

Submission: Police powers for crowd control and related matters

The ability of people to move and associate freely lies at the heart of a society's democratic identity. In every society there is a tension between the desire of people to live free from intrusive intervention of the state in ordering their lives, and the interest of the many to be free from the inconvenience the exercise of these rights might entail.

The extent of move-on powers and the ability of the police and other government agents to control a person's movements go right to the heart of this balance. Complete and unimpinged freedom to move without regulation or constraint is a precursor to anarchy. Pervasive and overbearing move-on powers will ultimately compromise the democratic freedoms on which our society is founded. It is no coincidence that those regimes that are the most overbearing in the ordering of their citizen's lives, and the most restrictive on their ability to move freely, are those regimes that are commonly held to be the most oppressive and the least democratic.

It is the submission of *Civil Liberties Australia* that current laws in the ACT governing the ability of citizens to move and associate freely must provide for a balance between the person's civil and political rights and the good order of the state. Any alteration to the laws, other than to clarify or simplify them, is wholly unnecessary. A tightening of personal restrictions would be founded less in the public interest, and more in populist extremism.

As move-on powers and a person's inherent right to freedom of movement are intertwined, this submission will canvas the law in its current form, and its impact on the right to free movement and association. The submission will also consider the implications the various law reform proposals in this area might have on these freedoms.

In considering police powers relating to crowd control in general, this submission will also consider police powers in relation to 'move-on' powers and police powers to evacuate people in the event of an emergency. These issues fall under 'other relevant matters' pursuant to section (d) of the terms of reference of this inquiry – they deal with the ability of police to direct the movements of individuals, collections of individuals, or crowds in other relevant circumstances.

The basis of a right to freedom of movement and association in theory and in law

In considering the pros and cons of crowd control and move-on powers, it is necessary to consider the legal background in which any changed powers would operate. The law has a long and evolved tradition of recognising certain rights which underpin our democracy and freedom. We examine these rights to set the context in which the debate around police powers takes place, and to help appreciate the implications that such powers might have to our democratic way of life.

Australia, like most civilised societies, recognises certain rights underpinning our democracy and freedom. The first US Congress asserted that “we hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that amongst these are life, liberty and the pursuit of happiness.” Article 1 of the Bill of Rights in the US Constitution provides that some of these inalienable rights included restricting the US Congress making laws “abridging the freedom of speech...or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances”.

The US founding fathers were not the only learned people to consider the right of people to peaceably assemble to be self-evident and unalienable. In 1948 the General Assembly of the UN, including Australia, declared that

“man’s disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world where human beings shall enjoy freedom of speech and belief and freedom from fear from want has been proclaimed as the highest aspiration of the common people...”

And the same body proclaimed that “as a common standard of achievement for all people and all nations...:

Article 3 – Everyone has a right to life, liberty, and security of person...

Article 13(1) – Everyone has the right to freedom of movement and residence within the borders of each state...

Article 20(1) – Everyone has the right to freedom of peaceful assembly and association.

In Australia the primacy of how these rights underpin our democracy are recognised as being cemented in the Australian Constitution, as was noted by the High Court in *Kruger v The Commonwealth* (1997) 190 CLR 1 when it found an implied constitutional right to freedom of movement and association. Justice Toohey noted with approval Canadian precedents that described freedom of association as “one of the most fundamental rights in a free society.” Justice Gaudron decided that:

“It is clear, and it has been so held, that the fundamental elements of the system of government mandated by the Constitution require that there be freedom of political communication between citizens and their elected representatives and also between citizen and citizen. However, just as communication would be impossible if ‘each person was an island’ [*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72], so too is it substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom to associate necessarily entails a freedom of movement.”

Society's and the law's tradition of the right of freedom and association and movement is well understood and entrenched. Drawing on this tradition the members of the ACT Legislative Assembly wisely, in our opinion, enacted the *Human Rights Act 2004* (ACT). For the purposes of this inquiry it contains the following relevant sections:

“Section 13 – Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence within the ACT

Section 15 –

- (1) Everyone has the right of freedom of assembly*
- (2) Everyone has the right of freedom of association*

Section 16-

- (1) Everyone has the right to hold opinions without interference*
- (2) Everyone has the right to freedom of expression. This includes the freedom to seek, receive and impart information and ideas of all kind, regardless of borders, whether orally, in writing or in print, by way of art, or in any other way chosen by him or her*

Section 18(2) – No one may be deprived of liberty, except on the grounds and in accordance with the procedures prescribed by law.”

Section 28 of the Human Rights Act is also important in the context of this inquiry. It provides that “Human Rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.” The freedoms

mentioned above are not absolute, so the legitimacy or otherwise of any future move-on powers will invariably turn on whether they are 'demonstrably justified.' The test applied by the High Court as to the extent of constitutionally implied rights is useful in this context. The Court accepted in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 that for a restriction on these freedoms to be valid it must be "directed to a legitimate end" and "reasonably appropriate and adapted" to meet that end.

Protests and pickets

Traditionally, common law entrenched the freedom to protest through the reluctance of judges to construe the law in a way curtailing individual liberty and freedom unless expressly provided for in statute: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J. As such, there was no positive right to freedom, rather it was a residue right. In *Hubbard v Pitt* [1976] 1 QB 142 at 178-9 Lord Justice Denning commented on the common law's gradual evolution and recognition of a picket that, albeit a residue as opposed to positive right:

...These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done... our history is full of warnings against suppression of these rights... As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited...

Current powers

At present there is no single law or piece of legislation primarily regulating pickets and protests. Rather, such activities are affected by a diversity of provisions spread across various pieces of legislation and the common law.

It is clear there are ample statutory provisions to give police the power to arrest and the courts the power to convict and sentence people who have abused their right to protest, and have engaged in violent or intimidating behaviour, damaged public or private property, or otherwise acted in a menacing or disorderly fashion. Some examples include:

- Any person who in the course of a protest interferes with someone's person, or causes apprehension of such interference, is guilty of assault - section 26 *Crimes Act 1900* (ACT).
- Any person who fights in a public place is guilty of an offence – section 391 *Crimes Act*
- Any person who behaves in a riotous, offensive, insulting or indecent manner commits an offence – Section 392 *Crimes Act*
- Any person who has destroyed or damaged property is guilty of an offence – section 116 *Crimes Act*
- Any person who defaces a premises commits an offence – section 119 *Crimes Act*
- Any person who contravenes a direction given by a police officer commits an offence – section 30 *Road Transport (Traffic and Safety Management) Act 1999*.

The police have the power to arrest people in relation to any of these offences where they believe on reasonable grounds that a person is committing or has committed the offence: section 212 *Crimes Act 1900*. Moreover, the police have the power to arrest a person before any of the above offences are committed if they believe on reasonable grounds that a person is attempting or conspiring to commit any of these offences: sections 44-48 *Criminal Code 2002*. For example, if police have reasonable grounds to believe that a person has conspired with others at a protest and that they have conspired to damage property at the protest, but they have not yet caused such damage, they may arrest those people on suspicion of conspiracy.

Where damage to private property or private economic interests has occurred, aggrieved parties have numerous remedies in tort. Some available actions include:

- Trespass to property
- Private nuisance
- Interference with contract
- Negligent infliction of economic harm
- Negligent infliction of damage to property
- Intimidation
- Conspiracy to inflict economic harm

These actions in tort may, in some circumstances, include an action seeking an injunction to prevent the actions of others before the feared action takes place. In addition, there may be remedies available to private parties damaged by protests under the *Trade Practices Act 1975* (Cth).

We reinforce Lord Justice Denning's poignant reminder that "our history is full of warnings against suppression of these rights". We encourage the committee to be cognisant of this important point whilst making its deliberations.

Additional police powers for protests

Given that the police have ample power to arrest and prosecute people for breaches of the law at protests, the most obvious temptation is to give police preventative or "move-on" powers in relation to protests. At present, the ACT's move-on powers do not extend to protests and pickets: Section 4(5) *Crime Prevention Powers Act 1998* (see page XX).

However, extending police powers would be an additional intrusion on a citizen's liberties and freedoms. Advocates of change should bear the burden of showing a need for such change, and demonstrate a clear and unambiguous threat to the physical safety and wellbeing of the community. No lesser proof will do to fundamentally alter the law – and the history of the law – in such a basically important area of governance of civil society. We remind the committee that, in order to justify a law curtailing a person's civil and political rights under the ACT *Human Rights Act 2004*, section 28 of that Act requires that the law must be "demonstrably justified in a free and democratic society". And to justify curtailing a person's implied constitutional right to freedom of movement and association, that law must be "directed to a legitimate end" and be "reasonably appropriate and adapted" to meet that end: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

CLA believes strongly that a law directly impacting on a person's civil and political rights is not justified if it merely flows from 'noise and heat' generated by an extremist minority, or if it is to placate people's heightened sensibilities. An explanatory brochure published by the NSW Attorney-General's Department in 1981 titled "Protection on the Streets - Legal Power Controlling Public Misbehavior" encapsulated this point:

"we should all be able to tolerate argument, criticism or foolish behavior from others; but only up to a certain point. That is, we have to put up with some people who may be rude or uncivil. If the police were able to arrest everyone who engaged in simple rudeness or lack of civility, most of us would be in Court at one time or another."

There is no evidence to suggest that the behaviour of people attending protests in the ACT in the past has threatened the physical safety and wellbeing of the community. There is no indication this situation will change in future. Consequently, no further additional laws governing protests are justified.

Furthermore, we believe that police powers at present are sufficient, which makes any move-on powers unnecessary. The police already have move-one powers with respect to roads for 'temporary obstructions' or a 'temporary purpose'. Section 30 of the *Roads Transport (Safety and Traffic Management) Act 1999* provides that:

Road or road related area may be closed temporarily to traffic

30(1) *A police officer may—*

- (a) close a road or road related area to traffic during a temporary obstruction or danger to traffic or for any temporary purpose; and*
 - (b) give directions to prevent the traffic of any vehicles, people or animals in or on a road or road related area closed to traffic under paragraph (a) or under the authority of another Act.*
- (2) A person must not, without reasonable excuse, contravene a direction of a police officer under this section.*
Maximum penalty: 20 penalty units.

We are concerned about the inherently discretionary nature of any extended move-on powers which might be tailored for protests (see below discussion on move-on powers and arguments about police discretion, p. xx).

We certainly object to move-on powers that would enable police to move on entire groups. It would be entirely unacceptable to give police the power to move on entire groups because of the actions of an individual within the group. To move on a group of people simply because some individuals who are members of that group have misbehaved, or might misbehave, is tantamount to 'guilt by association' or collective punishment. It would be inherently wrong and fundamentally unjust for a person to be deprived of their rights and freedoms on the basis that people adjacent to them misbehave, when they themselves have not misbehaved. Those who have not not misbehaved have no legal obligation for, nor control over, people near them.

Finally, given the generally good behaviour of the overwhelming majority of people who have engaged in protests in Canberra historically and recently, it may be concluded that

the current police powers of arrest for offences committed during protests act as a sufficient deterrent to undesirable behaviour.

RECOMMENDATION: That the committee recognise that there are sufficient laws presently in place to regulate the behaviour of persons attending protests. That the committee recognise that there is no evidence giving rise to any need or imperative to create further laws regulating protests. And that being the case, any further regulation would be an unnecessary and excessive curtailment of a person's right to free association and movement and right to protest.

Should the committee consider it appropriate to create specific legislation in relation to protest and pickets, we recommend the following as a suitable first draft. Please note that we believe, in the community's interest, the emphasis should be on the rights of the individual and the community grouping(s), not on the rights of police, in such circumstances:

"Notwithstanding any other law it shall be lawful for one or more persons to go to, to be in, and to assemble in any public place and to remain in a position of his or her or their choice in that place in every case where the purpose of such person or persons has been made to appear to be to publicise or to promote or to resist or to agitate upon the merits of an industrial claim or policy or a political claim or policy but it shall not be lawful for any such person or persons then and there in connection with that purpose or arising from the same to do any act of his or her or their initiative which breaches the peace other than under unlawful provocation".

We suggest the committee specifically rejects any semblance of the relevant American protest and picket 'move-on' provisions, under which pickets are forced to march around and around in circles to avoid police intervention in otherwise lawful, democratic and peaceful expression of their personal and group opinions.

Regulation of crowds, other than at protests

The *Major Events Security Act 2000* is a further source of police powers governing crowd control at 'major events'. The Executive may declare an event to be a 'major event' per section 4(1) of the Act. In deciding whether or not to make an event a 'major event', the Executive is bound to have regard to the following considerations:

Section 4

- (2) *(a) the nature of the event; and*
(b) the number and kind of people expected to attend the event; and
(c) any other relevant matter.
- (3) *The Executive may make a declaration only if satisfied that its making is reasonable and necessary—*
 - (a) for the safety of people attending the event; and*
 - (b) for the avoidance of disruptions to the event.*

It should be noted that section 4(4) provides that “the executive must not declare a public protest or demonstration to be a major event”.

Once an event is declared a major event, police may exercise greater powers in relation to the event than ordinarily. Specifically, they acquire powers to stop and search WITHOUT reasonable grounds, force people NOT suspected of a crime to disclose their name, and acquire move-on powers. We hold concerns about some of these provisions and will deal with each provision in turn.

Searches without reasonable cause

Section 7 of the *Major Events Security Act 2000* provides that:

- (1) *The Executive may state in a declaration that any of the following conditions of entry apply to the major event venue:*
 - (a) that a person seeking to enter or in the venue must, if asked by a police officer, permit a search to be made of his or her personal property;*
 - (b) that a person seeking to enter or in the venue must, if asked by a police officer, permit a frisk search to be made of the person.*

Sections 9 and 10 of the Act provide as follows:

9) *Search of personal property*

- (1) *A police officer may ask a person seeking to enter or in a major event venue to permit a search to be made of his or her personal property.*
- (2) *The person must not, without reasonable excuse, refuse to permit a police officer to search his or her personal property.*
Maximum penalty: 10 penalty units.
- (3) *This section applies to the major event venue only if the declaration of the event to be held at the venue states that it is a condition of entry to the venue that a person seeking to enter or in the venue must, if asked by a police officer, permit a search to be made of his or her personal property.*

10) *Frisk search of people*

(1) *A police officer may ask a person seeking to enter or in a major event venue to permit a frisk search of the person.*

(2) *The person must not, without reasonable excuse, refuse to permit a police officer to frisk search the person.*

Maximum penalty: 10 penalty units.

(3) *This section applies to the major event venue only if the declaration of the event to be held at the venue states that it is a condition of entry to the venue that a person seeking to enter or in the venue must, if asked by a police officer, permit a frisk search to be made.*

The exercise of these powers is limited only in that a prior declaration must be made that an event is a major event, and that it is a condition of entry that a person submits to such searches.

We note that this power is more intrusive than ordinary police powers of search. Ordinarily police can only conduct a frisk search if they first have reasonable grounds to suspect someone is committing or has committed an offence (section 212 *Crimes Act 1900*) AND secondly the police officer believes it reasonably prudent to conduct a search to find seizable items (section 223(1) *Crimes Act 1900*).

The relevant section of the *Major Events security Act 2000* provides that a police officer may use their power to exercise these searches. The word 'may' in this context means that such searches are discretionary: see section 146(1) *Legislation Act 2001*. The ability to exercise this without any guidelines or basis on when to use or not use this power would *prima facie* appear to contravene section 18(1) of the *Human Rights Act 2004* which provides that "everyone has the right to liberty and security of person..."

Searching a person where that person has provided no reasonable grounds for suspecting they have done anything wrong, or are about to do anything wrong, is an arbitrary interference with someone's security of their person.

However, we acknowledge that this provision aims to provide for security of persons attending major events in relation to preventing terrorism incidents or avoiding spectators taking missiles into a sporting event to lob them on to the sporting field. In this sense, these provisions may exist to protect the physical security of people attending major events. Such provisions might be justified as necessary under section

28 of the *Human Rights Act*...but we believe the provisions in the current form are excessive to achieve this purpose.

Arguably the powers in their current form give police the power to search even when it is not necessary for public security. For example, where a person entering an event is known to police for drug offences, they may search him to find evidence of drugs or related materials. Such a search would clearly not be within the contemplated purpose of the Act, as drug possession has nothing to do with the physical safety of people attending the event.

To conduct such a search without reasonable grounds would ordinarily amount to arbitrary interference with a person. Nonetheless, the generality of the search power under the *Major Events Security Act 2000* would permit such a search. Thus the law in its present form is excessively intrusive, and unjustifiably infringes on a person's civil liberties.

We submit that the provisions relating to searches should be amended to clearly specify that they are only to be used in the furtherance of public security, and searches conducted for any other purpose under this particular Act are not permitted. Moreover, any evidence seized that is collateral or unrelated to the reason for a search under the relevant Act should be inadmissible in a court of law. To allow otherwise simply amounts to a backdoor lowering of the appropriate standards of reasonableness generally required for searches and seizures.

RECOMMENDATION: That amendments be made to those sections of the *Major Events Security Act 2000* concerning police powers to search to make it clear that these powers are only to be used in the furtherance of public security, and searches for any other purpose under this particular Act are not permitted, and evidence seized that is collateral or unrelated to this purpose as a result of a search under this Act is to be inadmissible in a court of law.

Powers requiring people to give their name to the police

Section 12 of the *Major Events Security Act 2000* provides that:

12)(1) A police officer may ask a person seeking to enter a major event venue to provide his or her name or address (or both).

- (2) *The person must not, without reasonable excuse—*
 (a) *refuse to comply with the request; or*
 (b) *give a name or address that is false in a material particular.*
Maximum penalty: 5 penalty units.

Why should a person who is not suspected of doing anything wrong be required to give their name to police, as this section provides for? We do not see the necessity of this provision. People do not have to give their names to the police when they go shopping, or attend the movies, so why at the time of 'seeking to enter a major event'?

Providing a name provides no practical or timely assistance to the ability of the police to protect people attending major events. It is one thing to require a person to give their name to police when the police suspect they have committed an offence or have breached a condition of entry. But to require someone to give their name for no apparent reason, as the Act requires, seems to be an arbitrary and excessive intrusion on a person's privacy.

Given the presumption for privacy under section 12(a) of the *Human Rights Act 2004*, this presumption should only be displaced by reasonable cause. If a person is not suspected of committing an offence, it is not business of the police that a particular person is attending an event? Why do police need a name? Practically, any terrorist would be able to give a reasonable-sounding name and contact details.

It is worth noting that the ordinary power of police to require people to disclose their name only arises when police reasonably believe that person has committed an offence: see section 211(1) of the *Crimes Act 1900*.

RECOMMENDATION: That sub-section (1) and (2) of section 12 of the *Major Events Security Act 2000* be deleted.

Directions to leave a venue

Under section 13 of the *Major Events Security Act 2000* police have the power to evict a person from an event if they commit an offence against ANY law of the Territory. Although certain types of behaviour and offences would give police legitimate cause to evict someone from an event, the scope of this provision seems way too broad and far-

reaching. Police have the power to evict for ANY Territory offence. That means if someone litters, they may be ejected. If someone smokes in a prohibited area, they may be ejected. Such scope for ejection is extensively too far-reaching, and is conducive to arbitrary interpretation – which is not a sound basis for good public order.

The basic police powers of arrest are subject to a number of conditions which act to prevent police arresting someone when they could just as easily proceed by summons: section 212(1) *Crimes Act 1900*. We propose that similar considerations that determine whether a person should be arrested or proceeded against by summons should be used to determine whether or not a person should be ejected from a major event for committing an offence against a law of the Territory. Namely, a person should only be ejected from a major event if police believe on reasonable grounds that one or more of the following will be achieved:

- (i) preventing a repetition or continuation of the offence or the commission of another offence;
- (ii) preventing the concealment, loss or destruction of evidence relating to the offence;
- (iii) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
- (iv) preventing the fabrication of evidence in respect of the offence;
- (v) preserving the safety or welfare of the person.

RECOMMENDATION: That the committee finds that the grounds under which police may eject a person from a major event are excessively wide and onerous, and limitations should be placed on the scope of the ejecting power. Also, that there should be a limit on the capacity to prosecute for collateral information arising from a search at a major event.

Other relevant matters - 'Move-on' powers?

We take a move-on power to be a power afforded to police and government officials (e.g. firefighters) by operation of law, empowering them in certain circumstances to use their discretion to direct a person to undertake certain movements including relocation, under pain of committing an offence if the directive is not complied with.

The current legal situation in the ACT with respect to move-on powers

At present, police hold general move-one powers pursuant to section 4 of the *Crimes Prevention Act 1998*.

- (4) (1) *This section applies if there are reasonable grounds for a police officer to believe that a person in a public place has engaged, or is likely to engage, in violent conduct in that place.*
- (2) *The police officer may direct the person to leave the vicinity of the public place.*
- (3) *The direction may be made subject to either or both of the following conditions:*
 - (a) *if the police officer has reasonable grounds for believing that the person is likely to engage in violent conduct while, or immediately after, leaving the vicinity by a particular route—that the person leave the vicinity by a different route (whether the route is stated or unstated);*
 - (b) *that the person not return to the vicinity for a stated period of not longer than 6 hours.*
- (4) *A person must not, without reasonable excuse, contravene a direction (including a condition of a direction) given to the person under subsection (2). Maximum penalty: 2 penalty units.*
- (5) *This section does not apply in relation to a person who, whether in the company of other people or not, is—*
 - (a) *picketing a place of employment; or*
 - (b) *demonstrating or protesting about a particular issue; or*
 - (c) *speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular issue.*

Civil Liberties Australia notes that the current move-on powers are not consistent with the move-on powers recommended to the Legislative Assembly by the ACT Community Law Reform Commission in 1996. That report recommended that:

“In addition, strictly in aid of the duty to avert a possible breach of the peace, a formal power to separate people should be given to the police. The Committee does not envisage this as a power to direct a person to leave a place. It is seen principally as a power to enable the police to defuse a potential breach of the peace by disentangling protagonists and letting potentially explosive situations cool down. In this respect, it is similar to the power of a referee to send protagonists ‘to their corner’ while the rights and wrongs of the situation are determined. The direction to separate:

- should only be available in relation to a situation involving a breach of the peace; and
- should only encompass a movement by a person relative to another person.”

Clearly the move-on powers enacted went further. The move-on power includes a power to direct a person to leave a space determined by the police officer, for a period of

six hours. The purpose of the Act appears to be to defuse potentially violent altercations. This, as the Law Reform Committee suggested, can be achieved by issuing a directive for one person to move relative to the position of another.

This issue was considered by the European Court of Human Rights when it considered the decision of the English Court of Appeal in *McLeod v Commissioner of Police of the Metropolis* [1994] All ER 553. This case dealt with the power of British police to prevent a breach of the peace. The court held that the power did exist and was consistent with Britain's various obligations and the human and civil and political rights treaties that it had adopted. It did find, however, that police could only exercise this power in a manner proportionate with the danger of the potential breach of the peace. That is to say, police are only entitled to infringe on a person's liberties to the minimum necessary extent to avert the breach of the peace.

This balance is not present in the ACT legislation. Consider the following hypothetical: Two men are having a verbal altercation in a Canberra nightclub. Police have reason to believe it is about to lead to violence, and order both men to leave the club for six hours. It is immediately apparent to all that one of the parties is distressed by the whole incident and decides to go home. At this point there is no further need for the other party to stay away from the night club. Nonetheless, if he comes back within six hours he has committed an offence. The direction clearly becomes unnecessary and superfluous to achieving its object of preventing a fight. If, on the other hand, police had ordered the parties not to go near each other, the same outcome could be achieved, and the other party could return to the nightclub without risking a further breach of the peace.

RECOMMENDATION: That the *Crimes Prevention Powers Act 1998* be amended so as the powers of police are consistent with the recommendation of the ACT Law Reform Committee's Report into street offences, namely that police should only have the power to direct the movement of a person relative to another person.

The nature of general move-on powers and the dangers associated with them

It is important to note that such a power, if exercise unchecked, would be an immensely undemocratic and pervasive. When exercised by government officials, the state essentially is interfering with a person's freedom in a way that would ordinarily be

inconsistent with concepts of natural justice; ordinarily before the State embarks on a course of action that prejudices a person's rights the circumstances are reviewed independently by people detached from the circumstances giving rise to that course of action, and that person is given a reasonable opportunity to present his case. Excessive move-on power effectively amounts to a 'do as I say' approach to policing and the exercise of power, which when exercised by lower ranking public officials, creates a potential for abuse and injustice.

Move-on powers are inherently discretionary and arbitrary. As Simon Bronitt and Bernadette McSherry point out:

“the discretionary approach to peace-keeping may be contrasted with the strict approach taken by the courts to the powers of arrest, detention, search and seizure, where the courts have demonstrated considerable vigilance in safeguarding the interests of personal liberty and private property¹ [see *Williams v The Queen* (1986) 161 CLR 27 and *Coco v The Queen* (1994) 179 CLR 278]

Mostly, incidents of the exercise of these discretionary powers are never known to courts or review bodies. If a person feels they have been wronged by the unfair exercise of these powers and wants to bring it to a court for appropriate redress, they have to instigate costly actions in tort for trespass against the person. This situation is the opposite of the normal use of police powers: their actions and directives usually entail judicial proceedings, during which the court will become aware of decisions made by police in the exercise of their powers in the circumstances of the case.

Moreover, it is important to note that move-on powers can be coercive and punitive. As M Feely points out, the *process itself* becomes the punishment.² Police serve a very important function in our society, often under trying circumstances. But Law Reports are peppered with countless illustrations of inappropriate use of powers by police; in the heat of the moment, with tensions raised, police do use their powers imprudently.

Often also, police come in contact with certain individuals or groups of people more frequently than with other members of the community; these people become 'known to police'. It is certainly not uncommon for certain police officers to form an unfavourable

¹ Simon Bronitt and Bernadette Mcsherry, **Principles of Criminal Law**, (2001: LBC Information services, Australia) page 780.

² M Feely, *The Process is the Punishment* (1979: Russell Sage Foundation, New York).

view of these people, and as such police would have a greater propensity to use their move-on powers with respect to these people. For these people to be frequently ordered to 'move-on' is certainly a curtailment of their liberty, and would be punitive in nature. A situation would exist where police would effectively become 'judge, jury and executioner'.

The need for move-on powers

Civil Liberties Australia recognises that a person's right to freedom of movement is not absolute and, as the High Court notes in *Lange v ABC*, there are occasions where it is legitimate for laws to be made to restrict this freedom.

As far as the law relates to police move-on powers and public disorder, it is necessary to be cognisant of the extent and rates of public disorder. We remind the Committee of the observations of the ACT Community Law Reform Committee in its 1997 report on street offences. The Commission noted that:

“In late 1992 and early 1993 the people of Canberra were told, in a series of media reports, that the barbarians were at the gates of their city and the streets were unsafe. The most commonly proffered solution at that time was a return to the policy of civility and a fundamental shift of power from the judiciary back to the police, whereby the police would become, once again, the arbiters of public standards of behaviour. Some writers paint a dim future dominated by fear; a future that seems a long way off from Canberra even though it is present to some degree in a number of American cities. Media reports of the impending collapse of the city turned out to be greatly exaggerated. Street offences remain at a comparatively low level.”³

The Committee went on to note that in the four years between 1994 and 1997, less than 1 percent of crimes reported to police were street crimes.⁴

In the financial year 2002-03, the community policing section of the AFP recorded a 14% reduction in offences 'against good order'. Comparatively speaking, the ACT has one of the lowest rates of crime against good order in the country, and it is trending downwards.

³ ACT Community Law reform Committee, “**Street Offences**” Report No. 15, tabled in the ACT Legislative Assembly on 25 September 1997.

⁴ ACT Community Law reform Committee, “**Street Offences**” Report No. 15, tabled in the ACT Legislative Assembly on 25 September 1997.

It is hard to see any urgent imperative for amending the law to give police extra powers to address a problem that, on the available statistical evidence, does not exist.

RECOMMENDATIONS:

- That the scope for police to move-on people not be increased.
- That the *Crimes Prevention Powers Act 1998* be amended to require a police officer to take note of the circumstances surrounding every instance in which they exercise powers under that Act; and
- that a report (including statistics/occasions) of annual use of 'move-on' provisions be a part of the Commissioner's annual report to the Minister for Police and Parliament.

Forced evacuations in emergencies

In the ACT there are extensive powers given to the emergency services for forced evacuation in the event of a major emergency. The bulk of these powers appear reasonable, but we are concerned about the absence of a right for a person to decide to protect their own property – and not be subject to police 'move-on' directives. Section 163 of the *Emergencies Act 2004* provides the following powers to the Territory Controller:

(1) This section applies if a declaration of a state of emergency is in force.

(2) For the management of the declared state of emergency, the Territory Controller may—

- (a) direct the movement of people, animals or vehicles within, into or around the area to which the state of emergency applies (the emergency area); and*
- (b) give directions regulating or prohibiting the movement of people, animals or vehicles within, into or around the emergency area; and*
- (c) direct, in writing, the owner of property in or near the emergency area to place the property under the control, or at the disposal, of the Territory Controller; and*
- (d) take possession of any premises, animal substance or thing in or near the emergency area; or*
- (e) excavate land, form tunnels or construct earthworks, barriers or temporary structures in or near the emergency area; and*
- (f) control, use, close off or block a drainage facility in or near the emergency area; and*
- (g) maintain, restore or prevent disruption of essential services; and*
- (h) do anything else that the chief officer of an emergency service may do under section 34 (General powers of chief officers).*

Note A chief officer has a number of general powers including to enter land, shut off a power or water supply, demolish or destroy a structure or remove or destroy an animal.

Under these provisions, there is no right for a resident to stay and protect their own property in a bushfire, and a person may be forcibly evacuated from their property against their will.

Should there be forced evacuations of people wanting to defend their own home?

The McLeod report into the 2003 Canberra bushfires noted that:

“submissions reflected general support for the concept that residents should stay with their homes as long as they are well prepared and able to do so. Residents felt they had the right to make their own informed decisions about evacuation and should not be forced or be threatened with arrest if they refuse to leave..... Some residents reported in submissions that they were ordered to evacuate just as they managed to bring the fires burning around their homes under control . They felt that evacuation prevented them from responding to the fires and they believed fewer houses would have been lost had people stayed to defend their property.”⁵

The 2003 House of Representative Parliamentary Committee Report into Recent Australian Bushfires noted the following:

..... in the event of a bushfire, the chance of survival is greater for those who attend their house because evacuation, particularly last minute, bears greater risk to life than remaining at home..... [a]s un-attendance can lead to a loss of property, it has been suggested to the committee that the Victorian approach to evacuation be adopted nationally. This involves the prevention of forced evacuation of a person from a land or building if they have a pecuniary interest in it.⁶

The Australasian Fires Authorities Council in their position paper on evacuation provide that: “Where legislation exists that enables forced evacuation, a protocol should be developed between the relevant authorities to allow people having a pecuniary interest in property involved to only be forcibly removed during a bushfire when they are *in imminent danger of death or serious injury*.”

Section 31(4) of the *Country Fire Authority Act 1958* (Vic) provides that:

(Nothing in this or the last preceding section shall authorise the removal from any land, building or premises of any person having any pecuniary interest therein or in any goods or valuables whatsoever thereon.

We agree with the Victorian approach and consider it to be best practice.

⁵ Ron McLeod AM, “**Inquiry into the Operational Response to the January 2003 Bushfires in the ACT**”, page 74.

⁶ House of Representatives select Committee, “**A Nation Charred: Inquiry into the Recent Australian Bushfires**”, (October 2003) page 269.

As the adage goes, 'a man's home is his castle'. Everyone's worldly possessions and memories are involved in the home, and its loss can have a devastating and catastrophic effect. As such, the decision whether to defend one's home/property or leave in the event of a major emergency such as bushfire is a deeply personal choice, and should reside with the homeowner/property owner.

The reality is that, for all their best efforts, the emergency services can give no guarantee that they can be there to defend every home. We believe it is deeply unfair that uniformed authorities can tell someone not to protect their home, when uniformed authorities are in no position to undertake to protect that home.

RECCOMENDATION: That the *Emergencies Act 2004* should be amended to make it consistent with the Victorian model for evacuations and provide that a person may not be forcibly evacuated from any land, building or premises where that person has a pecuniary interest in that land or goods and valuables thereon.

The burden required for fire and other authorities to forcibly evacuate

The provisions in the ACT *Emergencies Act* are not consistent with the recommendations of the Australasian Fire Authorities Council. The burden required for evacuation is contained in the operative phrase in the ACT legislation is "for the management of the declared state of emergency the territory controller may..." This is far short of AFAC suggested burden of "imminent danger of death or serious injury." We believe the later burden to be the more appropriate.

Police involvement in fire evacuations

Police involvement in fire evacuations should be kept to a minimum, and they should only play a role in enforcing decisions to evacuate, not in making them. The House of Representatives Select Committee into Bushfires noted that:

The Australasian Fire Authorities Council..... believes that authority to evacuate should reside with the lead fire combat agency.....⁷

⁷ House of Representatives select Committee, "A Nation Charred: Inquiry into the Recent Australian Bushfires", (October 2003) page 270.

The McLeod report noted that:

A number of criticisms were made about the action of police in forcing evacuation by using the threat of arrest. Submissions claimed that police are inexperienced in fires and therefore unable to make informed decisions about the need to evacuate. They felt the need for evacuation should be assessed by experienced fire-fighters and that advice should be given to police to carry out evacuations.

Submissions claimed that police were not well trained in bushfire evacuation and increased the gravity of the situation by spreading alarm: people were made to leave relatively safe areas with no idea where to go and which roads were safe to travel on, and with no idea of where the fire was, and with poor visibility and traffic congestion impeding the fire-fighters efforts.⁸

The Emergency Services Authority's Strategic Bushfire Management Disaster Plan for the ACT states that:

The "ACT Community Safety – Evacuation Policy" and guidelines developed by the ESA and the AFP-ACT Policing is consistent with AFAC and deals with all evacuations for all hazards including bushfires... AFP-ACT Policing and Chief Officers of an Emergency Service (or their delegates) can evacuate people and animals to protect and preserve life and property."⁹

The assertion by ESA that the guidelines are consistent with AFAC principles is not accurate. The Bushfire Master Plan document is extremely vague to the point of being incoherent. It provides no clear delineation of power or authority, and no procedures or protocols for considering advice, or even who is to make advice.

Section 159 of the Emergencies Act 2004 provides that:

"The Chief Minister must appoint a person to be the Territory Controller for a declared state of emergency."

That means that in the event of a large bushfire emergency, the police commissioner could be appointed, as has been the case in the past. Without procedural guidance and expert advice, the police commissioner would be in little better position to make appropriate decisions re evacuation than his most junior associates, cut off from information flows on street corners in a fire zone.

⁸ Ron McLeod AM, **"Inquiry into the Operational Response to the January 2003 Bushfires in the ACT"**, page 73.

⁹ The Emergency Services Authority's Strategic Bushfire Management Disaster Plan for the ACT, p. 54

RECOMMENDATIONS: That the committee finds:

- That the *Emergencies Act 2004* be amended to make it clear – so as to ensure appropriate home/property owner communication in terms of move-on or 'crowd' control procedures - that in the event of a major fire and/or bushfire the ACT Policing Commissioner be NOT appointed as Territory Controller.
- That in the circumstances of a major fire/bushfire, either the ESA commissioner be appointed the Territory Controller acting on the advice of the Rural Fire Service or Urban Commissioner, or the Territory Controller be appointed from either the Rural Fire Service Commissioner or the Urban Fire Brigade Commissioner.
- That the AFP-ESA evacuation guidelines should be reviewed to make it clear that, in the circumstances of major fire/bushfire, fire-fighting authorities are the lead decision making agencies, and the AFP is only to undertake a subordinate role, primarily acting on the advice of the lead fire-fighting agency in relation to evacuations.
- That the right of an individual in relation to property or the contents of property in which he or she has a pecuniary interest shall be pre-eminent in any personal or group decisions on whether or not to evacuate, or be evacuated by any authority under crowd control, move-on or like powers.