For Indigenous Australians, the right to freedom from discrimination is of greatest concern with respect to move on powers. This right is articulated in various international covenants to which Australia is a party.[56] For instance, article 26 of the ICCPR states that,

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[57]

On a similar footing, the Human Rights Commission has defined discrimination as,

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

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[53] Above n6, 7

[54] Above n44, 11

[55] Kevin Smith, 'The not so new move on powers' (2000) Available electronically at <http://www.faira.org.au/lrq/archives/200010/stories/powers_move.html

[56] See for example, Article 26 of the ICCPR, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 7 of the UDHR.

[57] International Covenant on Civil and Political Rights, Article 26 (*Office of the High Commissioner for Human Rights*), Available electronically at < http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

> footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[58]

It is submitted that move on powers discriminate on the basis of race and that this discrimination is both direct and indirect. When move on laws are applied by the police, indirect discrimination is evident as a result of Indigenous Australians over-representation in the homeless community, their greater use of public space as a traditional meeting place and their inability to afford legal representation once charged with a failure to comply with a move on direction. While this indirect discrimination is not blatantly evident in the wording of the legislation, 'it is the practical application of the legislation that produces racially discriminatory outcomes.'[59] Any form of indirect discrimination amounts to a violation of Australia's domestic obligations under the Queensland Aboriginal and Torres Strait Island Justice Agreement.[60]

The Indigenous over-representation among the homelessness community is a major element of indirect discrimination. For a homeless person who is given a move on direction, a crucial question to be asked of the Government is 'move on to where?' Because of their homelessness, a large number of Indigenous people are unable to comply with a move on direction. This difficulty is not evident for those who are not homeless. Because of this differential effect of a move on direction, Indigenous homeless people suffer a significant form of indirect discrimination.

The police application of move on powers is directly discriminatory against Indigenous Australians. Research demonstrating the disproportionate rates of move on directions is a simple testimony to this fact.[61] Various other studies have demonstrated the 'selective application of move on powers against Indigenous people.'[62] Such discrimination is in clear violation to the international treaties to which Australia is a party.

Is this Racial Discrimination a Breach of the Law?

It is submitted that the racial discrimination evident in the application of Queensland move on powers represents a violation of both the *Racial Discrimination Act 1975 (Cth)* and the *Anti-Discrimination Act 1991 (Qld)*. The *Anti-Discrimination Act 1991 (Qld)* prohibits laws that demonstrate either indirect or direct discrimination on the basis of various qualities including race, disability and age.[63] Additionally, discrimination is prohibited in the administration of State

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[58] International Covenant on the Elimination of all Forms of Racial Discrimination, Article 1 (*Office of the High Commissioner for Human Rights*), Available electronically at <http://www.ohchr.org/english/law/cerd.htm

[59] Above n10, 49

[60] Above n10, 50

[61] Above n28, 30

[62] Above n10, 49

[63] *Anti-Discrimination Act 1991 (Qld)*, s7

laws and programs.[64] Therefore, the policing and enforcement of move on powers is subject to section 101 of the Act. The over-representation of Indigenous people being subjected to move on directions constitutes a direct violation of this Act. Because the Act prohibits both direct and indirect discrimination it does not matter whether this discrimination is the result of intentional over-policing of Indigenous peoples or whether it is the indirect effect of greater rates of Indigenous homelessness.

On a federal level, Queensland police move-on powers are in violation of the *Racial Discrimination Act 1975 (Cth)*. The Federal Act seeks to guarantee rights to equality before the law. The Act states;

> "If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."[65]

The research on move on directions is evidence that persons of Indigenous background are not enjoying their right to use public spaces to the same extent that non-indigenous people are.[66] This differential treatment constitutes a breach of the Federal Act. There is also some limited evidence which shows that the discriminatory application of the law is not just occurring at an individual level but is being directed at Indigenous groups. An aboriginal man, when speaking about move on powers, claims that, 'If there's a big bunch of us, 10 to 12, that's when they move us on. If it's just 2 or 3, they just talk to us, ask questions, but don't move us on.'[67]

Recommendations to Reduce the Discriminatory Application of 'Move On' Powers

Accepting that the removal of 'move on' powers from Queensland's statute book is unlikely, it is important to consider ways in which the discriminatory application of the law can be minimized. There are a number of ways in which this can be done. The scope of the present submission only allows for a general outline to be provided for the following recommendations.

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[64] Ibid, s101
[65] *Racial Discrimination Act 1975 (Cth)*, s10(1)
[66] Above n28, 30
[67] Above n10, 83

Better Police Accountability

According to Terry O'Gorman, the lack accountability associated with move on directions is a major concern; '... in reality the move on power can be and too frequently is exercised in a capricious, arbitrary and totally unaccountable manner.'[68] The only apparent safeguard is the requirement that a police officer enters a move on direction into a police register. This has been paralleled as 'phoning in a crime report.'[69] For an individual being given an unchallengeable move on direction, this is no safeguard and is certainly 'in no way a check against arbitrariness or abuse of this power.'[70] Better police accountability is paramount to counter the discriminatory application of this law.

The more difficult question is 'how can police be more accountable in exercising move on directions?' The police register of move on directions should require police officers to identify the relevant ethnicity of those people given a move on direction. It is suggested that the police register of move on directions be made a public document. This would increase police accountability by exposing the relevant ethnicity of those subjected to move on directions. It is hoped that by making this document a public record, police would be deterred from having too many Indigenous entries on the record.

Secondly, it is proposed that a defence of reasonable excuse is legislated in Queensland. This is already evident in the equivalent New South Wales Act.[71] Having this defence available would encourage defendants to contest their charges when they appear in court. A clear example of the defence is an Indigenous homeless person who needs to remain in a public area to access vital services. Having more summary trials would help to expose the actions of police officers when exercising move on directions. Unfortunately, this form of accountability is largely dependent on Indigenous access to legal representation (see subsection below).

Finally, it is proposed that Queensland implement other State's accountability measures. For instance, in New South Wales, a police officer is required to provide their name and place of duty.[72] Additionally, in Western Australia, a police officer is required to provide a move on direction in writing.[73] These simple measures provide formality to the move on direction and may assist an accused when challenging a move on direction in a court of law.

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[68] Above n32, 3
[69] Above n32, 3
[70] Above n32, 3
[71] Above n10, 33
[72] Above n10, 32
[73] Above n10, 33

Other Cross-jurisdictional Implementations

In some form or another, move on powers exist in all Australian states.[74] Upon reading the various State's pieces of legislation, it is clear that in Queensland police officers have a far wider discretion to issue a move on direction. This discretion is most notably espoused by the fact that mere anxiety is grounds for a move on direction. In New South Wales, the relevant behaviour must be such 'as to cause fear to a person of reasonable firmness.'[75] The 'reasonable firmness' qualification forces a police officer to consider what the reasonable person would fear rather than what a delicate or fragile person might fear. This higher threshold for what constitutes grounds to issue a move on direction should be implemented into the *Police Powers and Responsibilities Act 2000 (Qld)*.

The New South Wales Act is also more effective operationally through the requirement of a warning. Under section 14 of the *Court Security Act 2005 (NSW)*, an officer must provide reasoning for police interference and also issue a warning before exercising a move on direction.[76] According to the 1999 review of the New South Wales Act, the warning requirement is effective because 'if a person or group of persons were to cease or alter their conduct, whether it relates to their behaviour or presence, so that it no longer constitutes the relevant conduct that was the subject of the direction, then it is not an offence to fail to comply with the direction.'[77] The writer shares the views of Terry O'Gorman who argues that, 'The Queensland Police Powers Act should be changed to ensure that a warning is given in Queensland consistent with the law in New South Wales before a move on order is in fact given.'[78]

It is further suggested that Queensland re-consider the maximum time in which an officer can direct someone not to come back to a certain place. Currently, the maximum time for a move on direction is 24 hours.[79] In the view of Terry O'Gorman, this maximum time period is being unjustifiably used; 'Often the 24 hour direction can not be justified but more often than not the direction is for the maximum period of 24 hours.'[80] It is suggested that Queensland adopt the legislative provisions in either the Australian Capital Territory or Tasmania where the maximum time limits are 6 and 4 hours respectively.[81] Excluding someone from a public place for up to 24 hours is excessive and can limit individual's access to vital services. This is particularly true for Indigenous homeless people who need access to valuable outreach services, such as medical assistance and the provision of food.[82]

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[74] Above n10, 38
[75] *Court Security Act 2005 (NSW)*, s14
[76] Ibid, 20
[77] New South Wales Ombudsman Office, 'Police in Public Safety' (1999), 235
[78] Above n32, 5
[79] Above n31, s48(3)(a)
[80] Above n32, 2
[81] Above n10, 32
[82] Above n10, 33

Extensive Crime and Misconduct Commission (CMC) Review

Section 49 of the *Police Powers and Responsibilities Act 2000 (Qld)* states that the Queensland Crime and Misconduct Commission (CMC) must review the use of move on directions by police officers and prepare a report on the review as soon as practical after 31 December 2007.[83] This mandatory review provides a narrow opportunity for this discriminatory law to be amended. As a result, engendering public debate and the production of a significant number of submissions from key stakeholders is vital.

It is proposed that key bodies such as the Queensland Council for Civil Liberties or the Aboriginal and Torres Strait Islander Legal Service assume responsibility for ensuring the CMC review is not rushed or poorly deliberated. Such organisations must also advocate Government compliance with any recommendations raised in the CMC's report. It is only through such proactive work that the discriminatory nature of this legislation will be sufficiently revealed and amended.

Broader sentencing Options for Magistrates

Research shows that the use of fines as a form of punishment for public space law offences can act as a pathway for Indigenous Australians into correctional centres and indeed, a criminal lifestyle. The ability of Indigenous Australians to pay a fine is particularly worse in Queensland where the maximum fine for a failure to comply with a move on direction is $3,000.[84] This is far more excessive than other jurisdictions such as New South Wales where the maximum fine is only $220.[85] As a result of the detrimental effects of a fine default, it is suggested that more flexible sentencing options are made available to Magistrates such as smaller fines, small periods of community service, good behaviour bonds or increased diversionary programs.

In December 2004, the State Cabinet recognised the need to implement diversionary programs for minor summary offences.[86] One of the programs launched in 2005 was a pilot court diversion program for homeless people charged with public space offences. The key aim of the program is 'to divert homeless people away from sentencing and into support services such as accommodation and health services.'[87] This program is a commendable step by the Government. However, given the current conviction rates suffered by Indigenous Australians, one has to question how effective and expansive the program currently is. Furthermore, 'one could be forgiven for querying the value of spending money at

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[83] Above n35, s49
[84] Above n31, s48
[85] Above n67, s14
[86] Above n49, 5
[87] Above n49, 6

the sentencing stage when it would be more economical to simply reform the legislation.'[88]

Mandatory Legal Representation for Defendants

In this writer's view, a court of law is one of the best ways to expose police abuse of powers. Therefore, mandatory legal representation for Indigenous peoples acts as an effective tool in police accountability. More importantly, mandatory legal representation prevents Indigenous Australians from being forced to plead guilty where their case has defendable grounds. The detrimental impacts of a conviction for Indigenous Australians have already been noted. Most significantly, an inability to pay a fine can result in incarceration, isolation from the community and the possible commencement of a criminal lifestyle.

The writer vehemently shares the view of former District Court Judge Shanahan who argues that all criminal proceedings should be stayed until legal representation is obtained.[89] In order to achieve this goal, increased Government funding is crucial. Such funding should be allocated to various community legal centres including the Aboriginal and Torres Strait Island Legal Service. Additionally, a new department within Legal Aid Queensland could be established in order to assume responsibility for the defence of public space law offences.

Concluding Notes

Queensland move on powers discriminate both directly and indirectly against Indigenous Australians. There is a body of research and academic literature to support this claim. In 2000, Mr. Pitt, the Australian Labor Party member for Mulgrave commented on move on powers; 'By and large, the success of this legislation will depend on the way in which our Police Service actually implements it.'[90] Seven years later, the government is clearly not appreciating how the application of move on powers by the Queensland Police Service is causing a discriminatory effect against Indigenous Australians. The Government continues to ignorantly claim, 'The Indigenous community and the police respect one another for the way in which these powers have been applied.'[91] Instead of idealizing the Queensland police service, the Government needs to accept that this law is not being equally applied.

The consequences of this discriminatory application of the law are devastating for Indigenous people. The law is restricting Indigenous use of public space. This

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[88] Above n49, 5
[89] Above n44, 12
[90] Mr Pitt (Australian Labor Party Member for Mulgrave), 'Police Powers and Responsibilities Bill 2000' Queensland Parliament Hansard Transcription Debates, 15 March 2000, 420-501, 440
[91] Mr Hoolihan (Australian Labor Party Member for Keppel), 'Police Powers and Responsibilities and Other Acts Amendment Bill 2006' *Queensland Parliament Hansard Transcription Debates*, 23 May 2006, 1766-1823, 1792

represents a total disregard for the social, cultural and historical underpinnings of this race. The law is also criminalising Indigenous people through their higher rates of homelessness. Move on powers are also acting as a pathway for Indigenous people into the criminal justice system. These forms of racial discrimination are serious issues and they are in breach of both the *Racial Discrimination Act 1975 (Cth)* and the *Anti-Discrimination Act 1991 (Qld)*.

It is this writer's conclusion that the introduction of move on powers, and the more recent amendments which expanded the police power across the entire State, represent nothing more than a 'law and order' political campaign. The scapegoats in this campaign are Indigenous Australians who are suffering a discriminatory application of the law. If Queensland is to remain a healthy, liberal and racially tolerant society, this draconian law must be reformed.

Please contact the writer at the office of Robertson O'Gorman Solicitors ((07)32361311) should you wish to discuss any aspect of this submission.

Yours faithfully
QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

DAN ROGERS

LTR CMC REVIEW ON POLICE MOVE-ON POWERS 090217 DRLP