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Office of the President

Police Powers & Responsibilities & Other Legislation Amendment Bill 2013 Submission 004

14 October 2013

Our ref 339/59

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email to: lacsc@parliament.qld.gov.au

Dear Research Director

Police Powers and Responsibilities and Other Legislation Amendment Bill 2013

Thank you for providing the Society with the opportunity to comment on *the Police Powers and Responsibilities and Other Legislation Amendment Bill 2013* (the Bill).

Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

Out-of-control events

1. General comments

We note that existing legislation includes offences which address this type of offending and reflect community concern. The Society questions the introduction of new offences where the same conduct is covered by an offence which already exists in legislation. We consider that the current proposals may create unnecessary duplication, which may be contrary to the government's commitment to red tape reduction.

For example, for proposed s53BC, out-of-control conduct is defined as:

> *(a) unlawfully entering, or remaining in, a place or threatening to enter a place;*
>
> *(b) behaving in a disorderly, offensive, threatening or violent way;*
>
> *Examples for paragraph (b)—*
>
> *• using offensive, obscene, indecent, abusive or threatening language*
>
> *• taking part in a fight*
>
> *(c) unlawfully assaulting, or threatening to assault, a person;*

(d) unlawfully destroying or damaging, or threatening to destroy or damage, property;

(e) wilfully exposing a person's genitals or doing an indecent act;

(f) causing or contributing to the emission of excessive noise mentioned in section 576(1);

(g) driving a motor vehicle in a way that causes a burn out within the meaning of section 69;

(h) unlawfully lighting fires or using fireworks;

(i) throwing, releasing or placing a thing in a way that endangers, or is likely to endanger, the life, health or safety of a person;

(j) unreasonably obstructing the path of a vehicle or pedestrian;

(k) littering in a way that causes, or is likely to cause, harm to a person, property or the environment;

(l) being drunk in a public place;

(m) conduct that would contravene the Liquor Act 1992, part 6;

(n) conduct that would contravene the Drugs Misuse Act 1986, part 2.

It is clear that these examples describe behaviour that is already appropriately criminalised under existing Queensland legislation.

The Society considers that the most effective way to address this issue is to strengthen policing resources to deal with such events, and also increase education to young people and their parents or guardians about holding safe events. We also note that young people may be disproportionately affected by this legislation, and as a result of the severe penalties imposed, there is increased likelihood of young people meeting in public places instead of holding private gatherings. This may create situations where there will be more interactions with police, and increase in the use of police powers such as move-on directions.

2. What is out-of-control conduct (proposed s53BB)

The proposed s53BB(1) states:

(1) An event becomes an out-of-control event if—

(a) 12 or more persons are gathered together at a place (an event); and

(b) 3 or more persons associated with the event engage in out-of-control conduct at or near the event; and

(c) the out-of-control conduct would cause a person at or near the event—

(i) to reasonably fear violence to a person or damage to property; or

(ii) to reasonably believe a person would suffer substantial interference with their rights and freedoms or peaceful passage through, or enjoyment of, a public place.

We note that having a threshold of three out of 12 or more persons engaging in out-of-control conduct may be quite a low barrier. We particularly note the wide variety of conduct that can be considered as being out-of-control, which could mean that three people being drunk in a public place (for example, by standing out on a footpath in front of a property where a party takes place) at different times in the night could result in those people and the organiser of the event being charged, noting the hefty fines and potential imprisonment which could result.

3. Taking action for out-of-control events (proposed s53BG)

If authorisation by a senior police officer is obtained for the use of out-of-control event powers, actions such as dispersing persons associated with the event can be taken by a police officer.

Perhaps it should be made clear that this dispersal should be in line with standard police processes regarding methods for dispersing persons, including parameters on the use of any force in order to do so.

4. Organising an out-of-control event (proposed s53BH)

This section makes it an offence to organise an out-of-control event, where the maximum penalty could be 165 penalty units or 3 years imprisonment. We note that the organiser of an event may not be the person responsible for promoting the party. Similarly, we query whether a person who promotes a party on social media which is not their own would also be liable under this section.

Proposed s53BH(3) provides a defence for a person taking reasonable steps to prevent the event becoming an out-of-control event. We note that in the Western Australian legislation, further examples were provided in relation to the types of reasonable steps:

> *(b) organising the gathering in a manner that indicates that only persons invited to the gathering may attend;*
>
> *(c) giving notice of the gathering to the Commissioner of Police in a manner approved by the Commissioner of Police;*
>
> *(d) taking steps to request the attendance of police officers at the gathering as soon as practicable after becoming aware that —*
>
> > *(i) the gathering is likely to become an out-of-control gathering; or*
> >
> > *(ii) any person is trespassing on a place where the gathering is occurring.*[1]

We consider these to be reasonable actions which should provide a defence for a person charged, and it would be instructive to include these as examples of reasonable steps in the Bill.

5. Causing an out-of-control event (proposed s53BI)

This section seeks to target those who have been refused entry to an event, engage in out-of-control conduct and as a result, the event becomes an out-of-control event. Proposed s53BI(2) states:

> *(2) A person may be liable for an offence against subsection (1) even if another person's conduct contributed to the event becoming an out-of-control event.*

[1] Western Australia Criminal Law Amendment (Out-of-Control Gatherings) Act 2012, s75B(4)

The Explanatory Notes further state that:

> *Subsection 53BI(2) clarifies that the out-of-control conduct of a person is not considered in isolation. The out-of-control conduct being engaged in by the person is taken together with the conduct of other persons is taken into consideration in determining if the conduct is of such a nature that it causes or would likely cause, any person at the event or in the vicinity of the event, any one of the resultant harm or impact on persons or property, set out in subsection 53BB(1)(c). Furthermore, the out-of-control conduct does not have to be the same type of conduct and does not have to occur simultaneously.*[2]

The Society is concerned with the expanded liability being proposed. This will lead to situations where the liability of the accused is being influenced by conduct that they were not only **not** part of, but perhaps entirely unaware of. As a minimum, we suggest that if another person's conduct is to be taken into account as contributing to the event becoming out-of-control, it should at least be the case that the accused knew, or ought reasonably have known, of that other conduct.

6. Offence to contravene direction (proposed s53BJ)

We note that s791 of the *Police Powers and Responsibilities Act 2000* already makes it an offence to contravene a direction or requirement of a police officer. We question why it is specifically needed in this Bill.

7. Costs orders (proposed subdivision 2)

The proposed Bill sets out that costs orders can be made against an adult, a child or the parent of a child offender (subject to a show cause process). We note that both the *Penalties and Sentences Act 1992* and the *Youth Justice Act 1992* already provide for compensation and restitution to be made, which is referenced in the Bill.

The Explanatory Notes state:

> *In determining the quantum of the commissioner's reasonable costs including the costs of the police time in minimising the impact of persons dispersing from the event and locality on the broader community, the costing rate shall be in accordance with the rate set out in the Financial Management Practice Manual.* [3]

There may be issues in terms of ensuring that reasonable costs are fairly sought between those accused, particularly where there are multiple parties charged with offences relating to the same conduct. For example, would the reasonable costs for police time in dispersing persons be sought against the organiser or against parties convicted of causing the out-of-control conduct? Further clarification is required in this regard. We also query the following points with regard to costs orders:

- What is the test to be applied by the court in assessing the amount of costs;
- Whether the amount is able to be referred to SPER;

[2] Explanatory Notes, page 9

[3] Explanatory Notes, page 10

- Would there be a default period for lack of payment; and
- What level of disclosure would be required by police to a defendant of the intention to apply for a costs order.

Other changes to the *Police Powers and Responsibility Act 2000*

8. Destruction of registered digital photo (replacement of s195L)

The Society understands that there may be an imperative to replace the provision with one which is more practical, given the advent of technology in accessing photos electronically. However, where the current section says that the police officer "**must destroy all copies** of it [the photo] obtained from the access", the Bill will change this standard so that the Commissioner "**must take reasonable steps to destroy copies**". We query the reason why there is not a blanket obligation to *ensure* destruction of copies.

Proposed s195L(3), which provides a list of exceptions where the digital photo does not need to be destroyed (whereas the current position is that all copies should be destroyed where it is no longer required for the purpose for which it was accessed). The exceptions are:

> *(a) the person has been found incapable of standing trial for the offence because of mental illness; or*
>
> *(b) the person's registered digital photo was accessed for a purpose relevant to the investigation or prosecution of more than 1 offence and for at least 1 of the offences—*
>
> > *(i) the person is found guilty; or*
> >
> > *(ii) a proceeding has started against the person but a finding has not been made by the court about whether or not the person is guilty.*

Proposed s195L(3)(b) is reasonable, as the person is still under investigation and access to digital photographs may be required. However, proposed s195L(3)(a) could pose a situation in which the person has been dealt with, and under the *Mental Health Act 2000,* the proceedings become discontinued. Specifically, we highlight s283 of the *Mental Health Act 2000* which states:

> ***283 Proceedings discontinued—permanently unfit for \trial***
>
> *If the Mental Health Court decides a person charged with an offence is unfit for trial and the unfitness for trial is of a permanent nature—*
>
> *(a) proceedings against the person for the offence are discontinued; and*
>
> *(b) further proceedings must not be taken against the person for the act or omission constituting the offence.*

In circumstances where the proceedings are discontinued and no further proceedings can be taken, we consider that the digital photographs must be destroyed. The Bill should be amended to clarify this point, as we were not able to find justifications for this exception in the Explanatory Notes.

The proposed section also removes the requirement for the destruction to occur in the presence of a justice. The Explanatory Notes have not provided information as to why this

change will occur, noting particularly the need to ensure that privacy of individuals is respected.

9. Noise complaints (changes to s577-582)

The amendments will allow persons to make anonymous complaints about excessive noise, and also removes the requirement that *"a police officer has to be reasonably satisfied that the noise complained of is clearly audible at or near a particular complainant's residence or work place. Instead, the police officer must be reasonably satisfied that the noise is clearly audible at or near residential premises."*[4]

The Society expresses concern that it appears it will no longer be necessary to ascertain that the noise level affects a particular person or persons tied to their location, and will rely solely on the reasonable satisfaction of a police officer that the noise is clearly audible at or near residential premises. It is important that there is in fact a person or persons suffering a detriment or interference, particularly given that there can be quite onerous consequences for non-compliance with abatement directions.

We also foresee that malicious complaints could be made as they will be anonymous, and may result in a large amount of police resources being used to respond to noise complaints.

Increase in hours of compliance with direction from 12 hours to 96 hours

This appears to be dramatic increase in the number of hours that a person must comply with a noise abatement direction, in circumstances where a person could be criminally penalised if the direction is not followed. There may be situations in which it would be unfair to impose a 4-day direction, particularly with situations of families and share houses where various people might not be aware of the direction.

10. Offence for driver of motor vehicle to fail to stop motor vehicle (s754)

The Bill proposes to insert the following new minimum penalty for this offence:

> *Minimum penalty—50 penalty units* ***or 50 days imprisonment served wholly in a corrective services facility.*** [emphasis added]

The Explanatory Notes on this section state:

> *On 6 August 2013, the Cairns Supreme Court delivered a decision in the matter of Commissioner of Police Service v Magistrate Spencer and Ors [2013] QSC 202. The decision suggests that alternative penalties for evading police offences could include a range of sentencing options, including probation or suspended sentences.*
>
> *Sentencing options such as these, particularly in circumstances where such an option is not comparable with a fine of 50 penalty units, undermines the Government's commitment to ensuring penalties for those who evade police are commensurate with the risk posed to the community.* [5]

The Society has long maintained a strong stance against any form of mandatory sentencing, which this proposal appears to amount to. Sentencing decisions should rest with highly trained judicial officers, who are in the best position to administer justice through judicial

[4] Explanatory Notes, page 16
[5] Explanatory Notes, page 3

reasoning and comprehensive understanding of the offence and the circumstances surrounding its commission. We do not support restrictions on the range of sentencing orders available to a judicial officer, noting that in this circumstance the judicial officer is seemingly limited to considering only two options given the minimum penalty being proposed.

It appears that an unintended consequence of this reform may be that a judicial officer who considers 50 days imprisonment to be excessive in the circumstances must apply the full 50 penalty units, but is prevented from imposing a shorter custodial sentence (such as 45 days in custody). This will have the unusual effect of an imprisonment sentence not being imposed, where an imprisonment sentence of less than 50 days might have been justified in the circumstances.

Take the following situation as an example of the potential unjust operation of the provision:

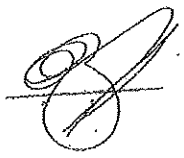
> *A person is charged with failing to stop her motor vehicle contrary to s754. The undisputed facts are that she was waved down by a police officer standing on the side of a busy road. She drove 40 metres around the corner into a side road and stopped there. The police officer entered his unmarked vehicle and drove the 35 metres to park behind her.*

This person could be convicted of an offence against s754 on these facts. We question whether imposing strict minimum penalties of 50 penalty units or minimum 50 days imprisonment is fair and proportionate in such a scenario. It is in circumstances such as this that judicial officers are best placed to judge the facts of each case and order consequences to an extent or in a way that is just in all the circumstances (with regard to the sentencing guidelines outlined in s9, *Penalties and Sentences Act 1992).*

We note that mandatory sentencing provisions may also reduce the proportion of pleas of guilty. Given the serious consequences attached, which include a mandatory two year licence disqualification and a fine of $5500 or 50 days imprisonment, this could lead to a higher number of contested hearings under this section. This will likely increase court costs and delays, and require prosecution resources and police witnesses.

We are pleased to assist should you require clarification of, or wish to discuss, any of the matters raised herein. Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dcruz@qls.com.au or Graduate Policy Solicitor, Ms Jennifer Roan on (07) 3842 5885 or j.roan@qls.com.au for further inquiries.

Yours faithfully



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