
Move-on powers: New paradigms of public order policing in Queensland

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In this article, the author examines the operation of move-on powers. These powers, which have been adopted in all jurisdictions in Australia, were enacted to deal with a wide range of antisocial behaviours that do not necessarily constitute offence. The police powers were presented as a diversionary measure to nip crime and disorder in the bud. Using Queensland as a case study, the article traces the historical and incremental expansion of move-on powers over the past 15 years. The broad and discretionary nature of such powers poses challenges for both policy and practice perspective. The article examines a recent review by the Crime and Misconduct Commission, and assesses the effectiveness of existing procedural safeguards in preventing the misuse of move-on powers – particularly against members of vulnerable and disadvantaged groups.

INTRODUCTION

Move-on powers exist in all jurisdictions in Australia. An early review of these powers defined this type of police power as “a power to require persons in a public place who may not have committed an offence to leave that public place, if the police officer believes that the person is likely to commit a breach of the peace or an offence”.¹ Such powers have been controversial and are subject to periodic review. Most recently, in December 2010, the Queensland Crime and Misconduct Commission (CMC) published a report examining whether move-on powers in Queensland have been used properly, fairly and effectively (CMC Report).²

The aim of this article is twofold: (a) to provide an overview of the current move-on powers contained in the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA 2000); and (b) to identify the key policy and practice issues relating to the use of this type of police power, focusing on the current police move-on powers operating in Queensland. It will trace the emergence of move-on powers, examining how these powers have been amended since their introduction in 1997. A comparative analysis of the move-on legislation across Australia reveals how statutory safeguards operate in guiding the operation of move-on directions.

Move-on powers in Queensland give police officers the power to direct persons to move away from an area (or to cease and desist activities) without requiring any triggering offence to have been committed. These powers were enacted in order to provide police with new tools to aid in the prevention of crime.³ In using these powers, police have a high degree of discretion and consequently the use of move-on powers (legitimately or otherwise) has the potential to significantly impact on the rights and liberties of individuals. Consequently, it is important to identify the key legal, policy and practice issues associated with their (mis)use. These policy and practice issues will be considered in light of the CMC’s findings and recommendations and the case law.

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¹ Criminal Justice Commission Queensland (CJC), *Report on a Review of Police Powers in Queensland – Volume III: Arrest Without Warrant, Demand Name and Address and Move-on Powers* (1993) p 641.

² CMC, *Police Move-on Powers: A CMC Review of their Use* (2010) (CMC Report). The CMC review commenced in 2008, with an objective to determine whether police move-on powers have been used “properly, fairly and effectively”: see CMC, *Review of Queensland Police Move-on Powers: Invitation for Public Comment* (2008), <http://www.cmc.qld.gov.au/data/portal/00000005/content/74691001228891880795.pdf> viewed 14 November 2011.

³ Parliamentary Criminal Justice Committee (PCJC), *Review of the Criminal Justice Commission’s Report of Police Powers in Queensland: Volumes I-III, Report 23B* (1994).

A BRIEF HISTORY OF MOVE-ON POWERS IN QUEENSLAND

Consolidation of police powers in the 1990s – a post-Fitzgerald legacy

The enactment of statutory move-on powers was precipitated by some of the findings of the Commission of Inquiry pursuant to Orders in Council 1989 (known as the “Fitzgerald Inquiry”). The Fitzgerald Inquiry recognised that the Queensland Police Service (QPS) and the criminal justice system in general, were suffering from difficulties, and this inquiry precipitated a major review of police powers.⁴ Mr Fitzgerald QC decided to forgo making a final recommendation on these issues and referred them to the Criminal Justice Commission (CJC)⁵ to conduct a “comprehensive review of police powers”. This referral resulted in the 1993 publication of the *Report on Police Powers in Queensland*.⁶ Through the course of its review, it became evident that there was an urgent need to consolidate police powers available under the common law and statutes into a single Act. The review revealed that a full inventory of police powers did not exist, and that police powers had been conferred in an ad hoc and inconsistent manner.⁷ Following the review, the government introduced a Bill to consolidate police powers into a single Act – the *Police Powers and Responsibilities Act 1997* (Qld) (PPRA 1997). It is important to note, however, that neither this Act, nor the current PPRA 2000, affects the wide range of common law powers otherwise available to police officers to maintain public order.⁸

In its review, the CJC recommended “police should not be given a general move-on power”,⁹ noting that such powers already existed in various forms in a multitude of statutes, including the *Public Safety Preservation Act 1986* (Qld) and the *Traffic Act 1949* (Qld), both of which contained provisions allowing police to direct the movement of people or vehicles when necessary. The *Criminal Code* (Qld), the *Vagrants, Gaming and other Offences Act 1931* (Qld) and the *Liquor Act 1992* (Qld) also contained a range of public order offences that could be used to deal with anti-social conduct. However, proponents of move-on powers argued that broader powers were needed to deal with antisocial behaviour (which may not constitute an offence) for the purpose of preventing crime and preserving public order.¹⁰ In responding to the CJC review, the Parliamentary Criminal Justice Committee (PCJC) adopted a “half-way” house approach. While rejecting the need for general move-on powers, the PCJC accepted that powers be made available to police “in defined circumstances, to direct person to either desist their actions that are potentially or actually improper, dangerous or unnecessarily affect the rights of others, or to require those persons to move-on”.¹¹ Its proposal was accompanied by recommendations for enhanced procedural safeguards, including the following:

- police officers should keep a written record of any move-on direction given, which should contain details of the event and demographic information;
- where move-on directions are exercised, the police officer should issue a citation to the individuals subject to a direction;
- police stations should keep monthly records of directions given, to be forwarded to the Commissioner’s office for collation; and

⁴ CJC, *Report on a Review of Police Powers in Queensland – Volume I: An Overview* (1993) p 1.

⁵ The CJC was established in 1989 by the *Queensland Criminal Justice Act 1989* (Qld) in response to widespread corruption amongst high-level Queensland politicians and police officers being exposed during the Fitzgerald Inquiry. On 1 January 2002, the CJC merged with the Queensland Crime Commission to form the CMC. The CMC is an independent body established under the *Crime and Misconduct Act 2001* (Qld).

⁶ CJC, n 4, p 362.

⁷ CJC, n 4, p 94.

⁸ *Police Powers and Responsibilities Act 2000* (Qld), s 9.

⁹ CJC, n 1, p 650; see also p 642.

¹⁰ CJC, n 1, pp 644, 649.

¹¹ PCJC, n 3, p 284.

- legislation should restrict the use of move-on powers in respect to peaceful and authorised assemblies.

The move-on power enacted in the PPRA 1997 incorporated the PCJC's recommendations. Almost immediately following its passage, however, the move-on powers were subject to amendment, expanding their scope in terms of the types of places where directions may be given.¹² Further reform occurred when the PPRA 1997 was repealed and replaced by the PPRA 2000. The PPRA 2000 completed the reform process of consolidating police powers into one Act,¹³ but also expanded police move-on powers to cover all shopping malls throughout Queensland, racing venues and war memorials.¹⁴

In 2005, despite some public objection to the expansion, the Brisbane City Council (BCC) applied to have several "hot spots" designated as notified areas¹⁵ for the purpose of police move-on powers. The BCC's application was reportedly made in response to a string of violent events in Brisbane's CBD, including the murder of a man in January 2005 in Kurilpa Park and the subsequent physical assault of two young people in the same park in May of the same year. On 17 February 2006, the then Minister for Police and Corrective Services, the Hon Judy Spence, approved the BCC application to have King George Square, Kurilpa Park and New Farm Park declared as "notified areas" observing that "move-on powers ensure that all people can enjoy public spaces without fear or threats of intimidation".¹⁶

After nearly a decade of incremental expansion, 2006 witnessed another watershed in the history of move-on powers – the extension of move-on powers to *all* public spaces in Queensland. The impetus for this came when the then Premier, the Hon Peter Beattie MP, "announced that he would be bringing a submission to Cabinet for state-wide move-on powers to be given to police".¹⁷ The Premier (somewhat opportunistically) justified the expansion of these powers in order to prevent a Cronulla Beach-style riot (which had recently occurred in New South Wales). Further, he noted that expanding move-on powers to all public places would remove the time-consuming process local councils confronted when seeking to have areas declared as "notified areas".¹⁸ As commentators noted following the 2006 reforms, "the current ambit of move-on powers comes extremely close to the 'general move-on power' which the PCJC specifically recommended against".¹⁹

COMPARATIVE ANALYSIS OF LEGISLATION IN AUSTRALIA

Police move-on powers exist in all Australian States and Territories (see Table 1 in the Appendix). Although, the terminology differs, these powers serve an equivalent function, namely, to provide

¹² The first amendment to the PPRA 1997 occurred before its proclamation, extending its operation to include automatic teller machines (ATMs) as declared "notified areas" in which police may use move-on powers. This amendment was introduced in 1998 to "allow police to give a direction to people to move away from the ATMs if it is suspected they intend intimidating those using the machines": The Hon Russell Cooper, *Protection for Automatic Teller Machine Users*, Ministerial Media Statement (29 January 1998).

¹³ CJC, *Police Powers Briefing Paper, No 1* (2000), <http://www.cmc.qld.gov.au/data/portal/00000005/content/94166001131403329213.pdf> viewed 14 November 2011.

¹⁴ See Spooner P, "Moving in the Wrong Direction: An Analysis of Police Move-on Powers in Queensland" (2001) 20(1) *Youth Studies Australia* 27; CJC, n 13; the Hon Tom Barton, *Move-on Powers to be Extended to War Memorials*, Ministerial Media Statement (17 May 2000).

¹⁵ PPRA 1997, s 40 provides as follows: "Proposal for notified area: (1) A government entity or a local government may apply to the Minister for the declaration of a stated area as a notified area. (2) Before the Governor in Council declares an area to be a notified area, the Minister must ensure any requirements prescribed under a regulation for this section have been complied with."; s 41 provides: "Declaration of notified areas: The Governor in Council may, by regulation, declare a stated area to be a notified area for this Act."

¹⁶ The Hon Judy Spence, *Move-on Powers for all Public Spaces in Queensland*, Ministerial Media Statement (21 April 2006).

¹⁷ Dixon N, *Police "Move-on" Powers*, Research Brief No 2006/16 (Queensland Parliamentary Library, 2006) p 16.

¹⁸ Giles D, "Beattie Wants Move-on Powers to Avoid Race Riots", *The Sunday Mail* (1 January 2006); Dixon, n 17.

¹⁹ Taylor M and Walsh T (eds), *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (2006), http://www.qpilch.org.au/_dbase_upl/Nowhere%20To%20Go.pdf viewed 14 November 2011, p 16.

police officers with the power to direct members of the public to move away from a specific area. However, the triggering conditions or circumstances required before an order can be given, the level of discretion afforded to police officers, the types of directions available and the penalties for contravening an order vary between each jurisdiction.²⁰ Generally, governments and police justify these powers as being necessary for securing the enjoyment of public space, and to prevent and respond to antisocial behaviour. They may also function as another diversionary tool, providing an alternative to arrest or issuing an infringement notice in situations that can be diffused without need for further police action. As move-on powers are broad ranging and highly discretionary, statutory safeguards and restrictions have been applied in all State and Territory legislation to guide and limit their use.

PPRA 2000 – conduct relevant to move-on powers

The current move-on powers in Queensland are contained in ss 46-48 of the PPRA 2000. As Table 1 (see Appendix) shows, the conduct required to trigger the use of move-on powers varies between jurisdictions. It ranges from specific forms of criminal conduct such as drug dealing, obstruction and prostitution, to general conduct such as loitering or presence causing anxiety. The relevant sections state that a police officer may give to a person or persons any direction that is reasonable in the circumstances, if the officer “reasonably suspects” the person’s behaviour or presence is or has been a “relevant act”. A “relevant act” is conduct defined in ss 47 and 48 of the PPRA and includes:

- causing anxiety to a person entering, at or leaving the place, reasonably arising in all the circumstances;
- interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place; and
- being disorderly, indecent, offensive, or threatening to someone entering, at or leaving the place.

These powers may be exercised in relation to a person at or near a “regulated place”.²¹

POLICY AND PRACTICE ISSUES

Debates on the need for and use of a statutory move-on power for Queensland police officers have centred around concerns about the adverse impacts on marginalised groups, such as homeless persons, Indigenous persons, young persons and the mentally ill, who often live or regularly move within public spaces. Empirical research conducted on the effect of the criminal justice system on those living in poverty, and the use of move-on powers suggest that marginalised groups within the community are being disproportionately impacted by move-on powers and generally experience higher levels of police harassment and interference in their lives. These issues have implications for policy and practice related to the administration of such laws. A key concern surrounding the 2006 expansion of the powers centred on the discretionary nature of the laws and how they may be applied by individual police officers. Further, it is submitted that policing public order through the inappropriate or heavy-handed use of statutory move-on powers may have long-term effects on the interaction between police and members of the communities who utilise public spaces, in terms of reducing police legitimacy as perceived by the public through the greater use of formal methods.

Until 2010, very little was known about the patterns of use of statutory move-on powers by Queensland police. Although adopted in 1997, there had been no review into the use of these powers to determine whether they had been effective in their objective of preventing crime, and maintaining public order and safety. However, with the State-wide expansion of Queensland’s move-on powers in 2006, the CMC was tasked with reviewing the use of these powers, to be conducted as soon as practicable after 31 December 2007. This review resulted in the CMC Report, published in December 2010.

²⁰ Walsh T and Taylor, M, “‘You’re Not Welcome Here’: Police Move-on Powers and Discrimination Law” (2007) 30 *The University of New South Wales Law Journal* 151.

²¹ A “regulated place” includes a public place or a prescribed place. “Public places” include: a road; a park; a beach; a cinema complex; a shop; or a racecourse. “Prescribed places” include: a child-care centre; or a pre-school centre; or a primary, secondary or special school; premises licensed under the *Liquor Act 1992*; a railway station and any railway land around it; a shop or a mall; an ATM; or a war memorial.

The review is timely since recent years have witnessed a growing number of cases challenging the use of these powers before the courts, particularly the use of “disobey” or “failure to comply with” police directions. As a result, there is now a cross-jurisdictional body of authority relating to the use and scope of statutory move-on powers.²² The leading Queensland case on move-on powers is *Rowe v Kemper*,²³ which has a highly visible presence throughout the CMC report. Both the *Rowe* case and the CMC Report provide an opportunity to explore how police move-on powers have been exercised to date and whether concerns raised about their use have been justified. The CMC found:

[A] number of legislative deficiencies exist that must be addressed in order to enhance the operational use of the move-on powers. Our legislative recommendations seek to remove unnecessary ambiguity that leads to confusion and uncertainty for police in applying the law, and to further reduce the possibility that the powers will unfairly affect marginalised groups.²⁴

PUBLIC ORDER POLICING AND DISCRETION

A key concern regarding the use of move-on powers is the highly discretionary nature of such laws and the potential for misuse by police. Discretion is widely recognised as a significant feature of police work, particularly within public order policing.²⁵ Statutory move-on laws have become a key component in the policing of public order.²⁶ Police can respond in a number of ways ranging from informal actions to invocation of formal police powers.²⁷ As Davis noted: “A public officer has discretion whenever the effective limits on his (or her) power leave him (or her) free to make a choice among possible courses of action or inaction.”²⁸ Specifically, discretion exists when an officer decides what action to take (or not take) in a given circumstance after the facts and law are established. These powers/actions exist on a continuum from “do nothing” to “full law enforcement”.²⁹ When deciding on a particular action, police officers should consider that each option available to them carries a potentially negative or positive consequence. Concerns arise about the exercise of discretion by police as it occurs mostly without the “knowledge of the general public, without the concerted efforts of police administrators to ensure that it is exercised properly, and without adequate attention from legislatures and courts”.³⁰

Scholars recognise that there will always be a need for, and legitimate uses of, discretion within the criminal justice system.³¹ Despite the many and varied reasons for preserving police discretion, its use still prompts concern particularly in light of the evidence (both empirical and anecdotal) revealing the discriminatory use of statutory move-on powers.

²² See *Rowe v Kemper* [2009] 1 Qd R 247; (2008) 185 A Crim R 526; *Spatolisano v Hyde* [2009] ACTSC 161; *Temoannui v Ford* (2009) 196 A Crim R 442; *Police v Murphy* [2010] NSWCL 9. For commentary on *Rowe* and *Police v Murphy* respectively, see Murphy B, “*Rowe v Kemper* [2008] QCA 175” (2008) 32 Crim LJ 384; Murphy B, “*Police v McMillan* [2010] NSWCL 9” (2011) 35 Crim LJ46.

²³ *Rowe v Kemper* [2009] 1 Qd R 247; (2008) 185 A Crim R 526.

²⁴ CMC Report, n 2, p xiv.

²⁵ See La Fave WR, “The Need for Discretion” in Sykes G and Dreben T (eds), *Law and the Lawless: A Reader in Criminology* (Random House, New York, 1969); Davis KC, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

²⁶ The past decade has seen a proliferation of measures aimed at reducing antisocial behaviour, particularly when it occurs in public spaces. All States throughout Australia have enacted move-on legislation, the British government has also introduced multiple programs and interventions to combat public displays of antisocial behaviour including antisocial behaviour orders, enacted under the *Crime and Disorder Act 1998* (UK); the dispersal powers are found in Pt 4 of the *Antisocial Behavioural Act 2003* (UK) (ss 30-36).

²⁷ Prenzler T, *Ethics and Accountability in Criminal Justice: Towards a Universal Standard* (Australian Academic Press, 2009) p 31.

²⁸ Davis, n 25, p 4.

²⁹ Prenzler, n 27, notes that the full police discretion continuum includes: (1) full law enforcement, (2) partial law enforcement, (3) formal warning, (4) informal warning, (5) welfare, and (6) do nothing.

³⁰ La Fave, n 25, pp 299-300.

³¹ La Fave, n 25. The necessity and limits of discretion are explored by Bronitt and Stenning in this issue.

Discriminatory impact of move-on powers

Ostensibly, move-on legislation does not discriminate on grounds of age or ethnicity. The provisions apply equally to all individuals engaged in prescribed behaviours in defined places.³² The proponents of statutory move-on powers in Queensland, responding to the concerns about the disproportionate use of public order powers against persons who are homeless, Indigenous, young or mentally ill,³³ offered assurances that these powers were not intended to target specific groups or “types” in society. As the Second Reading Speech noted:

Move-on powers are not focused on any particular age groups, sex colour or race within the community. They only come into play when a person acts in a manner contrary to public interest as determined by this parliament.³⁴

The difficulty with such formal neutrality and equality rhetoric is it ignores the structural disadvantage of these groups “in order for a law regulating the use of public space to be considered reasonable, it must recognise the inequalities that exist amongst public space users”.³⁵

Empirical research to date supports the suggestion that marginalised groups within the community are being disproportionately impacted by move-on powers.³⁶ The CMC Report revealed that move-on directions continue to be disproportionately applied to juveniles (aged 10-16 years) and Indigenous persons. Of the 6,092 directions given (where Indigenous status was recorded), 42.6% were Indigenous. As a proportion of the Queensland population, Indigenous people were “20.2 times more likely to be given a recorded move-on direction than were non-Indigenous people”.³⁷ The New South Wales Ombudsmen Report³⁸ published in 1999 also found that young and Indigenous persons disproportionately received directions to move on. Collated police data established that 48% of directions given were to persons aged 17 years or younger, with 22% of directions being given to Aboriginal and Torres Strait Islander people. Of the Aboriginal and Torres Strait Islander people given directions, 51% were given to youths aged 17 years or younger.³⁹

Increased criminalisation

With police acting as gate-keepers to the criminal justice system, arrest is the usual formal entry point for most people. Therefore, police decisions about how police enforce particular laws may have severe consequences for personal liberty, particularly freedom of movement. Police move-on powers were enacted as a way to deal with “minor incidents of public disorder”,⁴⁰ providing frontline officers with the ability to direct someone to move away from an area *before* trouble starts and providing an alternative to arrest. There is both empirical and anecdotal evidence suggesting that police move-on powers do not result in fewer arrests for public order offences but, rather, serve as another gateway into the criminal justice system.

Findings from the CMC Report suggest that rather than being an effective diversionary tool, police move-on powers may actually draw people unnecessarily into the criminal justice system. For example, Indigenous persons were more likely to be charged with a single offence of disobeying a move-on direction and less likely to be charged with additional offences (17.3%) than were non-Indigenous persons (24.5%). However, Indigenous persons (65.4%) were more likely to have convictions recorded against them, at a rate almost five times greater than non-Indigenous persons (27.8%).

³² Walsh and Taylor, n 20 at 167.

³³ See PCJC, n 3, p 277.

³⁴ Queensland Legislative Assembly, *Parliamentary Debates*, Police Powers and Responsibilities and Other Acts Amendment Bill (23 May 2006) p 1814.

³⁵ Walsh and Taylor, n 20 at 170.

³⁶ See Spooner, n 14; Walsh and Taylor, n 20; Taylor and Walsh, n 19.

³⁷ CMC Report, n 2, p 19.

³⁸ New South Wales Ombudsman, *Policing Public Safety* (1999).

³⁹ PCJC, n 3, pp 228, 230.

⁴⁰ Bronitt S and McSherry B, *Principles of Criminal Law* (3rd ed, Thomson Reuters, 2010) p 828.

It is important to note that the behaviour that triggers a direction to move on is not necessarily an offence. However, the refusal of an individual to comply with the direction may result in an arrest for the breach offence under s 791(2) of the PPRA 2000. Those charged with public order violations are often charged with multiple offences (for example, assaulting or obstructing police), usually with a more serious offence as the primary charge.⁴¹ In an observational study at Brisbane Magistrates Court, Walsh found that failure to comply with police directions was often associated with charges for offensive language, resist arrest and assault police officer.⁴² This combination of offences is often referred to as a “trifecta” or “quinella” charge, where the “defendant is charged with multiple offences based on the same facts”.⁴³ During the period 1 June 2005 to 31 May 2007 (12 months prior to and following the State-wide expansion of police move-on powers), the CMC Report revealed that 2,444 individuals disobeyed move-on directions. Of those failing to comply with a direction, 543 (22.2%) were charged with additional offences – resisting arrest, obstructing police, assaulting police or being a public nuisance. The report also revealed a significant upward trend in their recorded use, as well as move-on disobey incidents, over the course of the four years (1 June 2004 to 31 May 2008) of data collection. By May 2008, the use of move-on directions had increased by 204.8%, while move-on disobey incidents increased by 450%.⁴⁴ This increase in use has the potential to result in greater criminalisation of those groups already over-represented in the criminal justice system.

Move-on powers are often claimed to be an important “aid in the prevention of crime”.⁴⁵ However, the disproportionate application of move-on powers against marginalised groups, particularly young people, may result in negative consequences for community policing, such as increasing tension between police and the various members of marginalised groups. The high and increasing rates of disobey move-on incidents found in Queensland imply a failure by police to comply with procedural requirements, particularly the requirement to explain to the person subject to the direction why he or she was issued with the order and clearly advising that person of the consequences of non-compliance.

Psychological research conducted in the area of procedural justice indicates that when citizens view police activities as legitimate, their satisfaction with police increases and this influences citizens’ levels of compliance with the law.⁴⁶ Legitimacy is defined as “a property of an authority or institution that leads people to feel that the authority or institution is entitled to be deferred to and obeyed”, and in relation to police legitimacy “is linked to public judgments about the fairness of the processes through which the police make decisions and exercise authority”.⁴⁷ However, as this body of research reveals, the application of police authority in a procedurally unfair way leads to “alienation, defiance, and non-cooperation” of citizens.⁴⁸ This in turn, increases the likelihood of arrest for a refusing to co-operate with police directions.

Rowe v Kemper highlighted this cycle of escalation. Although the Court of Appeal held that the police officers had the power to direct the homeless man to leave the public toilets (because of the anxiety it caused to the cleaner), the police had not complied with the statutory requirements of the PPRA 2000. Most notably, the police officers in Mr Rowe’s case failed to give him a reasonable

⁴¹ Walsh T, “Who is the ‘Public’ in ‘Public Space’? A Queensland Perspective on Poverty, Homelessness and Vagrancy” (2004) 29(20) *Alternative Law Journal* 81; Jochelson R, “Aborigines and Public Order Legislation in New South Wales” (1997) 34 *Crime and Justice Bulletin* 1.

⁴² Walsh, n 41.

⁴³ See Walsh, n 41; Dennis M, “Is this the Death of the ‘Trifecta’?” (2002) 40(3) *Law Society Journal* 66.

⁴⁴ See CMC Report, n 2 and the associated *Data Report*.

⁴⁵ PCJC, n 3, p 284.

⁴⁶ Hinds L and Murphy K, “Public Satisfaction With Police: Using Procedural Justice to Improve Police Legitimacy” (2007) 40(1) *Australian & New Zealand Journal of Criminology* 27; Sunshine J and Tyler T, “The Role of Procedural Justice and Legitimacy in Shaping Public Support For Policing” (2003) 37(3) *Law & Society Review* 513.

⁴⁷ Sunshine and Tyler, n 46 at 514.

⁴⁸ Sunshine and Tyler, n 46 at 514.

opportunity to comply with the direction given.⁴⁹ This was not uncommon. Indeed, earlier research conducted in Brisbane in 2006 found that one-third of the homeless persons surveyed said they were not given any warning about the consequences for failing to comply with a direction.⁵⁰ The Court of Appeal also found the direction that Mr Rowe must leave the mall for eight hours was unreasonable in light of the circumstances giving rise to the direction (causing anxiety to the cleaner). Removal from the toilet block while cleaning was being undertaken by the cleaner would have been sufficient. The Court of Appeal cautioned that directions given should not be utilised as a general attempt to ensure orderly conduct, or simply to recover public spaces of the city for the “community”.⁵¹ Rowe emphasised that any direction given by police must be reasonable and proportionate to meet the identified circumstances.

Taylor and Walsh revealed how unreasonable a standard direction can be for homeless people. Their empirical research on the impact of move-on powers on homeless people in Queensland, found that many homeless people were “given nowhere in particular to go upon being issued a move on direction”.⁵² Currently the PPRA does not require an officer, upon issuing a direction to move-on, to direct a person to go to a specified area. Directing a homeless person to move from an area for a stated period of time (up to 24 hours) could be highly detrimental because it denies him or her access to the vital support services (healthcare, shelter and food) that usually operate in the public place from which they have been moved away.

To combat harsh and unreasonable directions, the CMC Report recommended that a new threshold requirement be inserted into s 48 of the PPRA 2000 to guide the type of move-on direction given. The exclusion and time period should be proportional to the conduct, and the direction is necessary to ensure “community safety and public order”.⁵³ However, it is submitted that this does not go far enough. In the author’s view, the PPRA should insert a limb similar to that inserted into the *Criminal Investigation Act 2006* (WA), s 27(3), which states:

When giving a person an order ... a police officer must take into account the likely effect of the order on the person, including but not limited to the effect on the person’s access to the places where he or she usually resides, shops and works, and to transport, health, education or other essential services.

Mitigating the negative impact of move-on powers: Curbs on discretion

Even though it may be accepted that there is a necessity for police to have a certain level of discretion to conduct the varied and often unpredictable tasks associated with police work, the fear still remains about the arbitrary power that the exercise of discretion carries. One method of ensuring that policing occurs in a more equitable manner that would remove perceptions of unfairness is through more explicit structuring and controlling of police discretion.⁵⁴ Structuring discretion could be achieved through police authorities formulating comprehensive policies and guidelines in relation to move-on powers. This would not mean eliminating police discretion,⁵⁵ but simply providing some objective standards for testing police decisions, which may be particularly useful for frontline police who are often confronted with complex public disorder situations.

In general, the guidance available for public order policing is fairly limited. The CMC noted that QPS training, operational resources, practical guidelines and leadership by senior officers is deficient

⁴⁹ *Rowe v Kemper* [2009] 1 Qd R 247 9at [120], [122]; (2008) 185 A Crim R 526.

⁵⁰ Queensland Public Interest Law Clearing House (QPILCH), *Homeless Persons’ Legal Clinic submission to the Crime and Misconduct Commission’s Review of Queensland’s Police Move-on Powers* (2009), <http://www.cmc.qld.gov.au/data/portal/00000005/content/21085001243141319143.pdf> viewed 14 November 2011.

⁵¹ See *Rowe v Kemper* [2009] 1 Qd R 247 at [72]; (2008) 185 A Crim R 526; Walsh, n 41 at 81.

⁵² Taylor and Walsh, n 19, p 61.

⁵³ CMC Report, n 2, p 41.

⁵⁴ Goldstein H, *Policing a Free Society* (Ballinger Publishing Company, 1977). For a general discussion on adopting guidelines for the use of discretion see Galligan DJ, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford University Press, 1990).

⁵⁵ Goldstein, n 54, p 111.

in relation to move-on powers. Training and training materials concentrate primarily on the formal legal requirements and police procedures relating to identification and arrest of offenders.⁵⁶ Training specific to the use of move-on powers was limited, with as little as one hour devoted to the application of these powers (at the police academy level); there is scant practical training and minimal attention directed to methods of de-escalation. In response to the identified limitations and deficiencies within the QPS training materials, the CMC Report recommended⁵⁷ that extensive improvements be made to police training. Specifically, the QPS should establish strategic principles for the policing of public order and make training more relevant to operational policing. Beyond these recommendations, the CMC believed that a “comprehensive approach should be taken to guide police in the appropriate use of their discretion when responding to public disorder situations”.⁵⁸

Effective remedies for misuse and procedural failures

The PPRA 2000 provides numerous statutory safeguards that limit when and how police officers should use move-on powers. Upon giving a direction to move on, a police officer is required to give the person (or group of persons) a reason for giving the order under s 48(4). Giving reasons is an important aspect of procedural justice; communicating information about the process reassures the individual of the fairness of the procedure, thus impacting compliance with the law.⁵⁹ Under s 633, if a person fails to comply with a direction, without “reasonable excuse”, the officer is required to warn the individual that non-compliance is an offence and they may be arrested. As noted above, the officer must then allow the individual a further opportunity to comply. Further, s 679 requires that all move-on directions be recorded in the “QPS Register of Enforcement Acts”, along with the information required under the Responsibilities Code.⁶⁰ In its review, however, the CMC could not ascertain whether police had complied with statutory safeguards because a formalised system to capture the data about procedural safeguards did not exist.

Without court challenges to a charge of disobeying a move-on direction, it is difficult to determine how often procedural safeguards are violated by police. The Homeless Persons’ Legal Clinic has observed that it does not often challenge the move-on powers being issued against their homeless clients because, although clients may have been issued with unlawful directions, it is easier for them to comply with the direction than to contest it.⁶¹ The Queensland Public Interest Law Clearing House (QPILCH) further noted that when clients did challenge a direction to move on as being unlawful or unwarranted, they are routinely “charged with contravening a direction [and] they do not have the resources or strength to contest charges in Court and [therefore] plead guilty”.⁶² Currently, there are only two ways to appeal a move-on direction. If a person chooses to refuse to comply with a direction from a police officer, he or she can plead not guilty and challenge the direction in court. Alternatively, the person may challenge the direction by attending the nearest police station to seek an internal review. These issues highlight the importance of test cases like *Rowe v Kemper*.⁶³ Clearly there is an urgent need to act on the CMC findings, perhaps most significantly to establish a Public Order

⁵⁶ CMC Report, n 2, p 49.

⁵⁷ CMC Report, n 2, p 54, Recommendation 9.

⁵⁸ CMC Report, n 2, p 54.

⁵⁹ Tyler TR and Blader SL, *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioural Engagement* (Taylor & Francis, Ann Arbor, 2000).

⁶⁰ The Responsibilities Code is found in the *Police Powers and Responsibilities Regulation 2000* (Qld), s 65, which states that officers are required to record information identifying: when the direction was given; the location of the person when given the direction; the name of the person given the direction, if known; the reason for giving the direction; and apparent demographic of the person. This information must be kept for a minimum of three years, and be accessible by the person given the order, unless it is not in the public interest (for example, where disclosure may interfere with an investigation).

⁶¹ See QPILCH, n 50.

⁶² QPILCH, n 50.

⁶³ As a postscript, Mr Rowe took his claim even further, instituting a private criminal prosecution against one of the police officers who used force to arrest him for refusing to comply. Constable Benjamin Arndt was found guilty of assault, was fined \$1,000 and ordered to pay \$2,500 in court costs. See O’Connor M, “Police Need to Admit Errors”, *The Courier-Mail* (21 March 2011), <http://www.couriermail.com.au/news/police-need-to-admit-errors/story-e6freomx-1226025012373> viewed 14 November

Advisory Panel to monitor the use of move-on powers and aim to improve interagency and stakeholder co-operation (particularly those groups that have contact with marginalised groups in the community).⁶⁴

CONCLUSION

Move-on powers were implemented to deal with minor public disorder and anti-social behaviour issues. They have a strong crime prevention rationale allowing police officers to direct people to move away from an area. The aim was to give police an additional flexible tool to aid in the prevention of crime. They also purport to serve a diversionary function by offering an alternative to arrest. Move-on powers were originally adopted as a restricted power to be used in prescribed circumstances and places. Over time there has been an incremental expansion into a general move-on power, an idea that was originally opposed by the CJC in 1993.

The policy and practice issues canvassed in this article have emphasised the detrimental impact in cases where these powers do not comply with the legislative safeguards. Departures from legality and the procedural safeguards impact heavily on the most vulnerable in the community, though these potentially affect all people who utilise public space. The types of behaviour which attract a police direction to move on are not necessarily criminal. Antisocial conduct may be transformed into an offence when the individual who is directed to move away from an area by police refuses to comply. The high rate at which individuals are disobeying directions in Queensland suggests that instead of diverting individuals from the criminal justice system, levels of criminalisation may rise.

Empirical research suggests that the legislative safeguards and restrictions intended to guide and limit the application of move-on powers have largely failed to prevent misuse. Court challenges to charges of disobeying move-on directions, such as *Rowe v Kemper*, highlight that police have given inadequate attention to the terms of the legislation and the procedural safeguards. Move-on powers are highly discretionary in nature, raising concerns about the potential for misuse by police and the potential to influence negatively the support of the public for police generally, and to damage the perceived legitimacy that the police have in public spaces. To ensure that such laws are not applied unfairly, particularly to those from marginalised groups within the community, or any person utilising public spaces, police authorities need to develop more comprehensive policies and guidelines. These reforms should be implemented as part of more extensive improvements to police training as recommended in the CMC Report.

2011; Sweetman T, "Rowe Case Shakes Public Trust in Police", *The Sunday Mail* (13 February 2011), <http://www.couriermail.com.au/ipad/rowe-case-shakes-public-trust-in-police/story-fn6ck620-1226005064632> viewed 14 November 2011.

⁶⁴ CMC Report, n 2, Recommendations 10 and 11.

TABLE 1 Australian State and Territory police “move-on” powers legislation (current as at 29 October 2010)

Jurisdiction	QLD	ACT	NSW	NT	SA	TAS	VIC	WA
Relevant legislation	<i>Police Powers and Responsibilities 2000</i>	<i>Crime Prevention Powers Act 1998</i>	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>	<i>Summary Offences Act</i>	<i>Summary Offences Act 1953</i>	<i>Police Offences Act 1935</i>	<i>Summary Offences Act 1966</i>	<i>Criminal Investigation Act 2006</i>
Provision: Section and name	Directions to move on, ss 44-48	Move-on powers, s 4	Powers to give directions, ss 197-200	Loitering – general offence, s 47A Loitering – offence following notices, s 47B	Order to move on or disperse, s 18	Dispersal of persons, s 15B	Direction by police to move on, s 6	Suspect and others may be ordered to move on, s 27
Triggering conditions/ circumstances	Commenced 1997 A person's behaviour or presence: • causes anxiety to a person entering, at, or leaving the place; • interfering with trade or business; • disrupting the peaceable or orderly event, entertainment or gathering; And if a person's behaviour is disorderly, indecent, offensive or threatening to someone entering, at or leaving the place.	Commenced 1998 A person in a public place has engaged, or is likely to engage • in violent conduct (violence to, or intimidation of, a person; or damage to property).	Commenced 2002 The person's behaviour in the place is: • obstructing persons or traffic; • harassment or intimidation; • causing fear; • unlawfully supplying prohibited drugs.	Commenced 2006 A person is loitering in a public place and: • an offence has been committed; • movement of pedestrian or vehicular traffic is obstructed or about to be obstructed; • the safety of the person or any person in his vicinity is in danger; • or the person is interfering with the reasonable enjoyment of other persons utilising the public place.	Commenced 1985 A person is loitering in a public place or a group of persons is assembled in a public place and: • an offence has been committed; • a breach of the peace has or is about to occur; • pedestrian or vehicular traffic is or about to be obstructed or safety of person in the vicinity is in danger, the officer may request that person to cease loitering, or request the persons in that group to disperse.	Commenced 2001 The person has: • committed or is likely to commit an offence; • obstructing or likely to obstruct the movement of pedestrians or vehicles; • Endangering or likely to endanger the safety of any other person committed/likely to commit a breach of the peace.	Commenced 2009 The person is or persons are: • breaching, or likely to breach, the peace; • endangering, or likely to endanger, the safety of any other person; behaviour is likely to cause injury to a person or damage property or is otherwise a risk to public safety.	Commenced 2006 The person is doing or about to do an act that is likely to: • involve the use of violence against a person; • cause a person to use violence against another person; • cause a person to fear violence will be used. A person is: • committing any other breach of the peace; • hindering, obstructing or preventing lawful activity carried out by another person; • intending to commit or has just committed or is committing an offence.
Exclusions	Does not apply to an authorised public assembly under the <i>Peaceful Assembly Act 1992</i> , s 48(2) unless it is necessary in the interests of –	No exclusions	Section 200, which does not authorise a police officer to give directions in relation to: industrial disputes; genuine demonstration or	No exclusions	No exclusions	No exclusions	Section 6 does not apply in relation to the person, including picketing a place of employment; demonstrating or protesting; or	Consideration of likely effect of the order on the person, including but not limited to the effect on the person's access to the places where he or she usually

TABLE 1 continued

Jurisdiction	QLD	ACT	NSW	NT	SA	TAS	VIC	WA
Exclusions	public safety; public order or protection of other persons rights and freedoms.		protest; a procession; or organised assembly.				speaking, bearing or otherwise identifying with a banner, placard or sign.	resides, shops and works, and to transport, health, education or other essential services must be taken into account – s 27(3).
Temporal limitations for direction	Maximum 24 hours	Maximum 6 hours	Maximum 6 hours	Maximum 72 hours	No time restrictions specified, must leave place and area	Minimum 4 hours; no maximum	Maximum 24 hours	Maximum 24 hours
Geographic limitations	Public places; prescribed places that are not also public places	Public places	Public places – not including schools	Public places	Public places	Public places – including schools	Public places – including schools	Public places and public transport
Procedural requirements for direction	Police officer must tell the person or group of persons the reasons for giving the direction: s 48(4)	No prescribed form	No prescribed form	A police officer may give a written notice to a person loitering at a public place: s 47B	No prescribed form	A police officer may direct a person to leave a public place for not less than 4 hours: s 15(B)(1)	Direction may be given orally: s 6(2)	Any order given under s 27 must be in writing on a prescribed form.
Breaches of direction and penalty	An offence to fail to comply with the direction or requirement, unless the person has a reasonable excuse: s 79(2) Penalty: Max 40 penalty units Penalty unit = \$100	Must not contravene order without a reasonable excuse: s 4(4) Penalty: Max 2 penalty units Penalty unit = \$110	An offence, without reasonable excuse, to refuse or fail to comply with a direction: s 199 Penalty: Max 2 penalty units Penalty unit = \$110	A person so required shall comply with and shall not contravene the requirements: s 47A(2)(a) Penalty: Max of \$2,000 or imprisonment for 6 months, or both Under s 47B the person is guilty of an offence if: the officer gives the person the notice, and the person contravenes the notice. Penalty: Max 100 penalty units or imprisonment for 6 months. Penalty unit = \$133	A person of whom a request is made must leave the place and the area in the vicinity of the place in which he or she was loitering or face a fine: s 18(2) Penalty: Max \$1,250 or imprisonment for 3 months	A person must comply with a direction: s 15B(2) Penalty: Max 2 penalty units Penalty Unit = \$120	Person must not excuse contravene a direction given to the person under this section: s 6(4) Penalty: Max 5 penalty units Penalty unit = \$119.45	No penalties