

24 November 2022

Our ref: LP:CrLC

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Bill 2022

Thank you for the opportunity to provide feedback on the Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Bill 2022 (**the Bill**).

This response has been compiled with input from the QLS Criminal Law Committee, whose members have expertise in this area.

QLS acknowledges the important policy intent of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (**the Act**) to reduce the likelihood that offenders who are convicted of sexual or other serious offences against children, will re-offend. However, we consider the Bill as currently drafted may give rise to some unintended consequences. To mitigate these consequences, we make five recommendations.

Recommendations

1. Consideration should be given to a new definition of a 'serious reportable offender' to capture higher risk offenders, to which only certain provisions of the Bill should apply.
2. Clause 40 should be amended to narrow the requirement to comply with new item 15A in sch 2 to 'serious reportable offenders', to ensure its application is relevant to those offenders who pose a risk of reoffending and to mitigate the likelihood of increased technical breaches of the Act.
3. New s 21B (cl 50) should only apply to 'serious reportable offenders'. In the alternative, a threshold criteria should be included to justify the exercise of the power (for example, where there is a 'reasonable suspicion' the reportable offender has committed a further child sexual offence).

Recommendations (cont'd)

4. There should be an express prohibition on the use of any evidence collected during a device inspection under s 21B in the prosecution of an offence, other than a 'prescribed internet offence'.
5. Section 21D should be narrowed to preserve a reportable offender's right to the privilege against self-incrimination in relation to any offence that is not a 'prescribed internet offence'.

We also note the Crime and Corruption Commission (CCC) is currently undertaking a statutory review of the Act to consider how it protects children and manages or mitigates the risks posed by offenders.¹ Consideration should be given to awaiting the CCC's recommendations arising from its review of the Act to ensure legislative amendments are evidence-based.

We make the following comments on the Bill to assist the Community Support and Services Committee in its inquiry.

The need to distinguish high risk or serious reportable offenders

While we support the Bill's underlying policy objective to disrupt recidivism and prevent child sexual offending, we consider that some provisions of the Bill, due to their significant imposition on a reportable offender's rights and the likelihood of increased technical breaches, should be limited in their application to those whom a court has assessed as being at significant risk of reoffending. We refer to evidence given by the Queensland Police Service in the Bill's public briefing that only 55 of the 3,982 current reportable offenders in Queensland have been identified as 'higher risk' in the community, due to their status as a reportable offender who has previously been the subject of an order under division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and has been convicted of a reportable offence under the Act.

We suggest consideration be given to a new definition of a 'serious reportable offender' to capture these higher risk offenders, to which only certain provisions of the Bill should apply.

Amendment of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*

Clause 40 Amendment of sch 2 (Personal details for reportable offenders)

Clause 40 amends sch 2 of the Act to insert (among others) a new item 15A, which requires details of each digital device in the reportable offender's possession, or to which the offender has access, to be reported as a personal detail, including:

- (a) the media access control (MAC) address of the device; and
- (b) details of each software application stored on the device, or that can be accessed using the device, that is designed or used to hide –

¹ Crime and Corruption Commission Queensland, October 2022, Protecting the lives of children and their sexual safety; Review of the Child Protection (offender Reporting and Offender Prohibition Order) Act 2004 (Qld)) available at <<https://www.ccc.qld.gov.au/sites/default/files/Docs/Legislative-Review/CPOROPO-review-Protecting-the-lives-of-children-and-their-sexual-safety-call-for-submissions.pdf>> 3.

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- (i) the identity or location of a person who administers, accesses or uses a network, computer, the device or another digital device; or
- (ii) information stored on a network, computer, the device or another digital device, including, for example, photographs, username and password combinations, and other software applications; or
- (iii) communication, including the exchange of information, between 2 or more persons using a network, computer, the device or another digital device; or
- (iv) the location of a network, computer, the device or another digital device.

Item 15A imposes both complex and broad obligations on a reportable offender to disclose a large amount of information in relation to any digital device to which the reportable offender has access. The Explanatory Notes justify the inclusion of item 15A on the basis it 'addresses technology changes which impact offending behaviours.' However, we are concerned that the breadth and complexity of information required to be provided by all reportable offenders will lead to increased technical breaches for failing to report the required details. This concern is heightened where any failure to report the information may result in a charge under s 50 of the Act, which attracts a maximum penalty of five years imprisonment or 300 penalty units.

We consider the policy objective of the Bill can be better achieved by narrowing the subset of reportable offenders to which these reporting requirements attach, being those who have been assessed according to certain criteria as 'serious reportable offenders'.

Amendment of *Police Powers and Responsibilities Act 2000*

Clause 49 Amendment of s 21A (Power to enter)

Section 21A of the *Police Powers and Responsibilities Act 2000* (PPRA) currently allows a police officer to enter premises where a reportable offender generally resides to verify the reportable offender's personal details. Clause 49 of the Bill expands this power to allow police to enter premises where a reportable offender generally resides to verify the reportable offender's personal details *or* 'to carry out an inspection under section 21B'.

Clause 50 Replacement of s 21B (Power to inspect digital devices)

Section 21B of the PPRA currently provides police officers with the power to 'inspect a digital device in the possession of a reportable offender' if:

- (a) in the last 3 months, the reportable offender has been:
 - (i) released from government detention; or
 - (ii) sentenced to a supervision order; or
- (b) the reportable offender has been convicted of a prescribed internet offence; or
- (c) a magistrate makes a device inspection order for the reportable offender.

Section 21B(1)(b) provides that a 'prescribed internet offence' includes:

- (a) an offence against ss 218A, 228DA, or 228DB of the *Criminal Code Act 1899* (Qld) (**Criminal Code**);

- (b) an offence against ss 474.19, 474.20, 474.22, 474.23, 474.23A, 474.25A, 474.25C, 474.26, 474.27, 474.27AA, or 474.27A of the *Criminal Code Act 1995* (Cth) (**Commonwealth Criminal Code**); or
- (c) any offence under a law of a foreign jurisdiction that, if it had been committed in Queensland, would have constituted an offence of a kind mentioned in paragraph (a) or (b).

Clause 50 of the Bill replaces this provision with a new s 21B. Importantly, new s 21B(1)(b) will trigger the device inspection power in relation to a reportable offender who has been convicted of a 'device inspection offence' (replacing the current definition of a 'prescribed internet offence'). The definition of a 'device inspection offence' includes those offences listed above (under the definition of 'prescribed internet offence'), and is also expanded to include:

- (b) an offence against any of the following provisions of the Criminal Code if the offence was committed using an electronic communication network or digital device –
 - section 218B (Grooming child under 16 years or parent or carer of child under 16 years)
 - section 228B (Making child exploitation material)
 - section 228C (Distributing child exploitation material)
 - section 228D (Possessing child exploitation material)
 - section 229B (Maintaining a sexual relationship with a child)

Further, new s 21B provides police with the power not only to inspect a digital device in the reportable offender's possession, but to 'require the reportable offender to produce, or otherwise make available, for inspection each device in the reportable offender's possession'.

We have four concerns with the provision as currently drafted, and address each one below.

Retrospective application of the power to new triggering offences

First, the definition of a 'device inspection offence' operates retrospectively to capture current reportable offenders who have been convicted of the new triggering offences. Laws that change legal rights and obligations with retrospective application undermine the rule of law and strong argument is required to justify their adverse effect on rights and liberties of affected individuals. The justification provided for the retrospectivity is that 'reportable offenders who have used the internet and digital devices to commit offences against children previously cannot be effectively monitored by police unless there is a level of compliance and inspection available to police during the offender's reportable period under the Act'.² Given reportable offenders are already subject to certain conditions and obligations, we do not consider this to be sufficient justification for the inclusion of the new triggering offences, and their retrospective application.

Additionally, the inclusion of s 229B of the Criminal Code as a 'device inspection offence' will capture some offenders against whom the inspection power is, arguably, unjustified. For example, it will capture an 18 year old male offender who was prosecuted for a consensual sexual relationship with a 15 year old female.

² Explanatory notes, 24.

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Insufficient safeguards to balance limitation on a reportable offender's rights

Second, providing police the power to enter premises where a reportable offender resides to undertake a device inspection, at any time and without warrant, is a significant imposition on a person's fundamental rights and liberties. The exercise of such a power engages two of the rights enshrined in the *Human Rights Act 2019* (Qld); namely, the right to equality before the law (s 15) and the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 25).

The Statement of Compatibility for the Bill provides the purpose of the limitation on these rights is to:

disrupt recidivism and prevent child sexual offending by allowing a police officer to enter the residence of a reportable offender under section 21A of the PPRA for the purpose of conducting a device inspection under section 21B of the PPRA. The limitation also acts to facilitate the investigation of any further offences by scanning each digital device to identify whether there is information or data stored on the device which would constitute a prescribed offence under the CPOROPO Act.³

The Statement of Compatibility further justifies the provision on the basis that device inspections are restricted to occurring four times in a 12 month period. We do not consider this to be a sufficient safeguard to balance both the limitation on a reportable offender's rights and the potential for the power to be used as a fishing exercise or means to intimidate or harass an offender.

There does not appear to be any limitation on the use of evidence gathered during a device inspection for the prosecution of an unrelated offence (i.e. not child sexual offending)

Third, we are concerned about the use of any information gathered by police during a device inspection as evidence of an unrelated offence. As currently drafted, we are unable to ascertain whether any information gathered by police during a device inspection can be used as evidence against the reportable offender in a prosecution for an offence unrelated to child sexual offending. If the policy intent of the provision is to disrupt child sexual offending, we do not consider that anything found by police during a device inspection should be able to be used as evidence of the commission of an unrelated offence (i.e. a drug possession or money laundering offence).

In this context, we also object to the complete erosion of the privilege against self-incrimination in new s 21D (Offence to contravene requirement to produce digital device), which provides it is not a reasonable excuse for the reportable offender to contravene a requirement to produce or otherwise make available a digital device if complying with the requirement would tend to incriminate the person. We consider the privilege against self-incrimination should be retained in relation to any offence that is not a child sexual offence.

Limitation on other people's right to privacy

Finally, where the reportable offender is living in shared accommodation, the power to enter the reportable offender's place of residence at any time and without warrant for the purpose of a device inspection is a significant intrusion on the privacy of others living in the same

³ Statement of Compatibility, 17.

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accommodation. While police cannot inspect a device that does not belong to the reportable offender, search the residence or enter a part of the residence where another person resides, having police (or knowing that police can) enter your place of residence with no warning or warrant may only serve to further isolate reportable offenders and reduce their likelihood of engaging in pro-social relationships.

To mitigate these concerns, we recommend:

- s 21B only apply to 'serious reportable offenders', or in the alternative, that a threshold criteria should be included to justify the exercise of the power (for example, where there is a 'reasonable suspicion' the reportable offender has committed a further child sexual offence);
- an express prohibition on the use of any evidence collected during a device inspection under s 21B in the prosecution of an offence other than a 'prescribed internet offence'; and,
- s 21D be narrowed so as to preserve a reportable offender's right to the privilege against self-incrimination in relation to any offence that is not a 'prescribed internet offence'.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED]

Yours faithfully

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Kara Thomson
President