QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Police Powers & Responsibilities & Other Legislation Amendment Bill 2013 Submission 003

Mr. Ian Berry MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Please accept this submission on behalf of the Queensland Council for Civil Liberties ('the Council') in relation to the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2013* (Qld) ('the Bill').

The Council is a voluntary organisation concerned with the protection of individual rights and civil liberties. It was founded in 1966 in order to protect and promote the human rights and freedoms of Queensland citizens.

Out-of-control events

We consider that the proposed laws for out-of-control events under clause 4 of the Bill are undesirable for two main reasons. Firstly, the proposed offence of organising an out-of-control event places an unreasonable burden on a potentially liable person that would, in many circumstances, be near impossible to discharge. Secondly, we consider the provisions making parents pay costs for their children's actions unreasonable in this case.

The unreasonable burden on event organisers

On the first contention, section 53BH creates the offence of organising an out-of-control event. The offence is committed if the person organises an event and the event becomes an out-of-control event. Section 53BB defines an event as a gathering of 12 or more persons. That section then defines an out-of-control event as resulting from 3 or more persons associated with that event engaging in out-of-control conduct which causes a person at or near the event to reasonably fear personal violence, property damage or interference with use of a public place. Section 53BC defines out-of-control conduct via a list of generally disorderly

behaviours. Section 53BD defines a person 'associated' with an event as being at the event or being reasonably suspected by a police officer as intending to go to the event, whether or not the person was invited, or leaving the event. Section 53BH(3) makes it a defence for a person to prove that he or she took reasonable steps to prevent the event from becoming an out-of-control event.

There is a significant disconnect between the supposed targeted offender and the broad range of people potentially captured by the laws. The explanatory notes to the Bill suggest that the offence will address a present deficiency in the law, that does not target 'persons who organise events which become out-of-control and are frequently undertaken for financial gain,'[1] or celebrity status.[2] However, the proposed organising offence does not make reference to these or any other intentions. It is these intentions which would link an organiser to the problematic, antisocial conduct which the explanatory notes decry. The organiser need not even engage in out-of-control conduct to be liable under the proposed laws.

Moreover, the offence is constructed such that an out-of-control event may result from behaviour of people over which the organiser may not have any control. The people who engage in out-of-control conduct which transforms a lawful event into an unlawful event need only be 'associated' with the event. An event host may have power to eject a disorderly individual from their event so that that individual is no longer 'at' the event. However, whether the event be at a public or private place, an event host is unlikely to be able to ensure that potentially disorderly people do not intend to attend the event or refrain from out-of-control conduct whilst leaving the event, so as to ensure the event does not become out-of-control. Consequently, actions of others over which a person has very limited control is likely to make that person liable for a criminal offence. The Council considers this result manifestly unfair.

Furthermore, considering the broad scope of circumstances that would seem to enliven the organising offence under section 53BH, it is unclear to what extent the defence of taking reasonable steps under section 53BH(3) would protect individuals

[1] Explanatory notes, *Police Powers and Responsibilities and Other Legislation Amendment Bill 2013* (Qld), 1.
[2] Explanatory notes, *Police Powers and Responsibilities and Other Legislation Amendment Bill 2013* (Qld), 2.

from conduct of others as discussed. Considering the overt intention of the Bill to target organisers, as opposed to attendees, it is unclear, even with examples of reasonable steps provided by the Bill, how a preventative action would be interpreted by the courts in specific circumstances.

The offence of organising an out-of-control event does not clearly apportion criminal liability to those who are culpable for the consequences of antisocial activities. In order for an organiser to be criminally liable, the Council considers that such a person must take a more direct hand in the antisocial behaviour. For example, this may include circumstances where the organiser also engages in out-of-control conduct or demonstrates an intention turn the event into an out-of-control event or profit materially or otherwise from the event becoming an out-of-control event. While intention is historically a difficult element to prove, the advent of social media means that evidence of intention would be easier to gather. Therefore, adjusting the offence to account for the organiser's actual culpability would not only be fairer, but also practical.

The unfairness of parent cost orders

Under section 53BM, if a court considers that a child who has committed an offence under subdivision 1 does not have the capacity to pay the commissioner's reasonable costs, that child's parent may be required to show cause as to why the parent should not pay such costs. Generally, the Council would oppose a costs order against a person for the commission of an offence by another. However, the Council regards the relationship between parent and child as exceptional, given the element of responsibility inherent in this relationship. Section 53BM is nevertheless objectionable. Due to our contention with the organising offence under section 53BH, we consequently object to a parent paying costs for their child's commission of that offence. We therefore suggest that the section 53BH organising offence be removed from the scope of parent cost orders.

<u>Accessing account information</u>

The Council does not oppose clause 13 of the Bill relating to accessing account information. We note, however, the importance of section 197B, which requires the officer to reasonably believe that advice sought is required for investigating an

offence, commencing proceedings for an offence or preventing the commission of an offence.

Failing to stop minimum penalty

The Council opposes clause 39 of the Bill relating to a proposed increased penalty for the offence under section 754 of the *Police Powers and Responsibilities Act 2000* (Qld). We oppose this law on the grounds that firstly, it is a mandatory sentencing scheme which can therefore lead to injustice in individual cases and secondly, increased penalties for this offence in recent times have not reduced offending rates.

Mandatory sentences can lead to injustice in individual cases

The proposed minimum non-parole period defines a minimum term to be served for those offenders sentenced to actual imprisonment.[3] We would therefore consider this scheme to be a form of mandatory sentencing and oppose it. Section 9(1) of the *Penalties and Sentences Act 1992* (Qld) directs the court to impose sentences for punishment, rehabilitation, deterrence, denunciation and community protection. As the High Court has said, consideration of these principles is required to determine whether it is necessary or desirable that an entire head sentence be served.[4] Being privy to an individual's circumstances, the court is best placed to apportion weight among the sentencing considerations. In doing so, the court tailors a sentence to achieve the greatest justice on an individual basis.

By prescribing a minimum non-parole period, the proposed scheme erodes the court's discretion to apportion weight among sentencing considerations, take account of mitigating factors and ultimately, set a parole eligibility date as it sees just. Therefore, the proposed scheme may unduly punish an individual where that person's circumstances do not warrant that level of punishment. An unnecessary period of time in prison is an unjustifiable breach of a person's liberty.

This result is made worse by the detrimental consequences that can potentially result from imprisonment. As Sir Anthony Mason reflected, 'There is no shortage of opinions from those experienced in the field of criminology who say that gaols are a fertile breeding ground of crime and that young offenders are at risk of becoming

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[3] *Police Powers and Responsibilities and Other Amendment Bill 2013* (Qld) cl 39.
[4] See, eg, *R v Shrestha* (1991) 100 ALR 757, 771, 772 (Deane and Toohey JJ).

professional criminals as a result of imprisonment.'[5] The Council believes that the court and not Parliament is best equipped to determine, in the case of parole, at what point the prisoner should become eligible. Where a prisoner serves a longer term than his or her circumstances would otherwise warrant, an injustice is done. Therefore, the Council opposes the proposed minimum non-parole period.

Harsher penalties have not reduced offending

The Council notes that as recently as 29 August 2012, the Parliament amended the penalty for a section 754 offence to create a minimum penalty of 50 penalty units.[6] This penalty is significant and was accompanied by an assertion that it would act as a deterrent for motorists who are directed to stop by police.[7] However, the rate of motorists failing to stop for police has actually increased by 17% this year as compared with last year.[8]

In any context, the Council views imprisonment, arguably as the punishment on the statute book which most severely restricts individual liberty, as a measure to be used only with adequate justification. Given that harsher penalties have not had the desired deterrent effect in relation to this offence, the Council questions the introduction of a minimum non-parole period.

DNA arrangements

The Council does not object to the relevant amendments which make provision for DNA arrangements whereby accredited non-government laboratories are permitted to perform DNA analyses. However, the Council's approval is conditional upon DNA samples analysed by those laboratories being de-identified. We agree with the sentiment expressed in the explanatory notes to the Bill that the de-identification process is imperative to preserving an individual's privacy.[9]

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[5] Sir Anthony Mason, 'Mandatory sentencing: implications for judicial independence' (2001) 7(2) *Australian Journal of Human Rights* 21.
[6] *Criminal Law Amendment Act 2012* (Qld) cl 21.
[7] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 June 2012, 818 (Jarrod Bleijie, Attorney-General).
[8] Queensland Police Records and Information Management Exchange (Q-Prime), *Total reported "Evade" Offences for the State by District*, 30 September 2013.
[9] Explanatory notes, *Police Powers and Responsibilities and Other Legislation Amendment Bill 2013* (Qld), 4.

Surveillance device warrants

On its face the amendment to section 332 appears reasonable. However, it raises once again the important question of the power of the Public Interest Monitor to review the actual implementation of search warrants. This Council has repeatedly called for the Public Interest Monitor to be given the right to be present in the room whilst conversations are actually monitored. We have also argued for the implementation of a requirement that all persons implementing the search warrant should be required to provide a report to the Judge who issued the warrant and to the Public Interest Monitor on the outcome of the warrant and if the warrant was not actually used, why it was not used.

It is our view that the *Police Powers and Responsibilities Act* ought to be amended to require that the police should report to the issuing Judge and the Public Interest Monitor on the actual implementation of the warrant or if it was not issued, to say so and to specify why it was not implemented. Furthermore, the law ought to provide, as is the constitutional requirement in Canada, that a person who is the subject of a warrant ought to be so advised. The law should require the police to notify all individuals whose personal information has been accessed within one year of the information being obtained unless the individual cannot be readily identified or notification would prejudice an ongoing investigation. Notification should be required within five years of the information being obtained unless it is determined the public interest in non-disclosure outweighs the right to a notification.[10]

We trust this is of assistance in your deliberations.

Yours faithfully,

Will Kuhnemann
Executive Member
For and on behalf of the
Queensland Council for Civil Liberties

[10] *R v Duart* [1990] 1 SCR 30 [43]; *R v Six Accused Persons* [2008] BCSC 212 [214].