

Your Ref:

Our Ref: Children's Law Committee

8 November 2012

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

YOUTH JUSTICE (BOOT CAMP ORDERS) AND OTHER LEGISLATION AMENDMENT BILL 2012

Thank you for inviting Queensland Law Society to provide confidential feedback on the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (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.

We make the following comments for your consideration.

Youth Justice Act 1992

1. Introductory comments

At the outset, the Queensland Law Society would like to highlight its support for all non-custodial sentencing options for children and young people. In our view, it is imperative to maintain the principle that detention should be used as a last resort. We consider for any sentencing option to be successful, including the Boot Camp Order, it must be based on empirical data and evidence based research.

2. Clauses 7 and 11

Clauses 7 and 11 of the Bill proposes to amend s 33, *Youth Justice Act 1992* to remove court ordered youth justice conferencing and to retain police ordered youth justice conferencing. The Society supports youth justice conferencing as an effective diversionary tool and an appropriate mechanism to address young people's

accountability for offending behaviour. We are therefore disappointed to see the removal of this diversionary option for courts and urge the Government to reinstate court ordered youth justice conferencing.

We particularly note in this context the Society's concerns about the effects of criminalisation of young people in residential care. It is the Society's view that where young people in care are dealt with by courts for offences arising in their residential placements, in many instances youth justice conferences are a particularly effective and appropriate response. The focus in a skilfully convened conference on repairing harm caused by the offence and the participation of the victim can help to support and strengthen the young person's placement.

3. Clause 19

The Society opines that a copy of the order in s 226D, *Youth Justice Act 1992* should be provided and explained to the young person.

4. Clause 40

Clause 40 proposes insertion of proposed s 282A, *Youth Justice Act 1992* (boot camp centre provider). In our view s 282A(2), *Youth Justice Act 1992*, should include the criteria as to what constitutes "appropriate experience or expertise to be a boot camp centre provider". For example, minimum education qualifications or period of employment involving children and young people might be appropriate criteria for inclusion.

With respect to proposed s 282H, *Youth Justice Act 1992* (helping child gain access to a lawyer), the Society considers that the test of reasonableness should be replaced with a higher standard. Unlike in the detention setting, youth boot camps will be operated by private entities that might be unfamiliar with the requisite action needed to satisfy the reasonableness test. As such, the Society suggests that the provision be amended to read:

'The boot camp centre provider must ensure that, if a child participating in the residential phase of a boot camp program asks the chief executive or a boot camp centre employee for help in gaining access to a lawyer, *the child must be assisted to access a lawyer. If requested by the child, the child's parents and/or Community Visitor must be informed of the child's request to access a lawyer and the attempts made to provide access to a lawyer.*

In addition to this higher standard, the Society also proposes that the boot camp centre provider should undertake some mandatory actions in discharging this duty. For example, the child should be provided with:

- Information about the availability of free legal services for children and young people;
- contact details of legal practitioners or access to the internet for the purpose of locating a legal practitioner;
- access to a telephone; and
- the ability to arrange or attempt to arrange an advice session with a legal practitioner.

Anti-Discrimination Act 1991

The Queensland Law Society raises concern about proposed new s 106C, *Anti-Discrimination Act 1991*, which permits an accommodation provider to discriminate against a sex workers or a client of a sex worker by denying them accommodation, evicting them or otherwise treating them unfavourably. The proposed section states:

106C Accommodation for use in connection with work as sex worker

It is not unlawful for a person (an accommodation provider) to discriminate against another person (the other person) by—

- (a) refusing to supply accommodation to the other person; or
- (b) evicting the other person from accommodation; or
- (c) treating the other person unfavourably in any way in connection with accommodation;

if the accommodation provider reasonably believes the other person is using, or intends to use, the accommodation in connection with that person's, or another person's, work as a sex worker.

The Society is concerned that the provision proposed breaches fundamental legislative principles as provided in s 4, *Legislative Standards Act 1992*, in that it does not have sufficient regard to the rights and liberties of individuals as the Bill directly discriminates against one lawful occupation and their clients. This breach of fundamental legislative principle is not addressed in the Explanatory Notes for the Bill.

The Explanatory Notes for the Bill state that the retrospective effect of the new provision is justified as a breach of fundamental legislative principle as it will provide certainty for accommodation providers. The certainty desired would be achieved for accommodation providers if the relevant portion of the Bill was to have effect from the royal assent and no explanation is provided of what particular and unique problem required the amendments to be retrospective. Further, commencing amendments in legislation from the date of introduction to the Legislative Assembly, without exceptional justification, may not have sufficient regard to the institution of Parliament as it presupposes the outcome of the Parliamentary process and the passage of the Bill.

The substance of the issue addressed by the provision is presently before the Supreme Court in the matter of *Dovedeen Pty Ltd & another v GK (7794/12)*, following a decision of the QCAT Appeal Tribunal in *GK v Dovedeen Pty Ltd and Anor* [2012] QCATA 128. It appears premature to legislate in this matter before the outcome is known. It is noted that the new provision will not affect the matter presently before the court.

The Society notes that it is unusual for legislation to specifically permit discrimination against a single lawful occupation. This is more particularly the case when the *Anti-Discrimination Act 1991* especially prohibits discrimination on the basis of 'lawful sexual activity', which is defined in that Act as being a "person's status as a lawfully employed sex worker, whether or not self-employed."

It is not unlawful to be a self-employed sex worker who trades outside of licensed brothels. These small business-owners, like any other business-owner, may expect to be supplied with accommodation in a fair and equal way compared to any other consumer. The Bill permits, however, direct discrimination on the basis of their work as a sex worker and this discrimination can be directed at either the sex worker or any other person as long as the accommodation provider reasonably believes the accommodation is intended to be used in connection with work as a sex worker. A client of the sex worker may therefore lawfully be discriminated against under the proposed section. In parts of regional Queensland both the sex worker and fly-in / fly-out mine workers may be refused

accommodation under the new provision. This may prove to be problematic if only limited accommodation facilities are available in that locality. The Society is unsure whether this was an intended outcome of the new provision.

It is noted that the proposed s 106C(c) may also permit an accommodation provider to charge higher fees to a sex worker, or the client of a sex worker, than to any other guest. The Society is unsure whether this was an intended outcome of the new provision and it does not appear to have been expressed as a matter giving rise to the need for the provision. It is suggested that there may be a conflict between permitted discrimination under the proposed amendment and the effect of the unfair contracts provisions in the Australian consumer law, as it may:

- cause a significant imbalance in the parties' rights and obligations arising under the accommodation contract; and
- not be reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

At a principled level, it is problematic to justify that a service provider, such an accommodation provider, should be entitled to refuse services to individuals for lawful purposes where no disturbance is caused. Enabling such conduct could lead to a perception that it is permissible to discriminate against individuals on the basis of other attributes, such as sex, relationship status, parental status or race.

With respect to licensed premises only, under s 165, *Liquor Act 1992*, an authorised person may currently require a person who is disorderly or creates a disturbance to leave a premises. It is an offence not to leave premises when required and an authorised person can use necessary and reasonable force to remove him or her. This section would provide a licenced accommodation provider with the legitimate power to deal with complaints about the conduct of a sex workers and, where reasonable to do so, require an individual to leave the premises.

Furthermore, s 76, *Prostitution Act 1999* makes it an offence to cause unreasonable annoyance to another person in the vicinity of a place that is reasonably suspected of being used for prostitution and to a significant extent, is caused by the presence, or suspected presence, of prostitution at the place. This places a positive obligation upon individuals associated with prostitution to conduct themselves in a way which does not create a disturbance or generate complaints for accommodation providers. An accommodation provider also has the common law rights of an occupier of property to reasonably ask a guest to leave the premises.

On the basis of these existing powers there may be no need to introduce the proposed section. The Society therefore recommends that the proposed s 106C be removed from the Bill and consultation be undertaken with all stakeholders to establish whether greater awareness of existing legislation and rights may be sufficient.

Thank you for considering the Society's comments in relation to the Bill.

Yours faithfully

Dr John de Groot
President