SUBMISSION TO LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

G20 (SAFETY AND SECURITY) BILL 2013

September 2013
1. INTRODUCTION

The hosting of the G20 meetings in Australia in 2014 necessitates special arrangements and it is clear that the Queensland Government has a responsibility to put in place measures to protect both Internationally Protected Persons and its own citizens. However in our view, the Legal Affairs and Community Safety Committee should recommend the rejection of several components of the G20 (Safety and Security) Bill 2013 (the Bill) which requires further consideration, consultation and significant amendment prior to enactment.

Caxton Legal Centre holds concerns that the Bill unnecessarily infringes fundamental freedoms, provides far too broad discretionary powers, removes judicial oversight of executive powers and is inconsistent with the Legislative Standards Act 1992. Moreover the explanatory notes do not allude to any justifiable need for many of the provisions in circumstances where Queensland’s existing laws already provide the Queensland Police Service with sufficient powers to deal with special events of this kind.

We have had the benefit of reading the Queensland Law Society submission and concur with their views. We also share the Society’s regret that in the limited time available to respond to the Bill we have not been able to address all of our concerns in this submission.

This submission is focussed on the rights of people involved in lawful public protest during the 2014 Brisbane G20 Summit and the rights of innocent bystanders, residents, business owners and vulnerable people such as homeless and cognitively impaired people.

About Caxton Legal Centre

Caxton Legal Centre Inc. (the Centre) is Queensland’s oldest non-profit, community-based, legal service and is staffed by 25 staff members and approximately 200 volunteer lawyers and law students. The Centre operates free legal advice and information services, 3 specialist legal casework services (including an advice programme for seniors experiencing domestic/family violence and other forms of abuse), 5 clinical legal education programmes in partnership with Griffith University, QUT and the University of Queensland, as well as general community education services and social work support services.¹

The Centre also undertakes law reform activities in areas of law relevant to the community we serve. Our goal is to promote ‘access to justice’ and we provide approximately 13,500 legal information and advice services each year to both individuals and other community organisations. We specialise in ‘poverty law’ and the majority of our clients are economically and/or socially disadvantaged in some way. At least a third receive Centrelink benefits.

¹ Caxton acknowledges the valuable research assistance provided by UQ law students Matthew Daniel, Jessica Faithfull, Kelly Staunton and Lucy McAuliffe in the preparation of this submission.
Our Experience in the Field of Criminal Law and Public Protest

We are often approached for legal advice about criminal law matters relating to police conduct and public nuisance. Legal problems associated with these areas of law have been identified at our free legal advice clinics throughout the entire period of our operation.

Adequacy of Existing Laws

Chapter 19, Part 2 of the PPRA sets out the “Special Events Powers” available to the Queensland Police Service. These powers have been used previously without incident to cover events such as the Goodwill Games, the Commonwealth Heads of Government (CHOGM) Meeting, the Asia Pacific Economic Cooperation (APEC) Meeting, the Rugby Union World Cup and the Gold Coast Indy.2

Under this Chapter, the Minister has the ability to declare a “special event site” in and around which the police have heightened powers.3 In and around these special event sites, entrants must provide reasons for entry,4 submit to physical and electronic searches of both themselves and their belongings.5 The Minister is able to publish a list of prohibited items which may not be brought into the special event site or possessed once inside.6 Just twelve months ago the Queensland Police Service reviewed Chapter 19 of the PPRA and noted,

“The QPS has not to date, identified any deficiencies with respect to their [Special Events Powers] effective operation. Whilst the test to establish a case to utilise the powers is high, this reflects an appropriate balance between the nature of the powers available to police officers and the justifiable need to limit the use of the powers to ‘special occasions’ rather than being available for use in ‘day to day’ policing operations” (emphasis added).7

This assessment by the QPS clearly raises questions about the necessity of introducing further ‘special powers’ legislation specific to the G20.

The history of the G20 shows that where the leaders summits have been held in inner-city locations, large protests have accompanied the events (London, Toronto). The Summits held in Los Cabos (Mexico), St Petersburg (Russia) and Cannes (France) have had greatly reduced protest activity resulting from physically excluding protesters from the core sites, and strategically limited media access to protest locations. The State Government argues that given the history of the G20, more extensive police powers are required for holding the event in Brisbane’s central business district. Given the extent of unchecked discretion vested in police by the proposed laws, there is a considerable scope for the laws to be misused and there will be very limited avenues of redress for people subjected to any misuse of the powers.

5 Ss558-559
4 S566
5 Ss567-569
6 S574.
2. KEY ISSUES AND RECOMMENDATIONS FOR AMENDMENT

2.1. PART 3 – UNLAWFUL ASSEMBLY

The purpose of Part 3 is to permit lawful assemblies in declared areas while restricting the right in restricted areas.\(^8\) Clause 17 of the Bill nullifies the effect of the *Peaceful Assembly Act 1992* (Qld) within security areas and for the period of the G20 summit. As a practical measure this minimises confusion about the legislative basis for the right to assembly and ensures that Part 3 alone governs lawful assembly during the summit. The Bill creates a specific set of formal requirements for the authorisation of a peaceful assembly that differ from the formal requirements under the *Peaceful Assembly Act 1992*. In addition it specifically states the conditions under which an assembly will remain lawful. These conditions appear to extend the operation of the *Peaceful Assembly Act 1992* in that they permit an assembly to remain lawful even when a limited number of people in the assembly commit an offence. However, it fails to recognise the reality of a protest atmosphere and circumstances; the abolition of the right to protest will be effected by the conduct of a single individual who commits a ‘violent disruption offence’ or an offence involving damage or destruction to property. In large crowds it is unlikely that the majority of those assembled will be aware that any offence has been committed and that the assembly has become unlawful.

Further, under this provision an assembly will become unlawful if two or more people participating in the assembly violate the offence provisions of the Bill. The use of a sign exceeding the 1m x 2m dimensions specified in Schedule 6(4) of the Bill, carried by two or more people together would thereby be sufficient to render an assembly unlawful. The commission of a violent or destructive offence by an individual who is not associated with a particular assembly but who nevertheless participates in it will also be sufficient to render the entire assembly unlawful and liable to dispersal.

Furthermore, the Bill does not confer the same immunity from prosecution that the *Peaceful Assembly Act 1992* creates.\(^9\) In particular the individual immunity from prosecution for obstruction of public space is necessary to permit a large group to gather for any length of time. The absence of this immunity from the Bill is a potential justification for the removal of individual persons from an area although a protest has not become unlawful. It should be made clear in the Bill that protesters will not be subject to obstruction laws and that they cannot be removed from the area on this basis.

**Recommendations:**

That Part 3 of the Bill be amended to:

1. Increase the number of people within an assembly who must commit an offence before the entire assembly is deemed unlawful, from ‘two or more’ to ‘at least ten’.
2. Expressly confer the same immunity from obstruction offences and torts as is conferred by s 6 of the *Peaceful Assembly Act 1992* (Qld).

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\(^8\) Cl 16
\(^9\) S 3(1); s 6
2.2. PART 5 - PROHIBITED PERSONS LIST

Clause 50(2): The Commission may place a person's name on the prohibited persons list ('the List') if the commissioner is reasonably satisfied the person –

(a) may pose a serious threat to the safety or security of persons or property in a security area;

This Part of the Bill raises significant concerns about the conferment of discretionary decision making powers on officials. This represents a delegation of decisions of a judicial nature to bureaucrats and effectively renders the decisions immune from legal challenge. At the very least the decision whether to list a person on the prohibited person list should be vested with the Minister. There publication of a person's prohibited status also raises issues of natural justice and the potential for significant harm to an innocent person's reputation and indeed public safety.

The vagary of clause 50(2) creates a lack of transparency in the process the commissioner undertakes to decide if a person should be placed on the list. It can only be presumed that a person's past conduct or offending will be used to decide if the person may pose a serious threat. Additionally, if past conduct or offending is relevant to the decision of the commissioner, no guidance is given as to the nature and extent of conduct which would deem that person as a threat.

(b) may, by the person's actions opposing any part of the G20 meeting, cause injury to persons or damage to property outside a security area; or

It is unclear why this provision is necessary. If a person is likely to cause injury to persons or damage to property outside a security area as a consequence of the person's actions opposing any part of the G20 meeting, we ask why is it necessary for this person to be placed on the List when the powers provided under the PPRA would be adequate to deal with any offending.

(c) may disrupt any part of the G20 meeting.

This provision is unclear as to the grounds the commissioner will use to decide if a person may disrupt any part of the G20 meeting. Additionally, in its present state, the provision is very broad.

Clause 51(1): If the commissioner places a person's name on the prohibited persons list and it is reasonably practicable for the commissioner to do so, the commissioner must cause the person to be personally served with a notice stating –

(a) the person's name is on the list; and

(b) the person must not enter any security area on and after the date stated in the notice until the end of 17 November 2014;

(c) if the person believes the person's name should not be included on the list – the person may make a written submission to the commission by a stated date about the inclusion.
This provision does not indicate if the commissioner’s notice must include reasons explaining why the person’s name has been placed on the List. A person’s decision to seek review of the commissioner’s decision should be informed by reasons.

Clause 51(4): Despite subsection (3) and any rule of natural justice to the contrary, the commissioner need not give reasons for the commissioner’s decision to retain a person’s name on the prohibited persons list (or for placing the name on the list under section 50) if the commissioner is reasonably satisfied disclosure to the persons of any information in relation to the decision –

(a) may be against Australia’s national security interests;
(b) could damage international relations between Australia and another nation; or
(c) may be prohibited by a law of the Commonwealth or a State; or
(d) may place the safety of an informant in jeopardy.

It is unclear how this provision will interact with Part 4 of the Judicial Review Act 1991 (Qld) (‘JRA’). Under s 32 of the JRA, a person may request that the decision-maker supply a written statement in relation to the decision to which Part 4 applies – namely, ‘a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)’.

Clause 52(2) Where it is not reasonable practicable for the commissioner to cause a person to be personally served with a notice as mentioned in section 51(1), the commission may publicly publish: (a) a notice stating the person is a prohibited person; and (b) the person’s photo description.

Clause 52(3) Without limiting subsections (2) and (6), public publication include publication in any of the following ways: (a) in a newspaper published in Australia; (b) in an electronic media interview given by or for the commissioner; (c) on a website; and (d) through a social media.

Undue embarrassment may be caused by a publication stating: (a) a person is a prohibited person; and (b) the person’s photo description. The public attention that could be drawn to what might be confidential and private aspects of a person’s life may also expose that person to negative treatment.

Additionally, where it is not reasonably practicable for the person to be personally served with a notice and the person does not observe the public publication of the notice, then the person will not have: (a) knowledge that they are listed on the prohibited person’s list; and (b) the opportunity to have the commissioner review the decision where they believe that they should not be included on the list. Therefore, it is recommended that the Queensland Police Service investigate other forms of substituted service that specifically inform the individual.

10 JRA, s 4.
Finally, although the explanatory memorandum states that the ‘terrorist example’ (‘the example’) in clause 52(2) is indicative of the ‘limited circumstances’ which would see a person’s name and details being made public, this intent is not expressed in the legislative provision itself. Therefore, the scope of what constitutes ‘limited circumstances’ is open to different interpretations, particularly as the provided example does not state that it is a ‘limited circumstances’ situation.

Other concerns

The legislation and the explanatory memorandum do not state what happens to the prohibited persons list and the details contained on that list at the conclusion of the G20 Meeting.

Additionally, the legislation and explanatory memorandum do not indicate if the prohibited persons list will close prior to the G20 Meeting or if it will remain open during the event. This concern is relevant for the following reason: where a person is placed on the list immediately prior or during the G20 Meeting, they may not have sufficient time to make plans if they live or work in a security area.

Recommendations:

1. That the Bill be amended to require the Minister to make decisions about the prohibited persons list;
2. That the Bill be amended to detail the grounds which the commissioner/Minister uses to determine if a person:
   a. may pose a serious threat to the safety or security of persons or property in a security area; and
   b. may disrupt any part of the G20 meeting.
3. That Clause 50(2)(a) be removed from the legislation unless it can be shown that the powers under the PPRA are not sufficient.
4. That the Legal Affairs Committee determine how Clause 51(4) of the Bill interacts with Part 4 of the Judicial Review Act 1991 (Qld).
5. That the Legal Affairs Committee consider substituted forms of service and remove clauses 52(1)-(4) concerning the public publication of the prohibited persons list; or, alternatively, more clearly define what are the ‘limited circumstances’ which would constitute the public publication of the list.
6. That the legislation determines what happens to the prohibited persons list at the conclusion of the G20 meeting.

2.3. CLAUSEs 44 and 61 – POWER TO SEIZE AND REMOVE OBSTRUCTION OBJECT AND RETURN OR FORFEITURE OF PROHIBITED ITEM

We concur with the Queensland Law Society’s views on these provisions and note that the proposed forfeiture without right to compensation defies the principle that compulsory acquisition of property be on just terms.
2.4. CLAUSE 79 – DETENTION OF PERSON ARRESTED

This appears to be one of the most concerning aspects of the Bill particularly in light of:

- The lack of any indication about the availability of Magistrates to determine applications for bail during the G20 Summit;
- The lack of detention facilities to cope with potentially hundreds or thousands of people detained under the proposed laws;
- The prospect of remand centres having to be used to detain people;
- The lack of legal representation available to persons charged with offences under the proposed laws; and
- The prospect of many juveniles and or 17 year olds being detained under the proposed laws.

Clause 79 establishes the duty of police officers to process individuals who have been arrested for an offence against the Bill. It confers a power to hold such individuals for the length of time “reasonably necessary” to decide how to deal with those individuals.

This provision is in conflict with s 403(2) of the Police Powers and Responsibilities Act 2000 (Qld) (“the PPRA”) which provides that the maximum amount of time an individual should be detained after arrest is 8 hours. Under Cl 4(1) of the Bill, the Bill will override the PPRA to the extent of any inconsistency in relation to a power conferred, or responsibility imposed on a police officer. On this basis and depending on the number of persons who are arrested over the period the G20, there is potential for individuals to be legally detained for periods more than 8 hours.

This power bears a similarity to the power conferred on the Ontario Provincial Police (“the OPP”) during the Toronto G20 in 2010. Over the course of the Canadian G20 summit weekend, 1,105 people were arrested and detained in a film studio; of those detained, 700 were eventually released without charge. Many of the charges against the 315 accused in connection with the G20 summit have been stayed or withdrawn, including with respect to nine individuals who were apparently listed in error. Following the G20 summit, a review of police conduct was undertaken by the Ontario Independent Police Review Director. The report found that there was systemic abuse of power and individual uses of excessive force throughout the G20. The officer who ordered the detainment of over 1,100 people in a temporary detention centre was charged with misconduct, along with 31 other police. Two officers are facing criminal charges for injuring protestors.

The extension of the time period for which individuals may be detained is an infringement of the right to liberty and in its current form has potential to be abused in the same way as the Toronto legislation. If the intention was in fact to override the PPRA provision setting the maximum detention period at 8 hours, this should be made clear in the Bill by specifically stating that s 403 of the PPRA does not apply. This will subject the provision and the meaning of “reasonably necessary” in cl 79(2) to be subject to appropriate parliamentary and public scrutiny.

However, it would be more appropriate to set the maximum duration of detention to the same length of 8 hours as provided in the PPRA. This will encourage police efficiency in the processing of arrestees and discourage prolonged detention.
Recommendations:

8. The provision allowing arrestees to be detained for a time “reasonably necessary” to process them should set the maximum detainment period at 8 hours.

2.5. CLAUSE 82 – PRESUMPTION AGAINST BAIL

Clause 82 of the G20 Bill shifts the onus to the accused to show why they should be released on bail. The onus normally rests upon the prescribed police officer to investigate whether or not the person should be granted bail: Bail Act 1980, s7(2)(a).

Legislators argue that this shift in onus is acceptable since it is only for the period of the G20, and also because it only relates to offences against police officials and G20 participants. This provision is open to abuse by officials as there is no review process available during the period of the G20, and those who have not been given bail must wait until the presumption against bail is lifted at the end of the G20 period to reapply for bail. A concern is that a person may be arrested, taken to a watch house and kept there for the weekend because they aren’t able to present a coherent, concise reason as to why they should be released on bail.

The power to detain someone for the period of the G20 for an offence they have committed is reasonable if the person is a genuine threat to the security of the Summit participants. If that is the case, then police should be able to rely on the provisions already found in s7 of the Bail Act 1980 to deny bail based on the reasons found in s16 Bail Act 1980. To impose a duty upon the accused to argue why they should be released is unfair, given their unfamiliarity with the legal system and the difficult situation they may find themselves in.

The NSW Government has recently realised the the oppressiveness of their legislation involving presumptions against bail, and have published The Bail Bill 2013 which seeks to have onus shifted to the prosecution to prove that it would not be appropriate to release the individual on bail.

This shift in onus is worrying given that our justice system is based on the notion that an accused person is innocent until proven guilty. It fails to observe the rules of natural justice and may lead to a decline in public confidence in the legal system, given the exclusion of this basic procedural right. finished, to avoid any further embarrassment or risks to security.

Recommendation:

9. Clause 82 should be removed from the Bill and the provisions of the Bail Act 1980 (Qld) should govern the detention and processing of individuals arrested for G20 offences.

2.6. SCHEDULE 6 – PROHIBITED ITEMS LIST

“(4) a placard or banner to which a timber, metal or plastic pole is attached or a banner more than 100cm high by 200cm wide”
Schedule 6 sets out items which constitute “Prohibited Items” for the purposes of the Act. Prohibited items are liable to seizure by Queensland Police, and the possessor is liable to a range of offences within the Act.

The inclusion of banners and placards attached to poles (timber, metal or plastic) and any sign larger than the specified dimensions is an unreasonable restriction on the materials protesters are able to carry. The security risk posed by protesters with such items is already mitigated through their exclusion from the restricted zone, thus this restriction appears to be disproportionate to the purposes of the Act.

Recommendations:

10. The Act should increase the size of the banners protesters are able to carry.
11. The Act should allow protesters to carry signs attached to poles, with restrictions on the size and material of the poles in accordance with the aims of the Act.

2.7. CLAUSE 4 – APPLICATION OF POLICE POWERS AND RESPONSIBILITIES ACT 2000 AND RELATED MATTER

4 Application of Police Powers and Responsibilities Act 2000 and related matter

(1) This Act prevails, to the extent of any inconsistency, over the Police Powers and Responsibilities Act 2000 (the Police Act) in relation to a power conferred, or responsibility imposed, under the Police Act on a police officer.

(2) To remove any doubt, it is declared that the Police Act, section 11(3) does not apply to a provision of this Act that confers a power or imposes a responsibility on a police officer.

(3) The Police Act, section 624(2) does not apply to a basic search.

(4) The Police Act, chapter 17, part 4 applies to an offence within the meaning of the Police Act.

(5) The Police Act, chapter 21, part 2, division 3 does not apply in relation to a police officer who is exercising a power under this Act.

(6) Unless this Act provides otherwise, this Act does not prevent the exercise of a power conferred on a police officer by another Act.

Clause 4(5) excludes Chapter 21, part 2, division 3 of the PPRA from operation in relation to a police officer who is exercising a power under this Act. This provision ordinarily requires officers to particularise details relating to the use to surveillance equipment in their requests for warrants.

By removing this requirement, issues of police accountability are called into question. Without the checks and balances of specifying the particulars of surveillance (including such basics as the offence the warrant is required for, the period that the warrant remains valid for) there is little opportunity for scrutiny of police action in relation to covert surveillance.

\[11 \text{ S60} \]
\[12 \text{ S63} \]
2.8. INCREASED PENALTIES

Under the G20 Act, the penalties imposed are greatly increased over the analogous offences contained in the PPRA.

In the PPRA, most of the offences associated with the Special Events provisions carry a maximum penalty of 10 units (although attempting to interfere with a special event carries a maximum penalty of 40 units). Under the G20 Act, the maximum penalties are increased to up to 50 units.

It has been well established that penalties in legislation are not an effective deterrent to behaviour, thus the rationale for the increase is concerning.

**Recommendation:**

14. The maximum penalty units should be reduced to align with the equivalent offences under the Special Events Provisions of the PPRA.

2.9. IMPACT ON BYSTANDERS

2.9.1. SEARCH

It is of particular concern that the Bill provides for the conduct of searches without a requirement of first forming a reasonable suspicion of an offence. This places an unacceptability wide discretion in the hands of police.

**Clause 23 - Who may conduct a search in a restricted area**

Clause 23 G20 Bill – A basic search, frisk search or specific search can be conducted on a person attempting to enter or leave a restricted area. Restricted areas are typically hotels which delegates have been assigned to stay in. These hotels are likely to be fully booked out by the G20 organisers, so the impact to the general public may be minimal, however this section may impact the liberties of hotel staff.

**Clause 24 - Who may conduct a search in a declared area**

Clause 24 G20 Bill – A basic search, frisk search or specific search can be conducted on a person attempting to enter or leave a declared area. The declared area is much broader in scope than the restricted areas so will affect more people.

The methods used to conduct a search found can be invasive, even when only a basic search is required (for example, a police officer may search bags or clothing: s26(l) G20 Bill). However, the officer doesn’t have to reasonably suspect that the person has committed an offence against the act to conduct a basic search - they simply “may” conduct a search.

A search may be conducted on a person attempting to enter a declared area: s24 G20 Bill. The scope of this section indicates that once a person attempts to enter a declared area, they can be searched,
regardless of whether they change their mind about entering the declared area. Once a person chooses not to enter a declared area, there is no practical reason to search them - the purpose of the Bill is to provide security around the G20 Summit, so if a person decides not to enter a declared area, they will not be an immediate threat to security in that area and should no longer need to be searched.

Clause 20 - What is a basic search

Clause 20(b)(iv) requires that an article in the person’s belongings can be searched. This possibly extends in scope to include the searching of data devices like mobile phones and cameras. This is a particularly draconian invasion of privacy, especially given that this provision comes under the basic search section which, prima facie, seems to be consistent with searches one might undergo when entering an airport, for example.

Recommendations:

15. If additional search powers are required in the Bill it should be re-drafted to reflect a requirement for the reasonable suspicion of the commission of an offence to escalate a search beyond that which would normally be encountered an airport security check.

16. That a definition of “outer clothing” be inserted into the Bill to define boundaries of what clothing is authorised to be removed by a member of the opposite sex under Clause 20(b)(i) G20 Bill.

17. That a person attempting to enter a declared area need not be subject to a basic search if they then decide to not attempt to enter the declared area.

18. That wording which specifically excludes the searching of data on mobile phones and camera equipment (or similar) be included as a note Clause 20 (basic search section), and if necessary, that a section that governs the searching of data devices and what standards are required before a search is necessary be included.

3. CONCLUSION

Some of the measures proposed in the Bill are truly draconian and potentially allow for severe incursions into the personal freedoms and rights of Queenslanders.

There does not appear to be sufficient evidence put forward to justify such drastic measures. Even if a sufficient basis was established, the conferment of such extraordinary discretionary powers, and the readily apparent risk of the arbitrary application of them by police officers, requires that they be subject to judicial scrutiny.

To confer excessive and unchallengeable discretions on public officials, even for the relatively short duration of the G20 period, undermines the rule of law13, and discredits the Queensland Parliament.

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13 The Rule of Law, Tom Bingham 2010, p49.
We are happy to discuss any aspect of this submission and wish you well in your deliberation of these important issues.

Caxton Legal Centre Inc