



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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The Secretary
Inquiry into the Great Barrier Reef
Marine Park and Other Legislation
Amendment Bill 2008

By Email: eca.sen@aph.gov.au

Dear Madam/Sir

Great Barrier Reef Marine Park and Other Legislation Amendment Bill

The Queensland Council for Civil Liberties (“the QCCL”) is a voluntary organisation committed to the implementation of the Universal Declaration of Rights in Australia.

As a purely voluntary organisation the Council is not always able to address all the issues that it would like and those issues that it can address as fully as it would like. The result of this is that this submission simply contains statements of principle as opposed to a detailed analysis of specific clauses of the Bill.

The Council has concerns in relation to the powers which are being given:

- to board and search vessels, aircrafts, vehicles and other platforms
- to conduct a frisk search of a person without obtaining a warrant
- requiring the persons in charge of the vehicle, vessel, aircraft or platform to provide information in the absence of the requirement that that person is suspected of committing an offence
- to seize items¹

Firstly, I express the Council’s concern at the extraordinarily short period given for this enquiry. The Council would have thought that such things would no longer be engaged in by the new Senate.

Boarding and Searching Vessels

The provisions of this legislation fail to balance adequately the rights of a person to their privacy and individual liberty against the needs of enforcement of the legislation.

¹ In preparing these comments the Council has had regard to the fourth report of the Senate Standing Committee for the Scrutiny of Bills – *Entry and Search Provisions in Commonwealth Legislation* 6 April 2000 and the Report of the Victorian Parliament Law Reform Committee – *The Powers of Entry, Search, Seizure and Questioning of Authorised Persons* – May 2002.

In the Council's view legislation should reflect the fact that the powers of inspectors serve different ends and those different ends need to be reflected in different types of powers and safeguards.

The legislation should recognise the distinction between the powers that an inspector should have to:-

1. investigate where a person is possibly exposed to some sanction be it criminal or otherwise.
2. monitor compliance with a regulatory scheme or funding program.
3. deal with emergency situations.

The Council says that:-

1. In first category of case a search warrant issued by judicial officer should be a prerequisite of an entry and search.
2. In the second category where the Authority wants to carry out an audit of compliance with guidelines applied to an organisation we would accept that there is a proper basis for authorising entry under the legislation without consent and without a warrant so long as there is reasonable notice and it is to be carried during business hours. The inspectors need to be required to identify themselves properly and to identify the purposes for which they are conducting the search. Refusal to consent or allow entry would form the basis of an application for a warrant. In these sorts of situations the inspectors would only be allowed to go in and audit and inspect and check. They wouldn't be authorised to seize things or arrest people.
3. We accept that circumstances may arise which make it impractical to obtain a warrant before an effective entry and search can be made. Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer. This deals with the oft-repeated refrain in the explanatory memorandum that it is impracticable in the remote circumstances in which inspectors operate to obtain a warrant. It is the Council's view that these circumstances have to be assessed on a case by case basis and not with a blanket exemption as is found in this legislation. If an inspector determines that it is not practicable to obtain a warrant then they should be required to justify that decision after the event to a Court.

In addition, individuals executing search warrants should be required to report to the Court. The legislation should contain provisions similar to that in Section 21 of the *Search Warrants Act 1985 (NSW)* requiring the person to whom the warrant is issued to furnish a report in writing to the court who

issued it stating whether or not the warrant was executed and setting out the results of the execution or setting out the reasons for why the warrant was not executed.

Body Searching

The power to carry out a frisk search seems to arise simply if a person has been found on board a ship or a vessel, etc. There appears to be no requirement of reasonable suspicion that they have committed an offence, nor is there any requirement for a reasonable suspicion that they pose any threat to anyone. In effect, the legislation provides that simply being on board the ship or vessel will be a justification for a personal search.

The legislation in the form of s498A of the EPBC Act goes further to provide immunity from civil and criminal proceedings, not only for a Commonwealth officer but also for any person acting on their direction if they act in good faith.

In our view the granting of such powers requires a strong justification. We join with the Senate Standing Committee for the Scrutiny of Bills in its 12th Report where the Committee expresses concern at the increasing number of statutes which have given Commonwealth officers and others power to conduct personal searches without a warrant. We observe that in its 12th report at paragraph 3.30, the Committee expressed its concern about the granting of personal search powers without a warrant under the *Environmental Protection and Biodiversity Conservation Act*. To the extent that these amendments simply carry over or extend the powers granted in that legislation the concerns remain the same.

The provisions of this Bill do not go as far as some of the others discussed by that Committee in that they do not provide for strip searches nor do they provide an absolute immunity. However, the point of principle remains.

The Council is concerned about the safety of officers from potential assault or injury. However, if these powers are to be granted then it is incumbent upon the Government to provide detailed justification for doing so. The short remarks in the explanatory memorandum about these powers being to protect officers are insufficient to justify the granting of these powers which constitute a significant violation of an individual's personal liberty.

It is the Council's view that there may be circumstances in which good faith immunities may be granted. However, in the context in which these powers are to be exercised and given the lack of any apparent restraint on these powers it is our view that it is not an appropriate course to grant any immunity. We are particularly concerned about the extension of the immunity to persons other than Commonwealth officers.

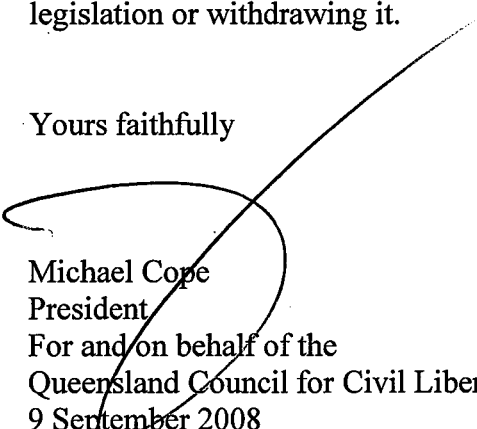
We submit that it is time the Commonwealth gave serious consideration to the introduction of a public interest monitor ("PIM") similar to that which has been created in Queensland. The PIM would not only appear in relation to applications for search warrants before the courts and tribunals. It also could be tasked with reviewing the operation of provisions similar to that under consideration to ensure that these powers are not being abused.

Strict Liability and Reversal of Onus of proof

The Council has a longstanding concern about the increasing reversal of the onus of proof and the creation of strict liability offences. The comments in the exmemo regarding difficulty of proof could apply to most offences. But those difficulties of proof reflect the underlying principles of our legal system that the state must prove guilt and that the person had a blameworthy state of mind. Liability should not attach simply because the conduct is seen to have adverse consequences for society. That would be a return to the criminal law of centuries ago which system undermines individual liberty and choice

We look forward to the Government providing detailed justification for this legislation or withdrawing it.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
9 September 2008