Submission to Legal Affairs and Community Safety Committee of the Queensland Parliament

Clause 125 of the Safe Night Out Legislation Amendment Bill 2014 (Qld)

Proposed Amendment to section 7 of the *Summary Offences Act 2005* (Qld)

Urinating in a public place

by

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Introduction

Clause 125 of the Safe Night Out Legislation Amendment Bill 2014 (Qld) proposes to amend section 7, Urinating in a public place, of the *Summary Offences Act 2005* (Qld) to increase the maximum penalty for a breach the section where a person urinates within licensed premises, or in the vicinity of licensed premises, from two penalty units ($220) to four penalty units ($440).

Central Tenet of Submission

The central tenet of my submission is this proposed increase in penalty should be rejected unless the section 7 is further amended to remove the injustices associated with the section.

My submission is not for the offence of public urination to be completely removed from the Act, but for the relevant section to be amended to provide:

- that an offence of urinating in a public place is not committed unless the urination occurs in an indiscrete or offensive manner, and

- to make provision that ensures that patrons are guaranteed access to public toilets within licensed premises or in the vicinity of licensed premises.

History

Section 6 of the *Summary Offences Act 2005* (Qld) as originally enacted made it an offence to commit a public nuisance. Although not explicitly mentioned in s 6, urinating in a public place if done so in an offensive or disorderly way, was an offence under that section.

Indeed, the explanatory notes which accompanied the Bill which became the *Summary Offences Act 2005* (Qld) say:

> In determining what is a public nuisance offence…a court…should take into account the following examples –
>
> …
> 8. A person urinating in view of another in a public place.

In its report, 'Policing Public Order: A review of the public nuisance offence', the Crime and Misconduct Commission (the CMC), recommended the creation of a separate offence of urinating in a public place. The basis of the CMC's recommendation was to give a clear alternative to proceeding for an offence under section 9, Wilful exposure, which incidentally contains a reasonable excuse defence. A prosecution for wilful exposure often has an implication of a sexual nature.

Although the CMC report recommends the creation of a separate offence of urinating in a public place, it does not go on to examine the details of the elements of such an offence. It simply does not address such issues as whether or not urinating in public needs to occur in an indiscrete or offensive manner, or whether the offence should be made subject to a without reasonable excuse element. I assume that the CMC was leaving such details to the Office of the Queensland Parliamentary Counsel.

The Details

Section4 of the *Summary Offences and Other Acts Amendment Act 2008* (Qld) inserted s 7(1) into the *Summary Offences Act 2005* (Qld). That subsection simply reads:

> A person must not urinate in a public place.
>
> Maximum penalty - 2 penalty units.

The sub-section makes no reference to urinating occurring in an indiscrete or offensive manner.

It contains, unlike section 9, Wilful exposure, no without reasonable excuse element.

It does not even require the urinating to occur in the view of another (refer above to the explanatory notes to the current s 6, Public nuisance).

Usually the Office of the Queensland Parliamentary Counsel would not draft such a provision in view of the provisions of the *Legislative Standards Act 1992* (Qld).

No doubt the previous Government (or perhaps the responsible Department) directed the Office of the Queensland Parliamentary Counsel to draft the subsection in its current form.

Worse, s 7(2) creates a statutory fiction:

> In a proceeding for an offence against subsection (1), evidence that liquid was seen to be discharged from the vicinity of a person's pelvic area is enough evidence that the person was urinating.

Under this provision:

- if water was draining from a person's togs after the person had left the ocean or a swimming pool;
- if a person had spilt a drink on their lap; or
- if a pregnant woman's waters broke

there would be evidence on which a person could be charged with the offence of urinating in public.

The subsection does not make clear as to whether the evidentiary provision is conclusive or is capable of being rebutted by the giving of evidence to the contrary.

The offence of urinating in a public place does not create an absolute offence. For example, the provisions of chapter 5 of the *Criminal Code* (Qld) dealing with criminal responsibility would apply. However, it is hard to see which of its exculpatory provisions would apply to the offence of urinating in public. No doubt s 29, Imature age would apply. Perhaps s 25, Extraordinary emergencies would apply, but this is far from clear.

Although the liability is not absolute, it is strict.

As the section is currently worded, a person who urinates in the following circumstances would commit an offence to which there would be no defence.

- Men with prostrate problems, pregnant women and persons with kidney problems who urinate in a public place in a discrete manner.

- A person who is traveling, say 200 kilometres west of Roma, where there are no toilet facilities and who pulls onto the side of the road and urinates in a discrete manner.

- A person who goes fishing in a dinghy and urinates either in a container in the dinghy or urinates over the side of the dinghy.

- Bushwalkers, campers, even golfers (the definition of a public place is defined in the dictionary to the *Summary Offences Act 2005* (Qld) to mean a place that is open to or used by the public, whether or not on payment of a fee) who urinate in a discreet manner.

- Swimmers who urinate while swimming in the ocean.

I understand that the previous Government claimed that the justification for creating the offence of strict liability is twofold. Firstly it was claimed that the maximum penalty is only two penalty units ($220). Secondly, it was claimed that the police will exercise a discretion as to whether or not a person is prosecuted.

Both claims, on proper examination, contain no justification for the creation of an offence of strict liability.

While $220 may not mean much to Ministers of the Crown, it certainly means a lot to many ordinary Queenslanders who struggle to put food on their family's table. In addition, 'a black mark' appears on a person's record. This may have adverse consequences in relation to the many 'fit and proper

person tests' which are contained in Queensland Legislation relating to the obtaining of various licences and professional qualifications.

A fine of $220 may well result in disadvantaged groups ending up in jail for answering 'the call of nature' in a discrete manner.

Leaving the matter to the discretion of the police will no doubt result in charges under the proposed section being brought against the homeless, Aboriginal and Torres Strait Islander people, and young people all of whom are already over-represented in the criminal justice system.

Perhaps even more importantly, leaving prosecutions to the discretion of the police would amount to an abrogation of one of the fundamental legislative principles that legislation has sufficient regard to the institution of Parliament; see *Legislative Standards Act 1992* (Qld) s 4. It is for Parliament to determine the elements that give rise to criminal liability rather than the police to do so in an ad hoc and case by case basis. The consequences of matters being left to the discretion of police in such a manner is likely to lead to justification for claims that there will be a lack of equality of all Queenslanders before the law.

Furthermore, while many police exercise their powers with common sense, not all do so. This happened to a young man who is a client of mine. Late at night, he stopped at a service station to get petrol. When he asked the operator to use the toilet, he was told that they were no longer available to the public. Because he was busting, he went around the back of the service station and relieved himself discreetly in some bushes. On returning to his car, he was asked by a police officer who had driven into the service station what he had been doing around the back of the service station. The young man told him what he had been doing and was charged with an offence of public urination. Prior to that charge my client had a completely unblemished criminal record.

The Availability of Public Toilets

One of the reasons that lead to public urination is the lack of availability of public toilets, especially in entertainment precincts, at least at certain times.

I provide the following examples.

- Public toilets operated by Councils and the like are often locked closed before the closing times of nearby licensed promises. I understand this is done to prevent the public toilets being used late at night for a range of inappropriate activities, including drug taking and illicit, but consensual, sex and also to prevent the public toilets from being damaged.

- The licensed premises lockout provisions, prevent patrons from being readmitted to licensed premises to go to the toilet while, for example, waiting for a taxi, which sometimes can take hours, or other public transport.

- Recently, a young male client of mine was about to leave a hotel at closing time. When he asked security could he go to the toilet on the way out, he was told he could not. He went outside to wait for his girlfriend to pick him up. The cold night air hit him and he was 'busting'. He urinated in the hotel car park and was detained by the same security officer who had refused my client permission to use the hotel toilet. He was detained by the security officer until police arrived. He was arrested by the police and transported to the watchhouse where he was charged with public urination. All this because of answering 'the call of nature'.

Conclusion

In my submission, it is illogical to make something an offence for answering 'the call of nature' where a conscious decision has been to deny patrons access to a toilet. What are people expected to do? – wet them? But even if they do, because the provision of s 7(2) referred to above (liquid was seen to be discharged from the vicinity of a person's pelvic area), they probably still commit an offence.

In my further submission, it is an entirely proper function of the Parliament and its Committees to insist that all aspect and consequence of proposed legislation be addressed by the sponsor of legislation before it is enacted. The passing of unjust or impractical laws ultimately leads to an alienation of the community.

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18 July 2014