QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Safe Night Out Bill 2014
Submission 019

The Research Director
Legal Affairs and Community Safety Committee

By Email: lacsc@parlaiment.qld.gov.au

Dear Sir/Madam

Safe Night Out Legislation Amendment Bill 2014

We thank you for the opportunity to make a submission in relation to this Bill.

The Council recognises that this Bill is a response to concerns in the community about alcohol related violence. However, the Council maintains that the response to this issue needs to take into account the right to privacy, the right to freedom of association and the right to due process. All of these rights are recognised in *Universal Declaration of Human Rights*. The QCCL has as its objective the implementation of the rights contained in this instrument in Queensland.

Mandatory Sentencing

The Bill contains a number of proposals for mandatory minimum sentences.

The history of mandatory minimum sentences has recently been reviewed by Trotter and Hobbs in their article *The Great Leap Backward Criminal Law Reform with the Honourable Jarrod Bleijie.*[1]

Mandatory minimum sentences do not reduce crime[2] or at the very best only marginally.[3] The only guaranteed consequences of mandatory sentencing are that injustices will occur and the prisons will fill up and become overcrowded at great expense to the State.[4]

The sadly now abolished Queensland Sentencing Advisory Council in its final report on *Minimum Standard Non Parole Periods* opposed the introduction of such schemes noting at page XV of the report "That there is limited evidence that SNPP Schemes meet their objectives, beyond making sentencing more punitive and the sentencing process more costly and time consuming".

It is particularly difficult to see how mandatory minimum sentences can be an effective deterrent when people are intoxicated.

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[1] 36 Sydney Law Review 1 at pages 12 to 16.
[2] David Brown *Mandatory Sentencing: A Criminological Perspective* [2001] Australian Journal of Human Rights 31
[3] D. Roche *Mandatory Sentencing: Australian Institute of Criminology Trends and Issues* December 1999 especially pages 5 and 6
[4] Chan *The Limits of Incapacitation as a Crime Control Strategy* New South Wales Bureau of Crime Statistics and Research Crime and Justice Bulletin September 1995

Quite clearly people who are intoxicated are going to pay no heed to the level of sentence that they are likely to receive. All this is likely to do is to result in a large number of people who are otherwise of good behaviour being imprisoned for lengthy periods in our jail system which is already under stress from overcrowding.

Tony Moore reported in the *Brisbane Times* on 8 April, 2014[5] that the State's prison population has swollen by a record 23% or 1,268 prisoners in the short period of the LNP Government.

Anecdotal reports have many prisoners sleeping on the floor.

Unlawful Striking Causing Death

The QCCL supports what is known as the "Subjectivist Theory" of criminal law on the basis that that approach best promotes individual liberty. Under that approach moral guilt, and hence criminal liability, should be imposed only on people who can be said "to have *chosen* to behave in a certain way or to cause or risk causing certain consequences" Law Commission *Involuntarily Manslaughter* 4 March 1996 paragraph 4.4.

In cases where a single punch or push has fatal consequences which could not reasonably have been foreseen, although the initial act is clearly antisocial and deserving of some punishment, prosecuting for manslaughter amounts to holding people responsible for bad luck.[6]

The proposed clause 14 by providing that section 23 (1) (b) and 270 of the Criminal Code will not apply to the offence clearly violate the principles enunciated above. We remain of the view that the law was correctly stated in the Queensland Court of Appeal as approved by the High Court in the case of *Van den Bemd*[7]. However, having regard to community concerns about this issue the QCCL has endorsed the proposal of the Irish Law Reform Commission for an offence of assault causing death and of the English Law Reform Commission that the penalty for such an offence should be a maximum of 3 years that remains our position.

Section 24

Section 24 prescribes one of the fundamental requirements for criminal liability. In 1902 Sir Samuel Griffith as Chief Justice of Queensland described the section is a rule of common sense as much as a rule of law. It is a principle to be found also in the common law. See *Carter's Criminal Law of Queensland* 18th Edition paragraph 24.1.

We see no justification in departing from this principle.

CCTV

The CCTV guide lines accessed from the Office of Liquor and Gaming website on 4 July 2014 show that CCTV must be deleted after 30 days, unless an incident is reported. There is no definition of "incident". In the event our view is that 30 days is too long a period and 48 hours would be more appropriate.

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[5] Paroled inmates unable to find accommodation returning to prison at $70,000 per year.

[6] We refer to the discussion in the report at pages 8-84 and 100-106 of the Irish Law Reform Commission report *Homicide: Murder and Involuntary Manslaughter* [2008]

[7] R v Van den Bemd (1994) 68 ALJR 199

Scanning of Drivers Licences

The Council accepts that of course licensees are entitled to comply with their lawful obligations by sighting proof of age. However, in our view the copying of a driver's licence represents a gross violation of the right to privacy.

The collection of copies of drivers' licences is justified on the basis that it is needed to allow the detection of violent crime or to deter crime on the premises. We ask where is the evidence that it is effective? The idea that ID scanners at pubs and clubs will be effective in deterring violence suffers from the same floor in logic as the idea that introducing mandatory minimum sentences will have that effect. The reality is that by the time people get inside the club and they've had a few drinks they are likely to forget that they have left their licence information at the door. Three Canadian Privacy Commissioners have conducted inquiries into this and found no evidence that the practice deters crime.[8] This position was confirmed by a recent study released by the Australian Institute of Criminology which found that the statistical evidence showed that "No discernable reduction in reported assaults or emergency admission" following the introduction of licence scanning in Geelong. [9]

But in any event this policy reverses the presumption of innocence. It makes everybody in the hotel or club a criminal. On the basis of this logic your local shopkeeper should be able to keep a copy of your drivers licence on the basis that you might be a potential shoplifter.

In December 2006 the Australian Federal Police warned people about allowing businesses to copy their ID as it created a real risk of identity fraud.[10]

The QCCL is extremely sceptical about claims of security for this data. Many of examples of the hacking of the security systems of highly sophisticated organisations abound. Most recently even E-bay have had its users accounts hacked despite all of its security measures. There is no reason to think these databases are going to be invulnerable to access either by police or criminal networks.

We certainly would have no objection to licensed venues being supplied with photographs of persons who are banned by Court orders from their premises. This no doubt is a necessary and proportionate measure to effectively enforce such orders. However, we would be concerned about the unrestricted sharing of information between the police and licensed venues.

The QCCL welcomes the legislative requirement that licencees subject themselves to the *Privacy Act* (Cth).

However, we remain of the view that requiring licencees to retain this information for 30 days is unnecessary. If there is a violent incident inside licenced premises we would expect it to immediately come to the attention of the management. We would have thought a retention period of no more than 48 hours was appropriate.

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[8] The Privacy Commissioner of Canada, (PIPEDA Case Summary 288396 5 August 2008), the Privacy Commissioner of Alberta (in the case of Pennylane Entertainment Limited Case File No. P0256, 15 February 2008) and the Privacy Commissioner for British Columbia (re Cruz Ventures Pty Ltd Order No. PO901, 21 July 2009)

[9] D. Palmer: *ID Scanners in the Night Time Economy* – Australian Institute of Criminology Trends and Issues No. 466

[10] The Daily Telegraph *"Where your ID is at risk", 29/12/06*

Sobering Safe Centre

The QCCL remains concerned about this proposal.
We agree with the President of the Police Association of New South Wales Mr Scott Webber who has been quoted as describing a similar proposal in New South Wales as a "band aid solution". He is further quoted as saying "Putting a large group of intoxicated people in one location is absolutely ridiculous and a huge drain on valuable police resources".[11]

It is a proposal which is likely to be abused by police. Clearly whenever the police are given a broad discretion such as for example the move on powers it is the mentally ill, the homeless and indigenous persons who bear the brunt of the legislation.

The problem of too many intoxicated people roaming the street would be better addressed by providing more adequate public transport so that they can get home. That would be better than giving the police an uncontrolled discretion to detain people who have committed no offence and to put them in danger by locking them up with other drunks.

The discretion given to the police in these circumstances must be considered in the context where it is generally accepted that it is impossible to accurately measure someone's level of intoxication simply by looking at them let alone to determine their propensity to become angry or violent.

If the legislation is to proceed then the police power to detain people has to be prescribed very clearly to situations in which the persons involved are at a serious and imminent risk to their own safety or represent an imminent and serious threat to the safety of others.

Alternative Proposal – Decriminalise Public Drunkenness

The 1991 Commonwealth Royal Commission to Aboriginal deaths in custody, *Royal Commissioner to Aboriginal Deaths in Custody National Report* (1991) recommended (recommendations 79 – 87) that public drunkenness be decriminalised.

This recommendation was followed by the Drugs and Crime Prevention Committee Parliament of Victoria *Inquiry into Public Drunkenness* (2001) (the 2001 Victorian Report) and the same committee in *Inquiry into strategies to Reduce Harmful Alcohol Consumption* (2006). In our view the problem of public drunkenness should be treated as a health issue. It should not be a criminal offence.

Our comments are based on the 2001 Victorian Report and having regard to its description of the systems in operation in other states were public drunkenness has been decriminalised.

If public drunkenness is decriminalised *civil* detention in a sobering up centre should be permitted where a police officer has a reasonable belief that it is necessary to detain the person as they represent a serious and imminent risk to their own safety or to that of other members of the public.

However, the legislation should provide the taking of a person to detention must be a last resort. The first attempt should be to place the person into the care of a responsible person such as a family member or friend who is willing and able to care for that person.

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[11] Sydney Morning Herald *Police Fear Death Risk in Plan for Drunk Tank* 4 November, 2012

We agree with the 2001 Victorian Report that the staff of sobering up centres should not be empowered to forcibly detain people beyond that the powers of citizens arrest.

Whilst we agree with the 2001 Victorian Report that the central issue in determining when a person should be released is whether or not they are intoxicated enough to continue to be a threat to their own safety or that of others, we are of the view that there has to be some limit to the period of detention. A person should be entitled to release after 8 hours. The continued detention of the person would have to be justified to an independent authority.

We also agree with the Committee that in appropriate circumstances an intoxicated person should be able to have his or her detention reviewed by a Magistrate or other legal officer.

Police should be prohibited from interviewing a person who is intoxicated whilst detained.

Breath Testing in Relation to Assaults on Police and Other Officials

The QCCL opposes the testing of people who have not been charged with an offence.

Where an accused did not give consent to be tested an independent authority such as a Magistrate should be approached for an Order permitting the test.

Police Banning Orders

The QCCL opposes the grant to the police of the power to ban persons from being in or around licensed venues. The move on power is entirely adequate.

The proposed power is transparently open to abuse. It is most likely to be used against indigenous and other disadvantaged members of the community as had been the case with the move on power.

Somewhat reluctantly the QCCL accepts the power which has been granted to the Court to issue banning orders. That at least has the advantage that the orders are made by a Court in the context of a sentencing regime having heard argument and being presented with evidence.

We are particularly concerned about section 602C (c) (iii) which enables the police to give a notice when a person is "disrupting or interfering with peaceful passage, or reasonable enjoyment of other persons at the places."

We are concerned about the trend, not just in this country but overseas, to increasingly restrict public places by removing the "noisy and inconvenient" from them. If this power is to proceed that provision should be removed.

There is then a power for a senior officer to extend this banning period for up to three (3) months. The legislation requires that the senior officer take into account the respondent's "personal circumstances" and the likely effect of giving the extended police banning notice on those circumstances. However, there is no provision in the legislation for the person who is to be subject of such a notice to make any submissions or supply any information from which the police officer might possibly know about these matters.

The right of review in QCAT is likely to be entirely otiose given the delays in that Tribunal. It would be far more effective to have right of review to the local Magistrates

Court. The legislation should provide that the ban is suspended once a notice of appeal is lodged.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
4 July 2014