



Office of the Victorian Privacy Commissioner

Review of proposed legislation (SARC)

July 2011

SUBMISSION TO
THE VICTORIAN PARLIAMENT'S SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
IN RELATION TO THE
JUSTICE LEGISLATION AMENDMENT (PROTECTIVE
SERVICES OFFICERS BILL) 2011

The Privacy Commissioner is currently on leave and has delegated all of her powers and functions to me under section 61(1) of the *Information Privacy Act 2000*.

The Committee's attention is drawn to the *Justice Legislation Amendment (Protective Services Officers) Bill 2011* ('the Bill').

I submit that a number of the acts and processes authorised and provided for by the Bill impact adversely on the personal privacy rights of Victorians. The relevant clauses are discussed below.

Summary of Conclusions:

- The exercise of additional powers under the *Control of Weapons Act 1990* provided by the Bill trespasses unduly on rights and freedoms (particularly the right to privacy), and represents an arbitrary interference with the right to privacy under s 13 of the *Charter of Human Rights and Responsibilities*
- The risk of such an undue trespass is heightened by the fact that the powers will be exercised by Protective Services Officers, as well as members of the police force.
- Protection of the rights and interests of children and persons with intellectual disabilities under the provisions in the Bill are inadequate
- Oversight, reporting and accountability mechanisms under the Bill are also inadequate.

I. Introduction

1. The Bill amends the *Police Regulation Act 1958* to:
 - i. Provide Protective Services Officers (PSOs) who are on duty at certain public places (designated places) with additional powers to combat crime and anti-social behaviour occurring at those public places; and
 - ii. Extend the provisions in Division 2 of Part VA (Offences) to PSOs.
2. The Bill also amends the following Acts to extend certain powers currently exercisable by members of the police force under those Acts to PSOs who are on duty at designated places:

- i. the *Bail Act 1977*;
- ii. the *Control of Weapons Act 1990*;
- iii. the *Crimes Act 1958*;
- iv. the *Drugs, Poisons and Controlled Substances Act 1981*;
- v. the *Environment Protection Act 1970*;
- vi. the *Graffiti Prevention Act 2007*;
- vii. the *Liquor Control Reform Act 1998*;
- viii. the *Magistrates' Court Act 1989*;
- ix. the *Mental Health Act 1986*;
- x. the *Road Safety Act 1986*;
- xi. the *Summary Offences Act 1966*; and
- xii. the *Transport (Compliance and Miscellaneous) Act 1983*.

II. Powers under *Control of Weapons Act 1990*

4. The Bill makes amendments to the *Control of Weapons Act 1990* so that, where a PSO has reasonable grounds for suspecting a person at or in the vicinity of a designated place is carrying or possessing a weapon, the PSO may, without a warrant, search the person and any vehicle or thing in the person's possession and seize and detain any item detected that the PSO reasonably suspects is a weapon.
5. The Bill provides that the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds for suspecting the person is carrying or possessing a weapon. This means that a reasonable suspicion could be formed merely on the basis of the geographic location of a particular person.
6. Section 13 of the *Charter and Human Rights and Responsibilities Act 2006* confers a right on all individuals not to have their privacy arbitrarily interfered with. The exercise of search powers, particularly without warrant, clearly interferes with the right to bodily privacy.
7. As noted in the Privacy Commissioner's submission to the Scrutiny of Acts and Regulations Committee in November 2009 on the *Summary Offences and Control of Weapons Acts Amendment Bill 2009*, conducting a search of an individual simply by reason of their geographical location is arbitrary. The provisions of the Bill are in direct conflict with a charter right.
8. The Bill also sets out conditions applying to such a search, including obligations on the PSO to inform the person of the grounds of suspicion, to inform the person of the PSO's name, rank and place of duty, to produce identification for inspection by the person unless the PSO is in uniform, and to inform the person that the PSO intends to search the person or thing for weapons and is empowered to do so. These partial protections, while welcome, are inadequate given the highly intrusive nature of the powers being exercised.

9. Schedule 1 of the *Control of Weapons Act 1990 (Vic)*, which deals with the conduct of certain searches under that Act, is amended by the Bill so that certain references in the Schedule to a member of the police force are taken to be a reference to a PSO, and so that a reference to a certain search in that Schedule is taken to be a reference to searches to be conducted by PSOs under the Bill. The risk of arbitrary interference with privacy rights is increased by the fact that PSO will have less training and lower degree of accountability than members of the police force.
10. Schedule 1 sets out rules for searches of children and for persons with impaired intellectual functioning, so that a search must, if practicable in the circumstances, be conducted in the presence of a parent or guardian of the child or person being searched, or if it is not practicable in the circumstances for a parent or guardian of the child or person to be present, any person (whether or not he or she is a PSO), other than the PSO who is conducting the search.
11. The requirement to have “any person” whether or not he or she is a member of the police force (or, for the purposes of the Bill, a PSO) present for searches of children and for persons with impaired intellectual functioning, replaced the previous requirement of having an “independent person” for such searches in 2010 (*Control of Weapons Amendment Act 2010*).
12. In a submission in June 2010 to the Victorian Parliament’s Scrutiny of Acts and Regulations Committee in relation to the *Control of Weapons Amendment Bill 2010*, I noted that protections for children and individuals with impaired intellectual functioning are of vital importance to protect the rights and dignity of those deserving additional protection in our society.
13. I also highlighted that replacing the previous requirement of an ‘independent person’ with ‘any person (whether or not a member of the police force)’ was an insufficient attempt to protect the dignity and privacy rights of Victorian children and those with impaired intellectual functioning.
14. My view expressed in that submission was also that the intention, at that time, for the Chief Commissioner to issue “instructions to all members to clarify that where a parent, guardian or independent third person cannot be obtained, that any other person, other than a police member, should be found” was insufficient protection, and that, at the very least, this protection should be afforded legislative authority.
15. The concerns raised previously in relation to the protections set out in the *Control of Weapons Act 1990 (Vic)* are intensified in light of the powers in question now being afforded to PSOs, rather than members of the police force.

III. Lack of accountability, oversight and review

16. Clause 11 of the Bill requires PSOs to make written records of searches conducted, and a person subjected to such a search is entitled on request to a

copy of the record of the search if the request is made no later than 1 year after the date of the search. I question the adequacy of this requirement as a safeguard to the exercise of the powers by PSOs. There is no requirement to advise persons subject to a search of their right to request a copy of the record of the search. Additionally it is unclear where records of searches will be held.

17. Clause 12 of the Bill also requires the Chief Commissioner to provide to the Minister for inclusion in Victoria Police's annual report of operations a report containing the number of searches carried out by PSOs without a warrant. I query whether such a report published in an annual report is sufficient, given the nature of the powers and that they will be exercised by PSOs. I consider that a more transparent method, and a more appropriate safeguard on the exercise of the powers, would be for a report on the exercise of powers to be tabled in Parliament, ensuring that Members of Parliament, and the public, can properly assess the exercise of such powers, given their significant impact on privacy rights.

IV. Conclusion

18. As a result of the above observations, I consider that:

The proposed legislation trespasses unduly on rights or freedoms (being the right to privacy) – s.17(a)(i) Parliamentary Committees Act 2003 (Vic) ('PCA')

The proposed legislation makes rights, freedoms or obligations (including the right to privacy) dependent on non-reviewable administrative decisions (of the Chief Commissioner of Police or his/her delegate) – s.17(a)(iii) PCA.

The proposed legislation is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities (the right to privacy) – s.17(a)(viii) PCA.

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