

Your ref:

Our Ref: Criminal Law Committee 2100339/25

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Research Director
Legal Affairs and Community Safety Committee
Parliament House
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BRISBANE QLD 4000

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Dear Research Director

POLICE POWERS AND RESPONSIBILITIES (MOTOR VEHICLE IMPOUNDMENT) AND OTHER LEGISLATION AMENDMENT BILL 2012

Thank you for providing the Queensland Law Society with the opportunity to provide comments on the *Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012* (the Bill).

Given the timeframes available for making submissions on the Bill it has not been possible to conduct an exhaustive review. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

The Society is pleased to note that it was consulted with respect to the motor vehicle impoundment aspects of the Bill prior to it being introduced into the House. The Society has long advocated that good legislation is the product of good consultation. We are grateful to the Government for the opportunity to have contributed our views.

We make the following comments for your consideration.

1. Preliminary comments

The Society is concerned with the amendments proposed in the Bill which appear to envisage forfeiture of a motor vehicle under ss 74B and 74F. We are concerned with the omission of the requirement for applications for impoundment orders and forfeiture orders to be considered by the court. Instead, it appears that this will be automatically triggered by charges for subsequent type 1 or type 2 offences. The Society advocates for the retention of the requirement for applications to be made to the court in these instances, and for a broad judicial discretion to be maintained in the determination of such matters. Decisions to impound or forfeit a person's private property are extremely intrusive and serious, with the ability to affect issues such as employment, health care, and child care. We consider that the court must maintain its role in deciding applications based on the evidence in each particular case.

The Society is aware of a recent decision of the Supreme Court of South Australia, *Bell v Police* [2012] SASC 188, in which a forfeiture order under the South Australian *Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007* was successfully appealed. Whilst we have not been able to conduct a thorough review of the decision, in light of the fact that constitutional arguments were relied upon, we consider that detailed consideration should be given to these issues before the Bill is debated in the House.

The Society is concerned with the varied use of ‘owner’ and ‘driver’ under the proposed provisions. For example, proposed s 74K permits a police officer to require the driver to produce the vehicle at a stated time and place for impoundment or immobilisation. However, if the owner and driver are different people, this may cause significant problems in complying with this requirement.

Amendments to Police Powers and Responsibilities Act 2000 (the Act)

2. Clause 7 – omission of s 70A (references to type 2 vehicle related offences including the same kind)

The Society considers that s 70A should not be omitted. This section ensures that persons being penalised for subsequent offences are aware that the specific type of offence is prohibited, which is particularly important in the context of the broad range of type 2 offences which are captured. For example, a person who commits an offence against s 79, *Transport Operations (Road Use Management) Act 2005* which involves liquor or other drugs may not necessarily also be aware that a modification offence within the relevant period could be captured.

We consider that, because the offences under the type 2 offences regime are so diverse, it would be prudent to retain this section to ensure that the regime does not operate oppressively.

3. Clause 14 - replacement of s 74 (impounding motor vehicle for first type 1 vehicle related offence)

The Society is concerned with the lengthy prescribed impoundment period for a first type 1 vehicle related offence, which is 90 days. We consider that a decision to impound a person’s vehicle for such a substantial amount of time should be made by application to a court. This is particularly important, given that the vehicle is impounded on the basis of a charge, not a conviction.

4. Clause 15 – insertion of new s 74A (impounding motor vehicles for second or subsequent type 1 vehicle related offence)

The Society is concerned with proposed s 74A(2) which provides that a police officer may impound a motor vehicle until the end of all proceedings for all charges, where a person has been charged with 2 separate type 1 offences and the person has not been found guilty. Impounding a vehicle on this basis, where the first charge has not been decided, could operate unfairly by penalising a person despite the presumption of innocence. We consider that impounding a vehicle in these circumstances should only occur where a driver has previously been found guilty of a type 1 offence committed within the relevant period.

5. Clause 15 – insertion of s 74B (forfeiture of motor vehicle if driver found guilty of second or subsequent type 1 vehicle related offence)

The Society expresses concern with proposed s 74B. As highlighted earlier, this section appears to provide that, if a driver is found guilty of a second type 1 offence within the relevant period, the motor vehicle becomes the property of the State. There does not appear to be a need to make an application to a court for the forfeiture. The Society strongly considers that such a substantial intrusion into a person's private property (particularly where the driver is not the owner of the vehicle) must be considered by a court.

We also highlight that this section applies on the driver being found guilty, despite the fact that the commissioner may grant an application for the release of the motor vehicle under division 2. The Society is concerned that the State can take steps towards the forfeiture, despite the ability of a person to apply for the release of the impounded or immobilised motor vehicle. We consider that the State should only be able to claim forfeiture once all appeal rights have been exhausted. We would be concerned that a person's property could be forfeited, sold or disposed of and at a later stage the forfeiture is found to be invalid.

Further, the Society re-states its objection to the rights of the owner of a motor vehicle being trampled upon when the owner was not the driver of the motor vehicle.

Personal Property Securities Act 2009 (PPSA)

Due to the time limitations we have not consulted with any industry participants or undertaken wider canvassing of legal practitioners to identify to what extent some of these concerns have already arisen under the existing regime and how in a practical sense financiers are responding.

However we consider that to the extent that there are concerns with the existing regime, these are likely to be of greater concern now that the process has effectively been reversed. The Society considers that consultation with industry participants would be beneficial.

The provisions of s 74B(2) follow the wording that appears in s 99B of the current Act (which is proposed to be omitted as part of this Bill). The distinction here appears to be that under the existing legislation the wording appears in the context of a provision that allows a court to order the forfeiture of a motor vehicle and the extinguishment occurs once the court has made its order. The proposed wording appears in the context of a provision in which the forfeiture results from the driver of a vehicle being found guilty of a second type 1 motor vehicle offence. The principal impact of the proposed provision is that the forfeiture of title and the loss of remedy rights for the secured party are automatic (subject only to a right of relief against forfeiture).

Despite the wording in the section being based on existing provisions, we consider the drafting in s 74B(2)(b) to be unclear. There appear to be two possible interpretations regarding the State's intention in this provision.

The first interpretation (and the one which is the most consistent with the form of wording used) is that upon the motor vehicle becoming the property of the State, any right to enforce a security interest by taking possession is extinguished other than when the enforcement right is being exercised against the State (i.e. the security holder is seeking to take possession of the vehicle from the State). In this sense the words 'against a person other than the State' relate to

the enforcement action of taking possession rather than the source or nature of the contractual right in the security.

If this is the intention, then a better method of expressing this is that the rights and remedies of the security holder to enforce against the motor vehicle (as secured property or collateral) remain enforceable against the motor vehicle despite the State obtaining title, but that the secured party may not exercise rights of seeking possession of the vehicle against a person other than the State (e.g. the former owner as guarantor of a relevant security interest of a leased finance vehicle immediately prior to title in the vehicle passing under s 74B(2)(a)).

However, an alternative interpretation could be that the State is seeking to prevent a secured party from exercising a right to take possession of the vehicle once the provisions of s 74B(1) have been enlivened. In this sense the words 'against a person other than the State' may in fact be intended to describe the source or nature of the right of repossession. While the wording is not clear, this intention could be inferred from the context of the provisions.

In this sense the ability of the secured party to obtain possession of the motor vehicle once s 74B had been triggered appears to rely on the discretionary power of the Commissioner under division 2 (as referenced in s 74B(3)).

Assuming that s 74B(2)(b) is intended to extinguish any rights of the secured party to take possession of the vehicle then a number of issues arise from a secured party's perspective:

1. Given that the impact of s 74B(2)(b) is only to extinguish the security interest to the extent of a right to take possession of the vehicle, what is the residual operation of the security interest held by the secured party?
2. Ensuring the rights of the secured party remain with respect to proceeds of sale arising from any sale or auction of the impounded vehicle. To the extent that any other rights under the security are preserved it may be that these are illusory because most of the substantial rights of the secured party to realise the secured motor vehicle are predicated on the secured party first having obtained possession.
3. Ensuring that the State has obligations with respect to the sale of the motor vehicle and accounting to the secured party for the relevant proceeds of sale.
4. If the State has the right to destroy the vehicle, what remedy would the secured party have against the secured property or the State in such circumstances?

Financiers would be significantly concerned by any provision which would result in the State having a right to forfeit and destroy a motor vehicle which was the subject of security interest under the PPSA without any right to fair compensation. Financiers would also be concerned to know that to the extent that a sale process for impounded cars is to be adopted, the process is completed in a timely manner and in a manner that reflects the processes that financiers themselves would adopt in order to achieve the best price reasonably obtainable for the secured property. To the extent that the provisions punish the driver of the vehicle, they should not punish a financier as the financier has not been involved in the commission of the offences.

Some other issues of a more general nature that would appear to be relevant - irrespective of which of the above interpretations is intended - are:

1. If a motor vehicle is impounded under s 74B, the State should be obligated to provide notice to the secured party. The existence of a security interest over a motor vehicle should be readily ascertainable by the State by a search of the Personal Property Securities Register (PPSR) and it does not appear to be unreasonable that the holder of a security interest would be notified at least by email of the impounding of the vehicle which would in itself in most cases constitute a breach of the underlying security agreement.
2. Will a financing change statement need to be registered on the PPSR (against the State) in accordance with s 34 of the PPSA upon the motor vehicle becoming the property of the State in accordance with the proposed s 74B(2)(a)?
3. Will financiers be advised of any proposal by the State to destroy a vehicle before the vehicle is destroyed?
4. In circumstances where an applicant who is the owner of a motor vehicle seeks relief under Division 2, will that result in the automatic reinstatement of the secured party's rights to take possession of the vehicle? It is foreseeable as a result of the current drafting that the owner of a vehicle might successfully make an application under Division 2 for the return of the vehicle. However if the right to enforce the security interest has been permanently lost under s 74B(2)(b) this would appear to leave the secured party without its usual remedies.

It is expected that financiers will have significant concerns with the proposed provisions and will require clarification on all of these issues. To avoid adverse consequences on motor vehicle financing it is suggested that some additional express protections should be included for financiers whose ordinary business includes motor vehicle financing and leasing.

The automatic removal of secured party rights in s 74B(2) may result in increased incidences of the loss of rights of a secured party and now places the onus on motor vehicle financiers to apply to a court to seek relief against forfeiture under Division 2 in order to preserve their interests. It is also not clear that the provisions adequately deal with the restoration of the secured party's rights should that relief be granted.

Overall, there seems to be an increased potential for adverse impacts on motor vehicle financiers in a process that is automatic. It may be that there are alternative arrangements that could be considered that are not automatic but which are the subject of a deliberate decision-making process.

The Society also raises whether it is the intention of the government to terminate reference to the Parliament of the Commonwealth in relation to forfeiture matters under s 7, *Personal Property Securities (Commonwealth Powers) Act 2009*, and whether this has been done previously regarding the operation of the Act in relation to the PPSA.

6. Clause 16 – insertion of s 74D (impounding motor vehicle for third or subsequent type 2 vehicle related offence)

As we have highlighted above, the Society considers that an impoundment period of 90 days is lengthy, and decisions of this nature should be made by a court exercising a broad judicial discretion. Similarly, the Society considers that this section should only apply if a person has

been found guilty of offences during the relevant period. In this regard, we consider that s 74D(1)(a) should be omitted, as in this circumstance a person would have his or her car impounded purely on the basis of unproven charges.

7. Clause 16 – insertion of new s 74E (impounding motor vehicle for fourth or subsequent type 2 vehicle related offence)

The Society considers that this section should not apply unless the driver has been found guilty for each of the previous offences.

8. Clause 16 – insertion of new s 74F (forfeiture of motor vehicle if driver found guilty of fourth or subsequent type 1 vehicle related offence)

The Society reiterates the concerns expressed with a regime which appears to provide for automatic forfeiture upon a person being found guilty, without an application first being considered by the court. We are also concerned that the vehicle could be dealt with in an adverse way and then at a later stage the forfeiture is successfully appealed. We consider that the State should only be able to claim forfeiture once all appeal rights have been exhausted.

The Society makes the same submissions here as were made in relation to the PPSA with regard to proposed s 74B.

9. Clause 16 – insertion of ss 74H (power to remove and confiscate number plates) and 74J (power to attach immobilising device)

These sections apply if a police officer is empowered to impound a vehicle and decides that it is appropriate in the circumstances for the vehicle to be kept at a place other than a holding yard for the impoundment period. The Society requests clarification on what the appropriate circumstances would be for this to occur.

We note that the current definition of holding yard includes a yard at a police establishment, or a place the commissioner decides is to be a holding yard. Section 74H(1)(b) and 74J(b) empowers a police officer to keep a motor vehicle at a place other than a holding yard for the impoundment period. The insertion of this section appears to delegate the Commissioner's role to any police officer.

10. Clause 16 – insertion of s 74M (vehicle production notices generally)

Proposed s 74M(1) states that the date on the notice for production must be a date that is no later than the first business day occurring five days after the notice is given. As s 74K(4) permits notice to be made orally as well, we consider that s 74M(1) should apply in relation to the written notice given by way of the vehicle production notice.

11. Clause 21 – replacement of s 78 (impounding notice or immobilising notice for vehicle related offence)

The Society is concerned that the new section requiring information to be given in an impounding or immobilising notice no longer includes *prescribed impoundment information* as

defined in s 69. The Society considers that much of the information remains relevant, and should be provided in an impounding or immobilising notice. The new section states the notice must include any other information prescribed under a regulation. The Society seeks clarification as to whether the removed prescribed impoundment information will form part of the new regulation. The Society also queries, if this is the case, whether it is the intention for the new regulation to be created to coincide with the commencement of the amendments contemplated by the Bill.

12. Clause 24 – Insertion of new division 2 (other provisions relating to impounded or immobilised motor vehicles)

The new division provides for three grounds on which a person can apply to the Commissioner for the release of a motor vehicle impounded for an impoundment period under division 1 or 1A, or immobilised under division 1C.

The Society seeks clarification as to whether this division will apply so that a person can apply for the release of a motor vehicle which is subject to forfeiture. We note that ss 74B and 74F state that the sections apply subject to division 2. Further ss 79A(3) and 79C(3) state that an application may be made under this section regardless of whether the motor vehicle may be liable to forfeiture. This does not make it clear whether a person can apply for the release of a motor vehicle which has been forfeited under ss 74B and 74F if the claim to the motor vehicle by the State does not still apply. The wording of the division appears to be focused on the impoundment or immobilisation period, rather than providing relief from forfeiture.

We are unsure why the ground contained in s 79E (application for release of impounded or immobilised motor vehicle on basis that circumstances giving rise to offence have been rectified) does not contain a similar provision stating that an application may be made regardless of whether the motor vehicle is subject to forfeiture or not.

The Society also notes that the example given in s 79B(8) does not appear to relate to the ground of severe financial hardship.

13. Clause 24 – insertion of new s 79L (effect of appeal on decision)

The Society is concerned this section provides that the start of an appeal against a decision of the commissioner does not affect the operation of the decision or prevent the taking of action to implement the decision. The Society considers that this provision could operate unjustly. The commissioner should not be permitted to take action until all appeal processes have been exhausted.

14. Clause 24 – insertion of s 79P – Power to take certain action if breach of condition

We note that s 79P(1)(b) refers to a breach of a condition. It is not clear who determines whether a condition has been breached. Further, where the breach of a condition may be in dispute, it is not clear whether there are mechanisms for lodging an appeal.

15. Clauses 28-45 – omission and amendment of various sections

The Society is concerned that the following sections, relating to applications regarding impoundment have been omitted:

- ss 85, 85A, 87, 87A, 90, 90A, 92, 92A, 96, 96A, 99A and 99B.

It appears that, as a result of these sections being omitted (which refer to applications being taken to court), the impounding, immobilisation and forfeiture of motor vehicles will no longer be required to be taken to court. The Society is particularly alarmed that forfeiture does not require consideration by a court before a vehicle can be forfeited.

16. Clause 68 - amendment of s 117 (release of motor vehicle if driver found not guilty etc)

We note that this section appears to be in conflict with various proposed sections, which indicate that the prescribed impoundment period could still apply. We consider that the vehicle must be released to the owner as soon as reasonable practicable.

17. Clause 70 – insertion of new s 118A (sale of impounded motor vehicle if driver fails to appear)

The Society is concerned that this section automatically forfeits an impounded motor vehicle upon issue of a bench warrant. There may be reasons beyond the control of the accused for failing to appear at a court date. This section shifts the presumption of innocence, and if the driver is later found not guilty of the offence for which they are charged, or shows cause as to why he or she did not appear in court, the vehicle could already have been dealt with in an adverse way. There also may be serious implications for the owner of a vehicle. The Society makes the same submissions here as were made in relation to the PPSA with regard to proposed s 74B.

18. Clause 72 – amendment of s 121 (application of proceeds of sale)

While this section deals with application of proceeds of sale, we highlight that security interest holders may be disadvantaged if a motor vehicle is 'otherwise disposed of', and therefore they may not be entitled to receive proceeds of this disposal. This has been explained in further detail in the section related to the PPSA with regard to s 74B.

19. Clause 73 – insertion of new s 121A (compensation for disposal of motor vehicle if driver found not guilty etc)

The Society is concerned with the potential impacts this section could have on an owner and other persons with an interest in a motor vehicle. It appears to imply that a commissioner can lawfully deal with a motor vehicle (i.e. by selling or otherwise disposing of the vehicle) even if a driver has not been found guilty of a prescribed offence. We are alarmed that if this occurs, the only redress appears to be compensation to be decided by the Minister. We consider that the commissioner should only be allowed to dispose of the motor vehicle after all appeals have been exhausted, and the claim to the forfeited motor vehicle is valid.

We refer to the fundamental legislative principle outlined in s 4(3)(i), *Legislative Standards Act 1992*, which states that legislation should provide for the compulsory acquisition of property only with fair compensation. At the very least, the section should provide for this.

20. Clause 75 – amendment of s 123 (third party protection from forfeiture order)

Proposed s 123(1)(b) relates to a person, other than the defendant, who did not appear at the hearing of an application for a forfeiture order and who has an interest in the motor vehicle forfeited to the State under the order.

The Society is unsure which hearing in relation to a forfeiture order for a motor vehicle is being referred to in the sub-section. We note that applications for forfeiture orders appear to apply only to motorbikes, and not more generally under the proposed amendments.

21. Clause 78 – insertion of s 874 (type 2 vehicle related offences of the same kind committed before and after commencement)

The Society is concerned that provisions relating to impoundment and forfeiture apply to offences committed before the commencement of the Act. We refer to the

fundamental legislative principle outlined in s 4(3)(g), *Legislative Standards Act 1992*, which states that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively. Retrospective application of this transitional provision is inconsistent with principles of natural justice. An accused person should be dealt with according to the law that applies at the time the offence is alleged to have been committed.

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Thank you for providing the Society with the opportunity to comment on this Bill. Given the short time frame which we had to consider this Bill, we would appreciate the opportunity to comment on further drafts.

Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au or Ms Jennifer Roan on (07) 3842 5885 or j.roan@qls.com.au for further information.

Yours faithfully

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