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Office of the President

Safe Night Out Bill 2014
Submission 021

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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

Safe Night Out Legislation Amendment Bill 2014

Thank you for the opportunity to provide a submission on the amendments to the *Safe Night Out Legislation Amendment Bill 2014*. The Society commends the government for permitting public consultation on the proposed Bill. As there has been only a very brief opportunity to review the proposed amendments, an in-depth analysis of the Bill has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We note that the comments made in this submission are not exhaustive and we reserve the right to make further comment on these proposals. We request that the consultation period and committee reporting date be extended, to ensure that the Committee has a reasonable opportunity to consider the draft legislation.

We note that this is an omnibus Bill that makes significant amendments to several pieces of legislation. In this regard, we highlight comments made by the Committee in relation to the inappropriate nature of omnibus bills. In particular we note the Committee's remarks in its consideration of the *Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012*. Here, the Committee noted that omnibus bills,

> …arguably may breach the fundamental legislative principle in section 4(2)(b) of the Legislative Standards Act 1992 because they fail to have sufficient regard to Parliament, forcing Members to vote to support or oppose a bill in its entirety when that (omnibus) bill may contain a number of significant unrelated amendments to existing Acts that would more appropriately have been presented in topic-specific stand-alone bills.[1]

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[11] *Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012*, Report No. 18, Legal Affairs and Community Safety Committee, November 2012, o. 18, Legal Affairs and Community Safety Committee, page 5.

1. Preliminary comments

The Society agrees that the issue of alcohol-related violence is an important one and we support the primary objective of the Bill to, 'reduce alcohol and drug-related violence in Queensland's nightlife.'[2] The Society considers that the aim to, 'make Queensland's nightlife safer for all through the reduction of alcohol and drug-related violence' is laudable,[3] and appreciates that the government's commitment to create a sustainable strategy that is based on thorough research and consultation. This model of policy development is to be commended.

The Society notes that community views were garnered using an online survey and that the government has committed to, "ensuring a considered and robust community discussion informs the package of reforms." Whilst we understand the Government's desire to garner community views on this issue, we consider that an online survey tool may produce limited quality data if the public is not furnished with the relevant information on which to base their views. In our view, to obtain informed and reasoned public comment on an issue requires the provision of empirical evidence and policy reform data to support any government policy position. This would not only aid in public understanding of the issue, but also assist in the creation of strategies that will be effective in reducing alcohol-related violence.

We note that the Bill proposes significant amendments to the criminal law and proposes to amend several pieces of legislation. We also highlight that the Bill contains potential breaches of fundamental legislative principles.[4] We urge the Committee to proceed with caution in considering the Bill and its impact on criminal law in Queensland.

With respect to the proposed amendments, we make the following comments on specific clauses in the Bill.

2. *Bail Act 1980*

Clause 4 - Amendment of s 11 (Conditions of release on bail)

Proposed section 9A

Proposed section 9A states:

> (9A) Section 11AB also provides for a condition requiring completion of a Drug and Alcohol Assessment Referral course that must be imposed on a person's release on bail in particular circumstances.

The Society is concerned about the inclusion of proposed section 9A. We do not consider that the clause should be included in its current form. We submit that if the government is minded to make this amendment the following change be made:

> (9A) Section 11AB also provides for a condition requiring completion of a Drug and Alcohol Assessment Referral course that *may* be imposed on a person's release on bail in particular circumstances.

In our view, it is important that the Court maintain a broad discretion to decide whether the completion of a Drug and Alcohol Assessment Referral course would be appropriate in the individual circumstances.

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[2] Explanatory Notes, page 1.
[3] Explanatory Notes, page 1.
[4] Explanatory Notes, page 4.

3. *Criminal Code Act 1899*

Clause 14 - Insertion of new s 302A

Clause 14 seeks to insert proposed new section 302A (unlawful striking causing death). The Society does not support clause 14 and is deeply concerned about the impact that the proposed section may have.

Proposed section 302A(1) states,

> (1) A person who unlawfully strikes another person to the head or neck, causing the death of the other person, is guilty of a crime.
> Maximum penalty—life imprisonment.

In our view, this offence of 'unlawful striking causing death', is appropriately covered by the current offence of manslaughter. Section 303 of the Criminal Code provides:

> 'a person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.'

The punishment for manslaughter is contained in section 310 of the Criminal Code:

> 'any person who commits the crime of manslaughter is liable to imprisonment for life.'

Both offences carry the same maximum penalty of life imprisonment and propose to cover the same conduct. Therefore, the proposed offence is otiose.

Proposed section 302A(2) states,

> (2) Sections 23(1)(b) and 270 do not apply to an offence against subsection (1).

The Society is concerned about the removal of the application of sections 23(1)(b) (intention—motive) and 270 (prevention of repetition of insult) of the Criminal Code in relation to the offence of unlawful striking causing death.

Section 23(1)(b) of the Criminal Code states:

> 23 Intention—motive
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
> (b) an event that—
> (i) the person does not intend or foresee as a possible consequence; and
> (ii) an ordinary person would not reasonably foresee as a possible consequence.

Section 270 of the Criminal Code states:

> Prevention of repetition of insult
> It is lawful for any person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to the person for an assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

The Society is concerned about the intended removal of the application of these provisions. In relation to section 23(1)(b), we note that the Explanatory Notes to the Bill state that, although an unlawful strike may be deliberate and wilful, the death of the victim might be an 'accident'.[5] To exemplify the serious miscarriages that might occur, we provide the following illustration.

A woman may receive repeated verbal insults and/or unwanted attention from a man in a bar. The woman may react by slapping that man in order to prevent repetition of the insult. Not expecting the slap, the man may fall backward, hit his head on a hard surface and die.

Under the current law, the woman might argue that she did not intend that her slap cause the death of the man. It may be argued that an ordinary person would not reasonably foresee death as a possible consequence of the slap. Under proposed section 302A, the woman would not be able to rely on the defence of accident, may be found guilty of the offence of unlawful striking causing death and may face life imprisonment. In our respectful view, this would be an unjust outcome. The Society respectfully urges the government to reconsider the introduction of the new provision.

Furthermore, proposed section 302A(3) states, 'assault is not an element of an offence'. This means that the defence of provocation under sections 268 and 269 of the Criminal Code do not apply to the new offence.[6] In line with the reasoning applied in the paragraph above, the Society considers that the removal of the defence of provocation may lead to serious miscarriages of justice.

Proposed section 302A(4)(7) states that, 'a person is not criminally responsible if the act of striking the other person was done as part of a socially acceptable function or activity (which includes a sporting event); and was reasonable in the circumstances.'[7] In our view, the defences discussed above would be more appropriate in dealing with whether an action was, 'reasonable in the circumstances'.

Proposed section 302A(5) states:

> (5) If a court sentences a person to a term of imprisonment for an offence mentioned in subsection (1), the court must make an order that the person must not be released from imprisonment until the person has served the lesser of—
> (a) 80% of the person's term of imprisonment for the offence; or
> (b) 15 years.

The Society maintains its objection to the introduction of standard non-parole period schemes, including the scheme in proposed section 302A(5). The Society's long-held position is that the current sentencing regime in Queensland, having at its core a system of judicial discretion exercised within the bounds of precedent, is the most appropriate means by which justice can be attained on a case by case basis.

In this regard, we note the comments of the former Sentencing Advisory Council which discouraged the adoption of standard non-parole periods. In particular, the Council reported:

> "After closely examining the issues, a majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing

[5] Explanatory Notes, page 5.
[6] Explanatory Notes, page 13.
[7] Explanatory Notes, page 13.

> process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment."[8]

The Society has long expressed its opposition to mandatory sentencing regimes. The practical reality of the implementation of an SNPP scheme is that, in some cases at least, there will be an erosion of judicial discretion and a mandatory component of sentencing to be applied. The Society does not support such an approach. We also point to the fact that the SNPP schemes that have been introduced in other states could not be said, on any objective measure, to have been successful in terms of deterring offending and reducing rates of crime.

We respectfully propose that the legislature reconsider the introduction of proposed section 302A. If the government is minded to proceed with the new offence, we suggest that all defences be maintained.

Clause 17 - Insertion of new ch 35A

Clause 17 proposes to insert a new chapter 35A (circumstance of aggravation for particular offences) which applies to persons,

> ... charged with certain offences of violence committed in a public place and while adversely affected by an intoxicating substance, is to be taken to be (in the case of alcohol) or presumed to be (in the case of drugs) adversely affected by an intoxicating substance at the time of the offending.[9]

The Explanatory Notes to the Bill outline that some offences would be considered aggravated if committed in a public place and while adversely affected by an intoxicating substance. The offences include:

- section 320 (grievous bodily harm);
- section 323 (wounding);
- sections 340(1)(b) (serious assault - police officer)
- section 340(2AA) (serious Assault – public officer)[10]

The Society notes that these are serious offences. However, we consider that the current Criminal Code punishments are adequate in dealing with these offences.

Proposed new section 365B

Proposed new section 365B (application of defences) specifically removes the application of the defence of mistake of fact as detailed in section 24 of the Criminal Code. The Society does not support the removal of defences. The defence of mistake is a long established one that has stood the test of time. It is by no means an "easy out" for someone accused of an offence, particularly one of violence. For the defence to apply, the accused's mistaken belief must be one that was held on *reasonable* grounds. The objective nature of the defence means that it will only apply in limited circumstances. The Society strongly argues against the removal of the defence as proposed.

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[8] Sentencing Advisory Council, Minimum standard non-parole periods final report, September 2011, page 20

[9] Explanatory Notes, page 14.

[10] Explanatory Notes, page 14 and proposed new section 365A.

Proposed new section 365C

In relation to proposed new section 365C (proof of being adversely affected by an intoxicating substance) the Explanatory Notes state:

> '... that in certain circumstances a relevant offender is: deemed to have been adversely affected by an intoxicating substance; or is presumed to have been adversely affected by an intoxicating substance and the legal onus then shifts to that person to establish otherwise.'[11]

The Society does not support clause 17. This shift in the onus of proof is not justified in the Explanatory Notes and therefore runs contrary to section 4(3)(d) of the *Legislative Standards Act 1992* which mandates that legislation should, 'not reverse the onus of proof in criminal proceedings without adequate justification.' In the Society's view, the onus of proof to prove that an offender is adversely affected by an intoxicating substance should remain with the State.

In relation to the evidence that may be relied upon to determine the level of an individual's intoxication, the Explanatory Notes state:

> Nothing under section 365C limits the circumstances in which a person may be proven to be adversely affected by an intoxicating substance. That is, reliance can be placed on any other admissible evidence to establish that the person was adversely affected, such as statements from the alleged offender, eye witness accounts as to the person's ingestion of drugs or alcohol, and witness testimony as to any indicia of intoxication shown by the person.[12]

The Society objects to the intended reliance on this type of evidence. Reliance on, 'witness testimony as to any indicia of intoxication shown by the person' is extremely subjective and potentially prone to abuse and one can imagine a situation where an individual may provide inaccurate testimony. Given the proposal to shift the onus of proof and the severe penalties that an accused may face, we submit that there be no reliance on this type of evidence. In conclusion, the Society does not support this provision. In our view, the reversal of the onus of proof is objectionable and the intended reliance on the factors outlined above is unreliable and fraught with danger.

4. Penalties and Sentences Act 1992

Clause 92 - Insertion of new pt 5, div 2, sdiv 2

The Society does not support clause 92.

The clause seeks to insert a new division (community service orders mandatory for particular offences). The Explanatory Notes state, 'new subdivision 2 establishes a mandatory community service order regime for offenders convicted of a prescribed offence of violence committed in a public place and while adversely affected by an intoxicating substance.'[13]

The Society repeats and relies upon its clearly stated position in relation to mandatory sentencing. We note the limited judicial discretion available in some provisions, such as proposed section 108B (when community service order must be made) which states that, 'the court must make a community service order for the offender unless the court is satisfied that,

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[11] Explanatory Notes, pages 14-15.
[12] Explanatory Notes, page 15.
[13] Explanatory Notes, page 28.

because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with the order.' If the government is minded to implement this mandatory scheme, we propose that the judicial discretion be widened.

Police Powers and Responsibilities Act 2000

The Bill introduces a Sober Safe Centre trial in the Brisbane CBD. The Society is supportive of the use of diversionary methods as an alternative to charge and arrest. However, we are concerned about aspects of the Sober Safe Centre scheme including:

- a watch-house being used as a sober safe centre;[14]
- a watch-house manager also acting as a centre manager for a sober safe centre;[15]
- the subjective test which would allow a police officer to take an intoxicated person to a sober safe centre if they 'reasonably suspect a person is intoxicated or the person is behaving in a way the police officer reasonably suspects constitutes a nuisance offence or poses a risk of physical harm to the person, or another person;[16]
- the person being able to be detained for a maximum of eight hours;[17]
- the liability of the detainee to pay a cost recovery charge;[18]
- the power for a health care professional to not require consent and use reasonable force against a detainee.[19]

5. *Summary Offences Act 2005*

Clause 124 - Amendment of s 6 (Public nuisance)

Clause 124 seeks to amend section 6(1) of the *Summary Offences Act 2005* which deals with public nuisance and states:

> Maximum penalty—
> (a) if the person commits a public nuisance offence within licensed premises, or in the vicinity of licensed premises—25 penalty units or 6 months imprisonment; or
> (b) otherwise—10 penalty units or 6 months imprisonment.

The Society does not support clause 24 for several reasons. First, the amendment would increase the fine maximum penalty of a 'public nuisance offence within licensed premises, or in the vicinity of licensed premises' from 10 to 25 penalty units. This is more than a doubling of the current penalty which, in the Society's view is inappropriate and arbitrary. The reasons and empirical evidence to justify the increased penalty have not been provided in the Explanatory Notes.

Secondly, there is no assistance within the Act itself or in any of the commentary in the Explanatory Notes concerning how the phrase, 'in the vicinity of licensed premises' is to be interpreted. This vague and uncertain terminology will mean that an individual will be unable to ascertain whether their conduct would constitute an infringement of this provision.

Thirdly, we note the enforcement of this offence will have a disproportionate impact on regular and visible users of public space, including young people, people of Indigenous and Torres

[14] Proposed section 390C(2)(a).
[15] Proposed section 390C(2)(c).
[16] Proposed section 390E.
[17] Proposed section 390J.
[18] Proposed section 390M.
[19] Proposed section 390O.

Strait Islander descent and people experiencing homelessness. In our view, the increase of fines will affect these vulnerable groups and in some cases, may result in increased State Penalty and Enforcement Registry (SPER) debts.

The Society respectfully suggests that the government reconsider the enactment of this draft provision.

Clause 126 - Replacement of s 10 (being drunk in a public place)

Clause 126 seeks to amend section 10 of the *Summary Offences Act 2005* which deals with being intoxicated in a public place. Section 10 of the *Summary Offences Act 2005* states that, 'a person must not be drunk in a public place.' Clause 126 proposes to change this to, 'a person must not be intoxicated in a public place, where, 'intoxicated means drunk or otherwise adversely affected by drugs or another intoxicating substance.'

The Society does not support clause 126. We note that there is no commentary in the Explanatory Notes on how the phrase, 'adversely affected by drugs or another intoxicating substance' is to be interpreted. In our view, this lack of clarity creates uncertainty.

If you require clarification of any of the issues raised in this submission, please do not hesitate to contact our policy solicitors. We look forward to the release of the Committee's report.

Yours faithfully

Ian Brown
President