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Criminal Law Review  
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### **Submission: Criminal Investigation Powers Bill Exposure Draft**

Liberty Victoria welcomes the opportunity to make this submission on the *Criminal Investigation Powers Bill* Exposure Draft ("*Exposure Draft*").

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au)

## **Preliminary**

1. Liberty Victoria supports the intention to modernise and streamline criminal investigation powers, and to consolidate them into a new standalone piece of legislation. However, Liberty raises significant concerns around a number of changes the *Criminal Investigation Powers Bill* would make to investigative powers. Liberty has significant concerns around -
  - a. The expansion of powers of arrest.
  - b. The expansion of the power of police to enter premises to arrest without warrant.
  - c. New provisions for the use of force to effect an arrest or prevent the commission of a crime.
  - d. The lowering of the threshold for the taking of fingerprints and DNA samples.
  - e. The introduction of a regime for covert search warrants without sufficient safeguards in place to protect the rights and privacy of individual members of the community.
2. Liberty welcomes the introduction of definitions for 'forensic relevance', 'incapable person', 'independent person', and 'suspect'. These definitions are appropriate and clear. Liberty welcomes changes to sections 457 to 463B of the *Crimes Act* whereby persons who have been arrested but not convicted of offences are not referred to as 'offenders'.

## **Powers of arrest and prevention of crime**

3. Liberty has significant concerns in relation to the expansion of powers of arrest. The power of arrest authorises one person to deprive another of his or her liberty and personal freedom, and authorises the use of force to achieve this end. This power should be controlled strictly, and in accordance with community expectations around the liberty and freedom of the individual. A lack of community acceptance and understanding of the use of this power has the potential to lead to the escalation of arrest situations and further violence.

## **Expanded power of any person to arrest**

4. Section (7)(2)(b) of the *Exposure Draft* expands the power of any person to arrest another from circumstances where he or she "finds [a person] committing an offence" to "finds doing any act or so behaving or in circumstances that person A believes on reasonable grounds that the person so found has committed an offence".
5. This represents an expansion of the powers conferred by sections 458 and 459 of the *Crimes Act* 1958 which limit the power of arrest of any person [other than a police officer] to circumstances where a person "finds [another] committing" an offence.
6. Expanding the power of any person to arrest another in this way creates the potential for the misuse of such power and a lack of community acceptance. Liberty submits that the power created by section 7(2)(b) is too broad. There is no need or basis for this expansion. The power is not limited in time or place [as the power in section 459 of the *Crimes Act* is limited to "finds committing"]. It is difficult to see how or why the need for this extended power would arise, and be able to be exercised in a practical and appropriate manner by members of the community who are not police officers. Liberty opposes the expanded power created by section 7(2)(b).

## **Power of police to enter and search premises to arrest without warrant**

7. Section 11 of the *Exposure Draft* authorises police officers to enter and search premises to arrest for any indictable offence without warrant. This expands such power from the current power under section 459A of the *Crimes Act* to enter premises to arrest for a "serious indictable offence".
8. The entry of premises without warrant or permission represents a significant incursion upon privacy and liberty. Such power should be controlled strictly and used sparingly. Further, the use of such power creates the potential for arrest situations to escalate and to become violent and dangerous.

9. There is no case for the need to expand this power by lowering the threshold from serious indictable offence to any indictable offence. This amendment creates a general power where any police officer, of any rank, can at any time enter premises for the purpose of arrest for any indictable offence. The general provision for this power, without the need for specific warrant, should be reserved for serious indictable offences. Liberty opposes the expanded power created by section 11.

### **Use of force to prevent commission of any offence or to effect arrest**

10. Section 12 of the *Exposure Draft* creates new provisions for the use of force to prevent the commission of any offence or to make an arrest. Currently, section 462A of the *Crimes Act* provides that a person, in effecting an arrest, 'may use such force that is not disproportionate to the objective as he believes on reasonable grounds to be necessary'. Under section 12 of the *Exposure Draft*, a person may use "any force that the person believes on reasonable grounds to be proportionate and necessary". This makes the test for the use of force more subjective, with greater focus on the subjective belief of the person making the arrest.
11. Liberty expresses strong concerns about these provisions for the use of force. Liberty opposes any move to make the test for proportionality less objective. In New South Wales, where a police officer "may use such force as is reasonably necessary" to make an arrest, the test for proportionality appears to be more objective.
12. A subjective test for the use of force during an arrest may provide a justification for the use of higher levels of force. An objective test for the use of force is an important safeguard for persons being arrested against arbitrary and excessive force.
13. Liberty also submits that the test for the use of force should have specific regard to the seriousness of the offence being prevented or giving rise to the arrest. There is no public interest in the use of extreme force - which may theoretically be necessary - to effect the arrest of a person for, or to prevent

the commission of, a minor or trivial offence that creates no danger to any person. The construction of section 12 makes no reference to the force being proportionate to the seriousness of the offence, only proportionate and necessary to prevent the commission of an offence or to effect an arrest. It is unclear whether the proportionality of the force used relates to the seriousness of the offence, or simply to the end of achieving the arrest.

14. Provisions for the use of force must also be read in conjunction with the expanded power of arrest for any person, including members of the community who are not police officers.

### **Need for definition of arrest**

15. Further, Liberty submits that it would be in the interests of justice, and within the stated intention of the Bill, to provide a definition of "arrest". To clarify what a person is authorised to do in order to effect an arrest, and what a person must do to effect an arrest. For example, the person being arrested should be informed, as soon as it is practicable to do so, that they are under arrest, and the reason for the arrest. Where an arrest is based on belief on reasonable grounds, that belief and the grounds upon which it is based should be communicated to the person being arrested. Given the stated aims of the Bill, there is no reason why these matters should not be included in the proposed legislation.

### **Offence not to provide personal details when requested by police**

16. Liberty has concerns about the power conferred under section 18 and the offence created under section 20 of the *Exposure Draft*. Part 2.3 is headed "Power to Require Personal Details". Section 18(1) authorises a police officer to "request" that a person state their details. Section 18(2) requires the police officer to inform the person of the grounds for the police officer's belief, but it does not require the police officer to inform the person that the police officer has the power to make this request and that the person is "required" by law to comply with the request.

17. The words "require" and "request" are used interchangeably between the heading and the content of the section. Section 20 then creates an offence for a person to "refuse or fail to comply with a request for personal details made in accordance with section 18". "Refuse" implies a wilfulness or mental element, whereas "fail" suggests a strict liability offence where mere non-compliance will suffice for the offence to be made out. If the offence is strict liability then greater onus should be placed on the police officer to "require" the person to provide the information and not simply "request" it. Equally, if the offence has a mental element, then the person must be informed of the requirement to comply before they could wilfully refuse.
18. The person should be informed expressly that the police officer has the power to "require" the person to provide the information and that they will be committing a criminal offence if they refuse or fail to do so. The provisions in their current form do not require this to be performed by the police officer making the "request".

### **Custody and questioning powers**

19. Liberty supports the introduction of proposed changes to section 464A(2) of the *Crimes Act* whereby persons in custody are informed of the circumstances of the offence before they are questioned. Further, Liberty supports the mandatory use of audio or audiovisual recording of questioning of a suspect. These proposed changes are consistent with procedural fairness and with section 25 of the *Charter* – rights in criminal proceedings.

### **Fingerprints**

20. Part 4 of the *Exposure Draft* creates provision for the taking of fingerprints. Changes to the current provisions for fingerprints include the lowering of the threshold to apply to persons *suspected* on reasonable grounds to have committed a relevant offence, rather than *believed* on reasonable grounds, and allowing for a suspect's fingerprints to be retained for 12 months instead of the current 6 months.

21. Liberty opposes these changes. No case has been made for the need for, or practical effect of, lowering the threshold for the taking of fingerprints. The higher standard of belief on reasonable grounds provides an appropriate limit to the exercise of police power and a safeguard against the intrusion into individual privacy that is consistent with community values surrounding the collection of personal data.
22. Equally, there is no basis for extending the period of retention of fingerprints from 6 months to 12 months. Such an expansion should not be made without sufficient justification for the need.

### **Forensic Procedures**

23. Part 5 of the *Exposure Draft* creates provisions for forensic procedures. Section 118 sets out when a forensic procedure may be conducted on a suspect, and substantially replaces the current sections 464S-464T of the *Crimes Act*. Section 118 allows for the taking of forensic samples from persons *suspected* on reasonable grounds of having committed a criminal offence, which lowers the threshold from *belief* on reasonable grounds.
24. Liberty opposes the lowering of this threshold. Similar to the objection taken to the lowering of the threshold for the taking of fingerprints, no case has been made for the need for this change, its practical effect in operation, or the basis in effective policing for the expanded power. Lowering the threshold in this manner represents an expansion of police power over individuals and an incursion into the rights of members of the community. Such powers should not be expanded without the identification of a clear need and justification.

### **Warrants**

25. Part 6 of the *Exposure Draft* consolidates provisions for search warrants and creates new provisions for covert search warrants. Liberty supports the consolidation in one Act of the warrant process for various purposes, but

expresses serious concern about the introduction of new provisions for covert search warrants.

26. Liberty opposes the introduction of covert search warrants in the form proposed on the basis that the threshold for granting such warrants is too low and that there are not sufficient conditions and safeguards in place for their operation.
27. A search warrant to enter premises in any circumstance represents an extraordinary power to do what would otherwise constitute an invasion of a person's home or place of employment, and would constitute a serious criminal offence. It is important to recognise that the use of a warrant is designed to protect the rights of the person subject to the search and to limit the scope of criminal investigation, not simply to facilitate police investigations. The mere fact that covert search warrants might make investigations easier is not of itself a justification for their introduction.
28. A covert search is exceptional in that it constitutes an invasion of a person's privacy and enjoyment of their property without their knowledge. Where a covert search - necessarily occurring without the knowledge of the occupier - takes place without the presence of any independent person to monitor its operation, it creates the risk of abuse or misuse of the power conferred.
29. The power to enter a person's home without their knowledge and without any independent oversight is an extremely serious power and it is submitted that the *Exposure Draft* in its current form does not adequately acknowledge this fact or provide appropriate safeguards against the misuse of such power.
30. The State's right to investigate and prosecute crime must be balanced against the individual's right to privacy, the enjoyment of their property and the right to conduct their business without intrusion from the State. There is a risk that covert search warrants tip that balance too far in favour of the State.



## **Privilege claims in relation to search warrants**

31. Division 6 of Part 6.2 sets out provisions for privilege claims where search warrants are executed. It creates a procedure for claiming privilege over a document or thing seized during a regular search. A procedure is also created where privileged documents are found during a covert search, but the effectiveness of this procedure is entirely reliant on the conduct of police officers conducting the search. Without the presence of the suspect or any independent person during a covert search, it is unrealistic to expect the effective operation of provisions designed to protect privileged information.
32. The right to privileged information is an important part of the right to privacy. In particular, legal professional privilege is crucial to the operation of the criminal justice system. Any erosion of legal professional privilege threatens the fundamentals of the criminal justice system.
33. The threat to privileged information is an example of the dangers of covert searches without the presence of any independent person to monitor their conduct. Liberty expresses strong concerns around the effectiveness of the provisions relating to privileged information and covert searches.

## **Victorian Parliament Law Reform Committee Report**

34. Liberty notes that the Victorian Parliament Law Reform Committee published a report into "Warrant Powers and Procedures" in 2005. The committee heard and considered submissions on the introduction of covert search warrants and recommended [at Recommendation 76] that legislation be amended to -
  - a. allow covert searches of property only with express authority clearly stated in a warrant;
  - b. require that the warrant must specify in what circumstances the execution may be carried out covertly;
  - c. restrict the availability and use of covert search warrants to exceptional circumstances in the most serious offences and to a narrow class of permissible applicants;
  - d. set rigorous safeguards including requiring:
    - (i) a Supreme Court judge to determine applications;

- (ii) applicants to demonstrate why, and issuing judges to be satisfied that, covert search is necessary and justified;
- (iii) a report within a specified period on execution or non-execution;
- (iv) a rebuttable presumption that the target of the search shall be notified of its occurrence as soon as practicable; and
- (v) prompt and public annual reporting and trend analysis on the use of the powers.

35. Liberty notes that under the *Terrorism (Community Protection) Act 2003*, application for a covert search warrant must be made to a Supreme Court Judge<sup>1</sup>; the applicant must notify the Public Interest Monitor<sup>2</sup> and give to the Public Interest Monitor a copy of the application and affidavit in support and any other information required to be given to the Supreme Court on the application - any secrecy provisions do not apply to the provision of that information<sup>3</sup>; the applicant must fully disclose to the Public Interest Monitor all matters of which the applicant is aware that are adverse to the application<sup>4</sup>; the Public Interest Monitor may appear at the hearing of an application for a covert search warrant and ask any questions of the applicant and make submissions to the Supreme Court about the appropriateness of granting the application<sup>5</sup>

36. Liberty submits that covert search warrants represent a serious intrusion into the privacy and rights of members of the community. Any regime to introduce such an intrusion should be strictly controlled. It should be used in rare and exceptional circumstances with stringent conditions and safeguards. It should also be acknowledged that once a regime such as this is introduced, there is always the risk that amendments will be made that lower thresholds and remove safeguards. This should be resisted.

37. Liberty opposes the introduction of the regime for covert search warrants proposed in the *Exposure Draft* on the basis that the threshold for their granting is too low and there are insufficient safeguards in place for their operation. Liberty submits that any regime for covert search warrants should

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<sup>1</sup> *Terrorism (Community Protection) Act 2003* section 6(1)

<sup>2</sup> Section 7A

<sup>3</sup> Section 4D

<sup>4</sup> Section 4E

<sup>5</sup> Section 4F


have greater regard for the matters set out in Recommendation 76 of the Victorian Parliament Law Reform Committee report into "Warrant Powers and Procedures" 2005.

38. In particular, Liberty submits that any regime for covert search warrants should have the following conditions and safeguards as a minimum standard -

- The restriction of covert search warrants to exceptional circumstances
- Only to be used for the most serious offences
- A Supreme Court Judge to determine applications
- The onus on the applicant to demonstrate why a covert search warrant is justified and necessary - and the requirement of a high standard of proof
- The presence of an independent person at the execution of the warrant, or at the very least, a senior police officer who is independent of the investigation
- The requirement to report to an independent body
- Ongoing independent analysis of the use of covert search powers
- The requirement that the Public Interest Monitor be involved in the manner set out in paragraph 32

Thank you for the opportunity to make this submission. This is a public submission and is not confidential.

Yours sincerely

A handwritten signature in black ink, appearing to read 'George A Georgiou', with a stylized flourish at the end.

George A Georgiou SC  
President  
Liberty Victoria