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The Research Director

Legal Affairs and Community Safety Committee

Parliament House

George Street

BRISBANE QLD 4000

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

4th July 2014

Dear Colleague,

Re: Safe Night Out Legislation Amendment Bill 2014

We welcome and appreciate the opportunity to make a submission in relation to the Safe Night Out Legislation Amendment Bill 2014 ("the Bill").

PRELIMINARY CONSIDERATION: OUR BACKGROUND TO COMMENT

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for over four decades, has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

INTRODUCTION

We commend the central objective of the Bill which is designed to address what is in some quarters a seemingly entrenched culture of viewing alcohol-fuelled violence as somehow being acceptable. To that end, we support the vast bulk of the proposed changes outlined in the Bill. However, there are a number of draft clauses etc, which we feel could either be counter-productive and/or have unforseen, unfair or unintended consequences – and it is to those matters that our submission is framed.

Further, on the basis that prevention is better than cure, we would urge that any changes that are brought into place, should be accompanied by a significant media marketing campaign. Any changes which are designed to be a deterrent – will only be so – if the public is fully aware of same.

CLAUSE 4 MANDATORY DRUG AND ALCOHOL ASSESSMENT REFERRAL

Proposed section 11 (9A) of the Bail Act makes it <u>mandatory</u> to impose a Drug and Alcohol Assessment Referral ("DAAR") in certain stipulated circumstances.

We would be of the firm view that (for example), a homeless long term alcoholic (possibly with mental health issues) should be dealt with in a manner different to that of say an intoxicated middle-class youth out night clubbing. Justice (and indeed common sense) dictates that individual circumstances are integral to the equation of arriving at an appropriate sentence or diversionary option or bail condition. To that end, whilst we would be supportive of the underlying rationale giving rise to the DAAR measures, we would counsel against making such "mandatory". Such should be an optional measure – to be imposed subject to the common sense discretion of a police officer or judicial officer.

Further, as a mandated requirement, such might in practice be impossible to fulfil due to a lack of resources in certain regions (especially remote regions) – another reason for "discretion" over "mandate".

CLAUSE 5 CONDITION REQUIRING COMPLETION OF DAAR

For the reasons outlined above, we would submit that the word "must' in proposed subsection 11AB (2), should be replaced with the word "may".

We note that various amendments in the Bill have the effect of stipulating that where a person is charged with a prescribed offence, and it is alleged that it was committed in a public place while intoxicated, in granting Bail the Court or a police officer must impose a condition that the person complete a DAAR.

For many of our clients who are itinerant, it might simply be impractical or unfairly cumbersome to impose a mandatory condition that they attend a DAAR. For example, we have acted for numerous clients who come from rural communities to visit the city, and are charged with various offences whilst visiting. For many of those clients, if they were released on the requirement that they attend a DAAR, they would be faced with the option of either breaching their bail to return home, or staying in the city to attend the DAAR but in the meantime, having to live on the streets or without any money, and therefore possibly facing further encounters with the police.

We urge the Committee to consider recommendations amending the Bill to reflect that this condition should be (a highly valuable) option – but not be mandatory.

Further, we would counsel against including s790 PPRA offenses (obstruct/assault police) in the list of "prescribed offences". An "obstruct police" charge for example has a very low threshold of activity to make out the charge. To include this type of offence in the list of "prescribed offences" would negatively impact upon already disadvantaged cohorts – such as the homeless or mentally challenged. Further, this offence often arises in circumstances where prior to police involvement, no offence had even been committed.

Further, we would suggest that the definition of what constitutes a "public place" (which appear at the end of this proposed new section), needs to be tightened up. For example: *"a place, or part of a place, the occupier of which allows, whether or not on payment of money, members of the public to enter"* - could arguably include a private residence.

CLAUSE 14 UNLAWFUL STRIKING CAUSING DEATH

This newly created offence seeks to remove the current defences/excuses of *provocation* and *accident* in relation to strikes to the head or neck which cause death [s302A (2) and (3)]. An "assault" must of course be an element of an offence for provocation to apply – hence s302A (3) – *Kaparonovski.*

It is further noted that the proposed definition of “causing” (the death) – includes “indirectly”.

We have always been of the view that if a death is accidental or provocation rightfully applies – then there is no logical reason to exclude such defences. Indeed, it would be incongruous to disallow such defences for someone provoked into throwing an ineffective punch to the jaw, but to allow such for another who throws a round-house karate kick to the chest.

Put simply, an event occurs by “accident” if it is an outcome which was not intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person as a possible outcome. When such circumstances do in fact exist, we would respectfully suggest that the defence should still be available – failing which, injustices will undoubtedly occur.

One possible mid-ground consideration might to be reverse the onus of proof in such circumstances (i.e. rather than the Crown carrying the onus of negativing the defence once properly raised on the evidence – to leave the onus of proof on the accused on the balance of probabilities).

Current section 270 Criminal Code (which is also proposed to be excluded), is of course only a defence if the force used is not intended, and is not such as is likely, to cause death or GBH. Whilst provocation is only a partial defence wrt a charge of murder, it can be a total defence wrt a charge of manslaughter – and rightfully so. This section only applies to deaths which are both unintended and unforeseen. There is no logical basis to exclude such.

The Criminal Code should criminalise criminals – not those who in the heat of the moment are provoked in a manner which justifiably leads to a loss of self-control. The law also requires any such a response to be proportionate. There is also no logical reason to distinguish between a provoked response which plays-out as a punch to the jaw, as opposed to say a kick to the groin. Loss of self-control means that the person will indeed be responding in the heat of the moment. There will not in that instance in time be a rationale thought process counselling against a punch to the jaw.

We are of the view that this amendment is unnecessary and will lead to unjust outcomes. The defences of accident and provocation are valid and reasonable defences when properly applied.

CLAUSE 17 CIRCUMSTANCES OF AGGRAVATION FOR PARTICULAR OFFENCES

Whilst we applaud and support any initiatives aimed at curbing alcohol or drug fuelled violence – we would question the fairness to a sentencing regime which in effect states that an assault committed by someone whilst in a sober state, with malice and premeditation – should be viewed less seriously than someone who commits a similar assault whilst their better judgment is impaired by the consumption of excessive alcohol.

CLAUSE 19 DRUGS MISUSE ACT

It is proposed to insert a new definition into the Definitions' Section of the Drug Misuse Act, namely:

"whole weight" of a dangerous drug, means the total weight of the drug and any other substance with which it is mixed or in which it is contained." [underlining added].

If the plain and natural meaning of this definition were applied, it could, we would respectfully suggest, lead to incongruous outcomes.

It is noted that at Clauses 20 and 21 – proposed new sections refer to: *"a reference… to the quantity of the thing is a reference to the whole weight of all part 2 drugs (whether of the same or different types) …"*

It is assumed that such is intended to make things easier from an evidentiary perspective in circumstances such as where a variety of part 2 drugs are mixed together. We read these sections as meaning that the whole weight is the total weight of all illicit part 2 drugs combined.

However, whilst such of itself is seemingly fair and reasonable – the stand alone definition of "whole weight" is exceedingly worrying from the perspective of what we assume is an unintended outcome. It does not state "and any other part 2 drug" – but rather "any other substance with which it is mixed or in which it is contained". It would thus appear to be the

case that if a minute quality of drug were mixed with a large quality of non-drug substance (e.g. water or sugar) – that the weight of the non-drug "substance" would be included in the overall weight of the drug. We assume that this cannot be the intention. In our submission the definition of "whole weight" needs to be amended.

CLAUSE 87 MAKING A BANNING ORDER

The Bill amends the *Penalties and Sentences Act 1992* to extend the police move-on powers to include the power to give banning notices.

In our experience, the move-on powers have been fraught with issues and banning notices will only reiterate these issues for our clients, particularly our homeless clients. Aboriginal and Torres Strait Islander people already face extreme difficulties in accessing services, whether medical, legal or financial. Banning notices will make life significantly more difficult for Aboriginal and Torres Strait Islander people, infringing on their capacity to care for themselves and their dependents, because they are banned from accessing services within the "banned area".

As an alternative, we ask the Committee to consider amending the banning notices provisions, so that they state they cannot operate to exclude a person being able to access basic goods or services, or meeting reasonable cultural or family obligations[1]. This would ensure that banning notices achieve the objective of the Bill by reducing violence, whilst allowing people to exercise their basic right to access essential services.

CLAUSE 92 MANDATORY COMMUNITY SERVICE ORDERS

The Bill amends several Acts to create a mandatory condition that a Court must make a Community Service Order (CSO) for an offender who commits a prescribed offence while intoxicated in a public place. We note that the newly inserted section 108B(2) of the Penalties and Sentences Act states that the Court must make a CSO "unless satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with the order".

[1] This suggestion was made by the Aboriginal Legal Service of Western Australia (Inc) in their submission to the Western Australian Parliament on the Prohibited Behaviour Orders Bill, dated August 2010.

The somewhat limited exceptions aside, we are otherwise dealing with a species of mandatory sentencing. Minority groups, such as the homeless and those with mental health challenged are often disproportionately adversely impacted upon by such – especially where by virtue of their life style (e.g. sleeping in the streets) they are far more likely to have adverse contact with the police.

Mandatory sentencing eliminates the judiciary's ability to consider appropriate mitigating factors, and thus arrive at the most appropriate sentencing outcome. Mandatory sentencing is an arbitrary contravention of the principles of proportionality and necessity[2]. Furthermore, they undermine the sentencing guidelines outlined in section 9 of the Penalties and Sentences Act 1992 which states "sentences may be imposed on an offender to an extent or in a way that is just in all the circumstances", which can lead to serious miscarriages of justice, and hinders the Court's ability to bring justice[3].

As mentioned previously, we commend initiatives which are aimed at making our streets safer. However, as referenced in some of our earlier remarks, we would counsel against the imposition of mandatory outcomes – rather rewording the draft to make such a discretionary outcome – upon full and proper consideration by the presiding judicial officer.

There would undoubtedly also be situations where whilst the legislation requires the imposition of a mandatory Community Service Order, where for one reason or another (e.g. remote geographic location), no community service option is actually available. The Court is then required to impose a sentence which the judicial officer already knows cannot be carried out. Discretion is crucial.

Further, given the serious nature of many of the "prescribed offences" – it is to be assumed that in many instances a mandatory CSO is to be coupled with an initial lengthy sentence of imprisonment: – such is likely to set up offenders for non-compliance re-sentencing post release in our view.

As with Clause 5, we again counsel against including s790 PPRA offense (obstruct/assault police) in the list of "prescribed offences". An "obstruct police" charge for example has a

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[2] Queensland Law Society "Mandatory sentencing laws and policy position" paper published April 2014.

[3] Queensland Law Society "Mandatory sentencing laws and policy position" paper published April 2014.

very low threshold of activity to make out the charge. To include this type of offence in the list of "prescribed offences" would negatively impact upon already disadvantaged cohorts – such as the homeless or mentally challenged. Further, this offence often arises in circumstances where prior to police involvement, no offence had even been committed.

CLAUSE 113 SOBER SAFE CENTRE TRIAL

Whilst we would commend this initiative, we would urge that both the fact of and cost of, a referral, should be discretionary rather than mandatory.

Proposed section 390M (charge for custody at sober safe centre):

It is not uncommon for extremely disadvantaged individuals, who should be treated as having a "health" problem, to get caught up in the criminal justice system – often for no other reason than they fall through the cracks of our welfare services. A long term sufferer of a mental health condition – whom might also be living in the streets and be an alcoholic, might in reality have next to no ability to pay the cost of a referral. Many are itinerant and not uncommonly, not even enrolled for Centrelink benefits.

We would suggest that a new subsection be inserted into proposed section 390M – providing the manager of the centre with a discretion, based upon reasonable grounds, to not require the imposition of the cost recovery charge.

CLAUSE 120 ASSAULT OR OBSTRUCT POLICE OFFICER

The proposed new section increases the maximum penalty if an assault or obstruction of a police officer occurs on a licenced premises or indeed, (and somewhat problematically), within the "vicinity" of licensed premises.

Whilst we do not condone unlawful violence of any nature - whether against the police (who have a very difficult and challenging function to fulfil) or against anyone else – we refer and rely upon our rationale as outlined at Clause 17 above.

It seems incongruous to hold an intoxicated person up to a higher measuring stick than someone who assaults a police officer whilst sober and in full control of their faculties.

UNFAIR AFFECT ON ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

Many of our clients occupy public spaces in a more visible way, due to a variety of factors which have resulted in Aboriginal and Torres Strait people experiencing over-crowding in housing and homelessness[4]. This means they are more likely to occupy public spaces, whether to sleep in or gather, enhancing their "public profile". One result of this is that Aboriginal and Torres Strait Islander people are 7.9 times more likely to be taken into police custody than non-Aboriginal and Torres Strait Islander people[5]. Laws that are aimed at persons occupying public places inevitably unfairly target Aboriginal and Torres Strait Islander persons. Whilst we commend efforts to make cities safer by reducing alcohol and drug related violence, we are firmly of the view that both justice and circumstances dictate that a number of the initiatives should be discretionary rather than mandatory.

I close by thanking the Committee for this opportunity to have input into this particularly important Bill – and would be only too pleased to provide further information or feedback if requested. I also take this opportunity to thanks Ms Julia Anderson, the Law and Justice Advocacy Development Officer in our Brisbane office, for her assistance with the original draft of this submission.

Yours faithfully,

Shane Duffy

Chief Executive Officer

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[4] Aboriginal Legal Service of Western Australia (Inc) in their submission to the Western Australian Parliament on the Prohibited Behaviour Orders Bill, dated August 2010.

[5] Select Committee on Regional and Remote Indigenous Communities, Indigenous Australians, Incarceration and the Criminal Justice System, pg (i) http://www.alsnswact.org.au/media/BAhbBlsHOgZmSSJhMjAxMS8wOC8xNS8yM18yNF80Ml80NTRfSW5kaWdlbm91c19BdXN0cmFsaWFuc19JbmNhcmNlcmF0aW9uX2FuZF90aGVfQ0pTX09jdF8yMDEwX1NlbmF0ZS5wZGYGOgZFVA