

# **Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017**

**Report No. 67, 55<sup>th</sup> Parliament  
Legal Affairs and Community  
Safety Committee  
September 2017**

## **Legal Affairs and Community Safety Committee**

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### **Acknowledgements**

The committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

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## Abbreviations

Bill	Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017
CLRO Act / CLROA	<i>Criminal Law (Rehabilitation of Offenders) Act 1986</i>
Committee	Legal Affairs and Community Safety Committee
DATO / treatment order	Drug and Alcohol Treatment Order
FLP	Fundamental legislative principle
JOIDA	<i>Justice and Other Information Disclosure Act 2008</i>
LSA	<i>Legislative Standards Act 1992</i>
PACT	Protect All Children Today Inc
QAI	Queensland Advocacy Incorporated
QNADA	Queensland Network of Alcohol and other Drug Agencies Ltd
QNMU	Queensland Nurses and Midwives' Union
TCLS	Townsville Community Legal Service Inc

## Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of parliament.

A number of stakeholders outlined the negative effects of the drug court being removed by the previous government. It was clear that diversionary programs provide a means of rehabilitation and are an important component of a properly functioning justice system.

The committee has recommended that the Bill be passed.

On behalf of the committee, I thank those organisations who lodged written submissions on the Bill and those who gave evidence at the public hearings. I also thank the committee's secretariat, and the Department of Justice and Attorney-General.

I commend this report to the House.



**Duncan Pegg MP**

Chair

## Recommendation

### Recommendation 1

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The committee recommends the Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017 be passed.

## 1 Introduction

### 1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's primary areas of responsibility are:

- Justice and Attorney-General, Training and Skills, and
- Police, Fire and Emergency Services, and Corrective Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017 (Bill) was introduced into the House and referred to the committee on 10 August 2017. In accordance with the Standing Orders, the committee is required to report to the Legislative Assembly by 28 September 2017.

### 1.2 Inquiry process

On 15 August 2017, the committee wrote to the Department of Justice and Attorney-General (the department) to seek advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The committee received seven submissions (see Appendix A). On 28 August 2017, the department provided a written briefing on the Bill and on 4 September 2017 it responded to matters raised in the submissions.

The committee held a public briefing with the department on 23 August 2017. Hearings were held in Brisbane on 6 September 2017, Cairns on 11 September 2017 and in Mackay on 12 September 2017 (see Appendix B).

The submissions, correspondence from the department and transcripts of the public briefing and hearings are available from the committee's webpage at [www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/PSDATOLAB2017](http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/PSDATOLAB2017).

### 1.3 Policy objectives of the Bill

The primary objective of the Bill is to provide a new sentencing option for offenders whose criminal behaviour is linked to their serious drug or alcohol use.

Other objectives include:

- clarifying that the imposition of a sentence of more than 30 months imprisonment falls outside the scope of the *Criminal Law (Rehabilitation of Offenders) Act 1986* and, therefore, never becomes a 'spent conviction' and must be disclosed
- replacing the current extended definition of 'dangerous drug' in the *Drugs Misuse Act 1986* with a definition which provides for a 'drug analogue'

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<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

- providing certain protections in court proceedings for victims of choking, suffocation or strangulation in a domestic setting
- enabling a person to use electronic means to participate in a diversion assessment program under the *Penalties and Sentences Act 1992*
- enabling a person to use electronic means to participate in a drug assessment and education session and associated appointments under the *Police Powers and Responsibilities Act 2000*.

#### **1.4 Consultation on the Bill**

The Drug and Specialist Courts Review involved ‘extensive consultation’.<sup>2</sup> Further consultation was undertaken on the draft Bill with specific stakeholders such as the Office of the Information Commissioner, Legal Aid Queensland, the Chief Magistrate, the Deputy Chief Magistrate, the Queensland Police Service, the Office of the Director of Public Prosecutions and the Department of Health.<sup>3</sup>

During the committee’s inquiry, the Queensland Law Society and the Queensland Network of Alcohol and Other Drug Agencies Ltd (QNADA) commented favourably on the government’s consultation on the Bill, with the Queensland Law Society stating:

*We commend the government on its comprehensive consultation process including the Queensland Drug and Specialist Courts Review. We consider that this evidence based and cogent consultation process led to the formulation of well thought out and responsive draft legislation.*<sup>4</sup>

#### **1.5 Should the Bill be passed?**

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives which it would achieve and consideration of the information provided by the department and from stakeholders, the committee recommends that the Bill be passed.

##### **Recommendation 1**

The committee recommends the Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017 be passed.

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<sup>2</sup> Explanatory notes, p 12.

<sup>3</sup> Explanatory notes, pp 12-13.

<sup>4</sup> Public hearing transcript, Brisbane, 6 September 2017, p 2; Queensland Network of Alcohol and Drug Agencies, public hearing transcript, Brisbane, 6 September 2017, p 6.



## 2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017 (Bill).

### 2.1 Drug and alcohol treatment orders

The primary policy objective of the Bill is to insert a new sentencing option in the *Penalties and Sentences Act 1992* – a Drug and Alcohol Treatment Order (treatment order or DATO).<sup>5</sup> The aim of the amendment is:

*... to facilitate the rehabilitation of offenders by providing a judicially-supervised, therapeutically-oriented and integrated treatment regime to reduce the offender's severe substance use disorder, reduce the level of criminal activity associated with the disorder and assist the offender's integration into the community.*<sup>6</sup>

Under the Bill, a treatment order would be made for an offender only if certain conditions are met, including that the offender's severe substance use disorder contributed to the commission of the eligible offence and the offender agrees to the order being made.<sup>7</sup>

An eligible offence is a summary offence or an indictable offence that is dealt with summarily.<sup>8</sup> The Bill proposes to amend the *Drugs Misuse Act 1986* to enable certain indictable offences to be dealt with summarily if both the person and the prosecution agree to a treatment order being made.<sup>9</sup> The Bill would also extend the jurisdiction of the Magistrates Court by allowing a drug court magistrate to impose a maximum penalty of four years if making a treatment order for an indictable offence that is dealt with summarily.<sup>10</sup>

A treatment order would have both custodial and rehabilitative components.<sup>11</sup> A multidisciplinary team, comprising the court and representatives of the Queensland Police Service, Queensland Health, Queensland Corrective Services, the Department of Justice and Attorney-General and Legal Aid Queensland, would assist the court to manage and administer each treatment order.<sup>12</sup>

The flowchart over the page (chart 1, page 4) shows the process proposed in the Bill for making a treatment order.<sup>13</sup>

Any Magistrates Court may be prescribed by regulation to be a drug and alcohol court.<sup>14</sup> With respect to this, the department stated:

*... in the legislation where it says that any Magistrates Court can be prescribed by regulation to be a drug and alcohol court, the recommendation in the drug and specialist court review report was very clear that it should start in one location and it should not be expanded until there had been evaluation.*<sup>15</sup>

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<sup>5</sup> Explanatory notes, p 1.

<sup>6</sup> Explanatory notes, p 2. See also cl 35: s 151C.

<sup>7</sup> Clause 35: ss 151E, 151J. See also, for example, cl 35: ss 151D, 151F-151H.

<sup>8</sup> Clause 35: s 151B.

<sup>9</sup> Clause 15.

<sup>10</sup> Explanatory notes, pp 5, 6; cls 5, 14.

<sup>11</sup> Clause 35: ss 151M.

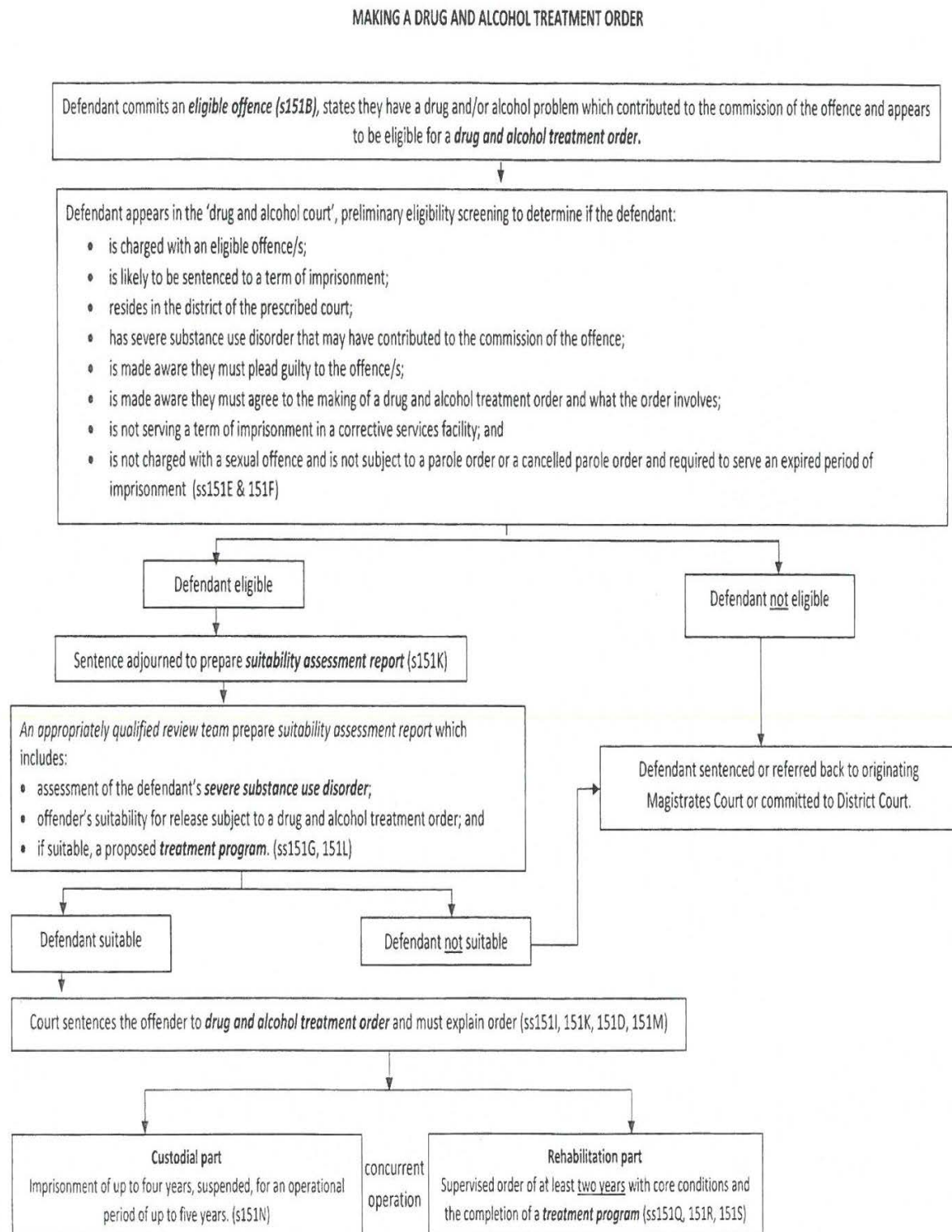
<sup>12</sup> Explanatory notes, pp 3-4.

<sup>13</sup> The flowchart was provided to the committee by the Department of Justice and Attorney-General. See Department of Justice and Attorney-General, correspondence dated 28 August 2017, attachment, p 10.

<sup>14</sup> Clause 35: s 151B.

<sup>15</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 6.

**Chart 1** - Process proposed in the Bill for making a drug and alcohol treatment order.



If the Bill is passed, the drug court is intended to commence in Brisbane in November 2017.<sup>16</sup> The Brisbane drug court would operate as a pilot until 2022, with an evaluation being completed at the end of 2018. An economic evaluation would then assess where other drug courts would operate in the future.<sup>17</sup>

It is anticipated that between 80 and 125 offenders per year would appear before the Brisbane drug court.<sup>18</sup> One hundred and twenty five offenders is the maximum number that could be subject to a drug and alcohol treatment order annually based on one court operating and the allocated funding.<sup>19</sup> In the first year it is estimated there would be approximately nine referrals a month of eligible persons and that the majority would complete the program.<sup>20</sup>

It is expected that most of the people who would be referred to the drug court under a treatment order would be male, consistent with the experience in other jurisdictions.<sup>21</sup> With respect to women under a treatment order, the department stated:

*Women who do become subject to the DATO proposed in the Bill will be given appropriate support. It is proposed that this support will include the expansion of outpatient drug and alcohol treatment options and the inclusion of female health practitioners on the Drug and Alcohol Court Team. Outpatient treatment options will lessen reliance on residential rehabilitation services and better support women (and men) with childcare and other responsibilities to enter and remain on their treatment program.*<sup>22</sup>

The department explained the difference between the approach in the Bill and the drug court that was previously in place in Queensland:

*The significant difference between this proposed model and the previous Drug Court is that this is an order that can be made by the court under the Penalties and Sentences Act for offences that do involve violence, whereas previously offences of major violence were not covered by the previous legislation. The order is a lot more intensive. Previously the rehabilitation or the program that the previous participants had to do averaged out to about nine months. This is a mandatory two-year program for the rehabilitation period. This court can impose a suspended sentence of up to four years and, significantly, the order that the court makes under this model is a clear sentence at the beginning of proceedings. Previously the participants received an initial sentence and then, if they completed and complied with that particular order, they returned to court and received a final sentence which was then based on their compliance and an assessment of their behaviour throughout this period. With this sentence, however, as soon as the person pleads guilty and consents to the order they will have a conviction recorded, a sentence of imprisonment will be imposed which will be suspended and then the rehabilitation order with all the conditions attached to that.*

...

*We were also going to say that it includes alcohol this time, whereas the previous order only applied to illicit drug use.*<sup>23</sup>

<sup>16</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 4.

<sup>17</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 6.

<sup>18</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 4.

<sup>19</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 4.

<sup>20</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 4.

<sup>21</sup> Department of Justice and Attorney-General, correspondence dated 25 August 2017, pp 1, 2.

<sup>22</sup> Department of Justice and Attorney-General, correspondence dated 25 August 2017, p 1.

<sup>23</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, pp 4-5.

Regarding the training of magistrates who would preside over the Brisbane drug court and any future drug courts, the department advised:

*If the legislation is passed we will be negotiating with the Chief Magistrate as to the designated magistrate, and possibly two backups would be trained initially and then there would be an invitation to other magistrates. Certainly the magistrate who will be presiding over the court will have quite intensive training; that is planned.*<sup>24</sup>

...

*If other drug courts are established there will be similar training. There is an expectation that it would be modelled similar to the domestic violence court with those specialist magistrates.*<sup>25</sup>

The Bill proposes to amend the *Justice and Other Information Disclosure Act 2008* (JOIDA) to provide that the agencies in the review team or a service provider engaged by one of those agencies could make 'treatment order information' available to another relevant agency. Treatment order information is particular information obtained by a treatment order agency or a service provider about a person to whom a treatment order applies.<sup>26</sup>

#### Stakeholder views

Stakeholders were generally supportive of the inclusion of treatment orders in the Penalties and Sentences Act.<sup>27</sup> The Queensland Law Society, for example, stated:

*The drug courts proved to be a very constructive and positive diversionary strategy to deal with drug dependent criminals when they were made permanent in 2005. Therefore, the Queensland Law Society welcomed the announcement to reopen the drug and alcohol court. Whilst therapeutic jurisprudence may seem to some in the community as a soft option, it simply is not because it actually requires people to address their addictive behaviour which is the cause of their criminality.*

*The cost to the community of drug addicted criminals committing crimes such as break and enter offences, prostitution and drug supply to feed their own habit is enormous. By diverting the worst of these offenders into these programs it will go a long distance to breaking the cycle of misery. However, it is not simply a matter of addiction. The likely people to be placed on this scheme more often than not have psychiatric problems, some of which have been caused or made worse by their drug addictions. They have health problems. They are often homeless and generally lacking family support. It is therefore an intensive, difficult and potentially expensive program, but a cost analysis shows that by preventing crime there is a significant saving to our community.*<sup>28</sup>

QNADA recommended the Bill be amended to include treatment providers in the definition of 'review team' for a treatment order.<sup>29</sup>

*There are three residential service providers who will participate in the pilot of the new drug court program and we argue that their inclusion in the review team will be critical in the success of the program, as it will assist in building a shared understanding between the courts and treatment providers.*<sup>30</sup>

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<sup>24</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 7.

<sup>25</sup> Department of Justice and Attorney-General, public briefing transcript, Brisbane, 23 August 2017, p 7.

<sup>26</sup> Explanatory notes, p 6; cl 22: ss 6A, 6B.

<sup>27</sup> See for example, Queensland Nurses and Midwives' Union, submission 3, p 2; Protect All Children Today, submission 6, p 1; Queensland Advocacy Incorporated, submission 7, p 1.

<sup>28</sup> Public hearing transcript, Brisbane, 6 September 2017, pp 1-2.

<sup>29</sup> Public hearing transcript, Brisbane, 6 September 2017, p 6.

<sup>30</sup> Queensland Network of Alcohol and Other Drug Agencies Ltd, submission 5.

In response, the department stated:

*Given the role and functions of the review team it was not considered appropriate to extend the membership of the team to include external agencies which were providing a service to assist in the operation of a DATO.*

*There may be a variety of service providers engaged in the course of a DATO, for example, residential providers, relationship counsellors, or parenting programs. It is not considered appropriate that each service provider be a member of the review team.*

*Each offender's service provider needs will be different. In the interest of privacy, it is not considered appropriate for each service provider to be involved in all aspects of a review team meeting about an offender. However, the Bill does not expressly exclude the participation of service providers at review team meetings and this could occur in appropriate circumstances.<sup>31</sup>*

QNADA expressed an interest on behalf of the alcohol and other drug treatment sector in Queensland in being consulted in the development of the training program for magistrates.<sup>32</sup> The department noted the comment and advised that it will continue to consult with QNADA and other non-government service providers during the implementation of the drug and alcohol court program.<sup>33</sup>

Queensland Advocacy Incorporated (QAI) submitted that all programs and materials related to treatment orders should be accessible for people with disabilities, such as being written in plain language.<sup>34</sup> In relation to this, the department stated:

*The information provided and being developed to deliver the drug assessment and education session is designed to maximise the person's participation and is tailored to accommodate the personal circumstance of the person, such as a disability, and includes the use of plain language.<sup>35</sup>*

Protect All Children Today Inc (PACT) was of the view that the ability to share treatment order information would enable services 'to be targeted to the most needed areas identified in evidence-based research.'<sup>36</sup>

Queensland Nurses and Midwives' Union (QNMU) opposed the exclusion of appeal rights as provided in proposed new s 151ZD. This concern is discussed in Part 3.

## 2.2 Criminal history

The Bill proposes to clarify that the imposition of an overall sentence of more than 30 months imprisonment is outside the scope of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (CLRO Act) and therefore would never be 'spent' and must be disclosed.<sup>37</sup> This amendment is in response to statements by members of the Court of Appeal in *Dupois v Queensland Television Ltd & Others*<sup>38</sup> that it 'would be desirable for the legislature to clarify the sentence length of convictions that are eligible to become spent convictions under the scheme in the act.'<sup>39</sup>

<sup>31</sup> Department of Justice and Attorney-General, correspondence received 4 September 2017, attachment, p 6.

<sup>32</sup> Queensland Network of Alcohol and Other Drug Agencies Ltd, submission 5.

<sup>33</sup> Department of Justice and Attorney-General, correspondence received 4 September 2017, attachment, p 8.

<sup>34</sup> Queensland Advocacy Incorporated, submission 7, p 2.

<sup>35</sup> Department of Justice and Attorney-General, correspondence received 4 September 2017, attachment, p 9. See also, Department of Justice and Attorney-General, correspondence received 4 September 2017, attachment, p 11 regarding the drug diversion assessment program.

<sup>36</sup> Protect All Children Today, submission 6, p 2.

<sup>37</sup> Explanatory notes, pp 2, 7.

<sup>38</sup> *Dupois v Queensland Television Ltd & Others* [2016] QCA 182

<sup>39</sup> Public briefing transcript, Brisbane, 23 August 2017, p 3.

### Stakeholder views

PACT supported the proposed clarification to the CLRO Act.<sup>40</sup>

Townsville Community Legal Service (TCLS) advised that it had no issue with the amending clause dealing with the decision in *Dupois*. The TCLS submitted that the CLRO Act is due for review and that their preferred reviewer is the Queensland Law Reform Commission because of 'the complex nature of disclosures in our contemporary society.'<sup>41</sup>

The TCLS gave the following reasons to support its recommendation for a review:

- ensuring the Act mirrors best practice within Australia and balances Queenslanders' privacy and other rights with those who genuinely need to know about a person's criminal history
- ensuring the Act complies with *International Labour Organisation Convention No. 111 – Discrimination (Employment and Occupation) Convention, 1958*
- a person's criminal history warrants careful treatment and protection.<sup>42</sup>

The TCLS elaborated on its concerns about the disclosure scheme:

*We have said in our submission that Dupois is symptomatic and we believe it is. For those who are seeking to rely on the scheme it is difficult to know how it applies. Do they rely on it and fail to disclose, thereby making their situation look worse or possibly actually making the situation worse? Most people we encounter are simply unaware of the scheme including those who might benefit from the privacy aspect of it and those who have a genuine need to require disclosure.*

*There is a considerable grey area in practice where people may be required to disclose or issues that are simply not covered by the act. Once disclosure is made, discrimination is very common. The area reveals the importance to have a balance between personal privacy and reputation and the rights of others to live free from abuse, violence and exploitation. Our centre sees both sides of this coin, and so there is no simple answer to this story.*

*We would say also, as we have said in the past, that these competing human rights can be accommodated in the model recommended by this committee in its 30th report where government members identified these rights as fundamental inclusions in a human rights act.<sup>43</sup>*

With respect to TCLS's recommendation, the department stated:

*Any reference to the Queensland Law Reform Commission to undertake a review of the CLROA is a matter for consideration and determination by the Attorney-General and Minister for Justice, in accordance with section 10 (Functions and duties of Commission) of the Law Reform Commission Act 1963.<sup>44</sup>*

## **2.3 Definition of dangerous drug**

By proposing to amend the definition of 'dangerous drug', the Bill responds to the decision of the District Court in *R v Champion & Anor*<sup>45</sup> and aims to implement a recommendation of the Queensland

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<sup>40</sup> Protect All Children Today, submission 6, p 1.

<sup>41</sup> Public hearing transcript, Brisbane, 6 September 2017, p 2.

<sup>42</sup> Townsville Community Legal Service Inc, submission 2, pp 1-2.

<sup>43</sup> Public hearing transcript, Brisbane, 6 September 2017, pp 2-3.

<sup>44</sup> Department of Justice and Attorney-General, correspondence received 4 September 2017, attachment, p 12.

<sup>45</sup> *R v Champion & Anor* [2017] QDC

Organised Crime Commission of Inquiry Report regarding the efficacy of the extended definition of dangerous drug under the *Drugs Misuse Act 1986*.<sup>46</sup>

The department elaborated:

*The upshot of the decision in Champion was that whilst the court said, 'Yes, of course chemists can give evidence about two substances being similar and the nature of that similarity,' ultimately the court determined that it is a question of fact for the jury to determine whether they are substantially similar based on the evidence. The term 'substantially similar' is a subjective term and it is not appropriate for expert witnesses to opine on that issue. That is the problematic nature of the extended definition at the moment that we are trying to address by putting strong parameters around the sort of substances we need to capture and making sure that it is appropriately defined.*

*As members may be aware, and as the Queensland Organised Crime Commission report also picked up on independently in recommendation 3.2, there is a lack of definition in the extended definition and that really did require some attention. That is what we have endeavoured to do.*<sup>47</sup>

## **2.4 Protection of witnesses**

The Bill proposes to amend the *Evidence Act 1977* to prevent a self-represented accused from cross-examining an alleged victim in a proceeding for an offence of choking, suffocation or strangulation in a domestic setting.

### Stakeholder views

The Queensland Council of Unions, PACT and QAI expressed support for the amendment which would extend the meaning of protected witness and would prevent a self-represented accused from directly cross examining certain witnesses.<sup>48</sup>

## **2.5 Participation via technology**

At present, persons are required to 'attend' drug diversion programs, and drug assessment and education sessions and associated appointments.<sup>49</sup> The Bill proposes to replace the term 'attend' in the relevant provisions of the Penalties and Sentences Act and the Police Powers and Responsibilities Act so that participation can be via technology.

The department advised that the intent of the amendments is to provide a more flexible mode of delivery of programs:

*The purpose of these amendments is to facilitate the delivery of certain flexible drug diversion programs to offenders. These programs do not involve an offender's physical attendance at a program and it is hoped by providing for flexible modes of participation we will see an increase in the successful completion of drug diversion programs in circumstances where the participant has difficulty physically attending an appointment, for example, people in remote or rural areas.*<sup>50</sup>

### Stakeholder views

PACT submitted that enabling a person to use electronic means to participate in the diversion assessment program and drug assessment and education sessions 'could lead to better participation

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<sup>46</sup> Hon Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills, Queensland Parliament, Record of Proceedings, 10 August 2017, p 2197.

<sup>47</sup> Public briefing transcript, 23 August 2017, p 5.

<sup>48</sup> Queensland Council of Unions, submission 1; Protect All Children Today, submission 6, p 2.

<sup>49</sup> Explanatory notes, pp 7, 8.

<sup>50</sup> Public briefing transcript, 23 August 2017, p 3.

by removing the obstacles associated with personally having to [attend], resulting in more successful rehabilitation.’<sup>51</sup>

QAI expressed support for the proposed amendments but drew attention to issues that may be faced by people with a disability participating via technology:

*... while electronic means such as webinars may be more appropriate than traditional mediums for people with intellectual or cognitive disabilities or learning difficulties, some people may require some support to participate in them. The nature of the support required may include accessing or operating a computer, or with reading or comprehending materials or the facilitation of text conversion.*<sup>52</sup>

## **2.6 Effect of previous drug court being removed**

At the public hearing, the committee asked witnesses about the effect of the cessation of previous court diversionary programs.<sup>53</sup>

Ms Rebecca Fogerty, Deputy Chair of the Criminal Law Committee, Queensland Law Society, considered that defence lawyers’ ability to act in the best interests of their clients was impeded through the removal of court diversionary programs. She noted the importance of judges having the discretion to balance punitive sentencing options with rehabilitation and deterrence:

*The view of the vast majority of defence lawyers has been that our ability to act in the best interests of our clients and act in the best interests of justice has been impeded by the removal of diversionary programs. In order for justice to be done, judges have to have discretion and they have to have a wide range of sentencing options and be able to balance punitive aspects of the sentencing discretion, because punishment is important to a justice system, but balance that against the other no less important considerations of rehabilitation and deterrence, general and specific.*<sup>54</sup>

The Queensland Law Society also identified some of the people who were most affected by the cessation of court diversionary programs:

*The real issue for us is that the abolition of the diversionary programs compromised some of the most vulnerable members of the community. It did not go to hardcore drug traffickers on the Gold Coast. It affected women, it affected children, it affected Indigenous Australians and it affected people who were chronically addicted to drugs, and the best interests of society was being able to rehabilitate them. It is quite clear from the Law Society’s presence today and our previous advocacy on these issues that we consider diversionary programs to be central to a just, functioning criminal justice system.*<sup>55</sup>

Mr Sean Popovich, Treatment Services Support Manager at QNADA, advised the committee:

*What we have seen according to the evidence—and the review report talks about this—is an increase in charges around illicit drug offences. That may or may not be caused by the cessation of the Drug Court, but certainly the impacts on clients where their offending is directly related to their problematic substance abuse is where you see increased costs in having to support those people and the legal system having to see those people in incarceration, rather than in treatment and the ongoing effect of that socially.*<sup>56</sup>

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<sup>51</sup> Protect All Children Today, submission 6, p 2.

<sup>52</sup> Queensland Advocacy Incorporated, submission 7, pp 1-2.

<sup>53</sup> See for example, public hearing transcript, 6 September 2017, pp 3, 6 and 9.

<sup>54</sup> Public hearing transcript, 6 September 2017, p 3.

<sup>55</sup> Public hearing transcript, 6 September 2017, p 3.

<sup>56</sup> Public hearing transcript, 6 September 2017, p 6.



### 3 Compliance with the *Legislative Standards Act 1992*

#### 3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ (FLP) are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. It is considered that clauses 6, 18, 22, 24, 29 and 35 raise issues of FLP. The committee brings the following to the attention of the House.

##### 3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

##### Clauses 18, 22 and 35

##### *Right to cross-examine witness*

Clause 18 of the Bill amends s21M (Meaning of protected witness) of the *Evidence Act 1977* to include a reference to s315A (Choking, suffocation or strangulation in a domestic setting) of the Criminal Code in the definition of prescribed special offence. A protected witness includes an alleged victim in a proceeding for a prescribed special offence.

The result of this amendment is that a self-represented accused will be prohibited from directly cross-examining a protected witness, in circumstances of allegations of choking, suffocation or strangulation in a domestic setting.

The explanatory notes acknowledge the potential FLP as follows:

*This amendment could be seen as removing an existing right and therefore, impacts on the rights and liberties of individuals (section 4(a) of the LSA). However, this potential breach is justified as it does not remove the ability for the witness to be cross-examined. The existing section 210 (Procedure for cross-examination of protected witness if person charged has no legal representative) provides that the court will arrange for the person charged to be given free legal assistance unless the person arranges for legal representation or does not want the protected witness to be cross-examined. In addition, as the purpose of the amendment is to protect a vulnerable witness it is considered that any potential breach is justified.<sup>57</sup>*

An accused currently has the right to cross-examine a prosecution witness or to have that witness cross-examined by the accused’s counsel. This amendment prohibits a self-represented accused from directly cross-examining a protected witness in instances of domestic violence related charges involving choking, suffocation or strangulation. The policy intent is to prevent re-traumatisation of the protected witness which would likely occur if they were to be cross-examined by their alleged abuser. It is also likely that the quality of the evidence provided by the witness would suffer if they felt intimidated being cross-examined by their alleged abuser.

The accused’s right to cross-examine the protected witness is preserved as either their own retained counsel can cross-examine the witness, or the court would arrange for legal assistance to be provided to them at no cost. This means that the veracity of the evidence of the protected witness would still be able to be tested, just not directly by the accused.

<sup>57</sup> Explanatory notes, p 9.

Committee comment

The committee considers this appears to be an appropriate compromise that preserves the right of the accused to have the evidence of a prosecution witness tested, whilst preventing potential re-traumatisation or intimidation of a protected witness which could readily occur if they had direct contact with their (alleged) abuser.

*Information exchange and privacy considerations*

Clause 22 inserts a new Part 2A into the JOIDA to enable the exchange of information between treatment order agencies, if that information is for a specified treatment order purpose. Also, the ability to exchange information extends to service providers who are engaged to provide support services to a person who is subject to a treatment order. Additionally, the chief executive can authorise a qualified person to use the information for approved research.

Any exchange of personal or confidential information may adversely impact on an offender's expectation of privacy.

A number of safeguards exist in respect of the information sharing:

- (a) The information that can be shared must be limited to the treatment order purposes that are listed in the Bill
- (b) A treatment order can only be imposed with the informed consent of the offender, and
- (c) If a person is given access to treatment order information for research purposes, the information must be used in a way that it cannot reasonably be expected to result in the identification of the persons to whom the research relates.

Committee comment

The committee considers that the exchange of information (and its implications for an offender's privacy) is reasonable and appropriate to facilitate effective administration of the treatment program regime.

*Conditions of a treatment program*

A treatment order comprises two parts; a custodial part (a term of imprisonment of up to four years) which is suspended for a designated period of up to five years (i.e. the operational period) and a rehabilitation part of at least two years that requires compliance with core conditions and completion of a treatment program.

Clause 35 inserts new s151S (Treatment program) into the Penalties and Sentences Act providing that an offender who is subject to a treatment order must comply with a treatment program supported by a range of conditions for a minimum of two years.

New s151Q provides that the core conditions and treatment program will constitute the rehabilitation part of a treatment order.

New s151R sets out the core conditions which must be complied with by an offender. These are that the offender must not reoffend, must report and receive visits under the order as directed, must notify a change of address or employer, must not leave Queensland without the court's permission, must appear before court as required, and must comply with any other reasonable direction.

New s151S provides for the treatment program aspect of a treatment order, which may include

- conditions requiring the offender submit to medical, psychiatric or psychological treatment relevant to their rehabilitation
- submit to detoxification at an appropriate facility
- participate in counselling or programs

- attend meetings or participate in vocational, educational or employment programs or courses
- submit to alcohol or drug testing
- wear a device that detects alcohol or drug use
- install a device or equipment in their residence, or
- reside at a stated place for a stated period.

All of these conditions limit the free movement and exercise of free will of the offender, and in that way impact on the offender's rights and liberties.

It must be noted that a court can only make a treatment order if the offender consents to the order being made and agrees to comply with it (new s151J). Before making the treatment order, the court must explain to the offender the order's purpose and effect, including the content of the order, the core conditions of the rehabilitation part of the order, and the potential requirements of the treatment program under the rehabilitation part of the order. The advice must canvass the impacts on the offender's right to privacy that may be necessary to comply with the order—such as the requirement for the offender to consent to the sharing of information about the offender between review team members, the requirement to wear a drug or alcohol monitoring device, and a requirement to install monitoring devices at the offender's residence.

The court is also required to explain to the offender the consequences of non-compliance with the order, and when and how the order may be amended, revoked, cancelled or terminated. As well as having the power to amend the treatment order, the court may revoke the treatment order on its own initiative if it is satisfied that the offender is unable, unwilling or unlikely to comply with the order. The court may also revoke the treatment order upon an application by the offender, prosecutor or review team member.

If the treatment order is revoked and the offence for which the offender was placed on the order was an indictable offence specified in s13A (offences that may be dealt with summarily if treatment order is sought) of the *Drugs Misuse Act 1986*, the Bill provides that the court must vacate the treatment order and commit the offender to the District Court for sentencing (as would have originally occurred, but for s13A). As the person has already pleaded guilty to the offence, the court must commit the offender for sentence.

#### Committee comment

The committee notes the treatment order conditions and their impact on the liberty of an offender, and that an offender must firstly consent to being subject to these conditions before becoming subject to a treatment order/entering into a treatment program.

#### *Clause 35*

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.<sup>58</sup>

Clause 35 inserts new s151ZD (No appeal against particular decisions) into the Penalties and Sentences Act to exclude appeals from the decisions listed in that section. The Bill provides that, despite the *Justices Act 1886* s222 (Appeal to a single judge) and the Criminal Code, chapter 67 (Appeal-pardon) an appeal does not lie against a decision of the court not to make a treatment order; to revoke a treatment order; that an offender has failed to comply with a treatment order; or to amend, cancel or revoke the rehabilitation part of the treatment order.

<sup>58</sup> *Legislative Standards Act 1992*, s 4(3)(a).

In respect of this, the explanatory notes state:

*This could arguably breach the FLPs regarding the provision of natural justice and procedural fairness (s4(3)(b) of the LSA) and making rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review (s4(3)(a) of the LSA).<sup>59</sup>*

The potential FLP breaches are required because removal of appeal rights for these decisions is necessary to enable the effective administration of treatment orders, and ensure appropriate action can be taken if an order is not suitable for an offender.<sup>60</sup>

The decision not to impose a treatment order is subject to a variety of factors including eligibility and the development of a suitability assessment report, and is ultimately an order of the court after consideration of all relevant factors and submissions. As such, it is considered that an appeal should not lie against a decision not to make an order.<sup>61</sup>

The Bill restricts appeal rights with respect to decisions that relate to a person's failure to comply with a treatment order or the amendment of a treatment order because these decisions deal with the administration of the treatment order and are necessary for the efficient administration of the treatment order by the court.<sup>62</sup>

If the court did revoke a treatment order the person would be sentenced for their original offending behaviour in the usual way, having regard to the extent to which they have already been punished under the treatment order. Any such sentence would be subject to the usual appeal avenues.<sup>63</sup>

#### Committee comment

The committee notes that the decisions for which appeal rights are removed are decisions of a Magistrates Court, after taking into account all relevant circumstances.

#### *Clause 6*

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.<sup>64</sup>

Clause 6 inserts new part 9, chapter 99 (Transitional Provision for *Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Act 2017*) s741 into the Criminal Code to provide that the court may impose a penalty under the newly inserted ss(1)(a) of s552H (Maximum penalty for indictable offences dealt with summarily) for an offence committed before commencement.

Section 552H(1)(a) provides that when a Magistrates Court is imposing a drug and alcohol treatment order, the court can impose a (maximum) penalty of 100 penalty units or four years imprisonment. The Magistrates Court ordinarily does not have jurisdiction to sentence an offender to more than three years imprisonment.

By extending its applicability to offences committed before commencement, this amendment has retrospective application (see s4(3)(g) of the LSA).

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<sup>59</sup> Explanatory notes, p 11.

<sup>60</sup> Explanatory notes, p 11.

<sup>61</sup> Explanatory notes, p 11.

<sup>62</sup> Explanatory notes, p 11.

<sup>63</sup> Explanatory notes, p 12.

<sup>64</sup> *Legislative Standards Act 1992*, s 4(3)(g).

In the briefing from the department, it is noted:

*The purpose of this amendment is to enable the court to impose a treatment order on the widest possible appropriate cohort of offenders who would benefit from the rehabilitation part of the treatment order.*<sup>65</sup>

The explanatory notes advise:

*The retrospectivity in this instance is justified on that basis that the amendment is simply taking into account the creation of another sentencing option that is available to the court and that the treatment order itself can only be made if the person agrees to it being made and has had the purpose and effect of the order explained to them prior to the order being made.*<sup>66</sup>

#### Committee comment

The retrospective aspect of this amendment and the policy intention of enabling the imposition of drug and alcohol treatment orders to be available for the greatest possible number of eligible offenders, including those who offended prior to commencement, is noted.

#### Clauses 24, 29, 35

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.<sup>67</sup>

#### *Exchange of information for a treatment order purpose*

The Bill provides for amendments to the JOIDA which confer immunity from prosecution for relevant agencies who exchange information for a treatment order purpose.

Clause 24 replaces s11 of JOIDA to provide that, despite any other Act, a person may use information provided to the person under s6C or s6D or under an arrangement mentioned in s13.

Clause 29 amends s16(1) of that Act to make the section apply if a person, acting honestly, makes information available under s6C or s6D or an arrangement mentioned in s13. Section 16(1) provides that the person is not liable, civilly, criminally or under an administrative process, for making the information available. Also, merely because the person makes the information available, the person cannot be held to have breached any code of professional etiquette or ethics; or departed from accepted standards of professional conduct. In addition, without limiting ss(2) and (3), in a proceeding for defamation, the person has a defence of absolute privilege for publishing the information if the person would otherwise be required to maintain confidentiality about the information under an Act, oath or rule of law or practice, the person does not contravene the Act, oath or rule of law or practice by making the information available; and is not liable to disciplinary action for making the information available.

Section 4(3)(h) of the LSA provides that legislation should not confer immunity from proceedings or prosecution without adequate justification.

The explanatory notes advise:

*The conferring of the protection from liability is justified in these circumstances because it is considered critical that agencies are able to exchange this information in order to properly support the court in the management and administration of the treatment order. Further, the immunity provided is only available when a person acting honestly exchanges the information in accordance with the other requirements proposed in part 6 of the Bill, namely proposed new*

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<sup>65</sup> Correspondence, Department of Justice and Attorney-General, 28 August 2017, p 6.

<sup>66</sup> Explanatory notes, p 8.

<sup>67</sup> *Legislative Standards Act 1992*, s 4(3)(h).

*section 6C (Making treatment order information available to treatment order agencies for treatment order purpose) and proposed new section 6D (Making treatment order information available for research purposes) and the requirement that information must only be exchanged for a treatment order purpose (see proposed new section 6B of the JOIDA in clause 22 of the Bill).*<sup>68</sup>

### *Immunity from prosecution*

Clause 35 inserts new s151ZA (Immunity from prosecution) into the Penalties and Sentences Act to provide that a person who is subject to a treatment order will not be liable for prosecution for a relevant drug offence if the person makes an admission during the preparation of a suitability assessment report or in the administration of the treatment order.

The admission and any evidence obtained because of the admission, is not admissible against the person in a prosecution for the relevant drug offence, however, this does not prevent the person from being prosecuted for the relevant drug offence if evidence of the offence, other than the admission made by the person or evidence obtained because of the admission, exists (see s151ZA(2)-(3)).

What constitutes a relevant drug offence is defined in ss(4). This is limited to less serious *Drugs Misuse Act 1986* offences that can be dealt with summarily (such as drug possession and possession of things to facilitate personal drug use).

The explanatory notes advise:

*The provision ensures that persons who are subject to treatment orders will be able to provide a full and honest account of their drug and alcohol use in both the period leading up to the order being made as well as throughout the currency of the treatment order. This is necessary to design and maintain an appropriate treatment program for a person with severe substance use disorder.*<sup>69</sup>

## **3.2 Proposed amended offence provisions**

Clause	Offence	Proposed maximum penalty
5	<b>Amendment of Criminal Code</b> <b>Amendment of s552H Maximum penalty for indictable offences dealt with summarily</b> (a) if the Magistrates Court is a court constituted by a magistrate imposing a drug and alcohol treatment order under the <i>Penalties and Sentences Act 1992</i> , part 8A; or (b) if the Magistrates Court is constituted by a magistrate other than a magistrate mentioned in paragraph (a); or (c) if the Magistrates Court is constituted by justices under s552C(1)(b).	100 penalty units or 4 years imprisonment  100 penalty units or 3 years imprisonment  100 penalty units or 6 months imprisonment

<sup>68</sup> Explanatory notes, p 10.

<sup>69</sup> Explanatory notes, p 10.

### **3.3 Explanatory notes**

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are comprehensive and contain the information required by Part 4 and a significant level of background information and commentary to facilitate understanding of the Bill's purpose.

## Appendix A – List of submissions

Sub #	Submitter
001	Queensland Council of Unions
002	Townsville Community Legal Service, Inc
003	Queensland Nurses & Midwives' Union
004	Queensland Law Society
005	Qld Network of Alcohol and Other Drug Agencies Ltd
006	Protect All Children Today, Inc
007	Queensland Advocacy Incorporated



## **Appendix B – List of witnesses at public briefing and hearings**

### **Public briefing - 23 August 2017**

#### **Department of Justice and Attorney-General, Strategic Policy and Legal Services**

- Mrs Leanne Robertson, Acting Assistant Director-General
- Ms Sarah Kay, Acting Director
- Mr Brian McFadyen, Acting Principal Legal Officer
- Ms Jo Hughes, Principal Legal Officer

#### **Department of Justice and Attorney-General, Justice Services**

- Ms Amanda Shipway, Acting Director, Drug and Specialist Courts

### **Public hearing – Brisbane – 6 September 2017**

#### **Townsville and Community Legal Service Inc**

- Mr Bill Mitchell, Principal Solicitor (by telephone)

#### **Queensland Law Society**

- Ms Christine Smyth, President
- Ms Rebecca Fogerty, Deputy Chair, Criminal Law Committee
- Ms Binari de Saram, Acting General Manager, Advocacy

#### **Queensland Network of Alcohol and Other Drug Agencies Ltd**

- Mr Sean Popovich, Treatment Services Support Manager

#### **Queensland Council of Unions**

- Dr John Martin, Research and Policy Officer

### **Hearing – Cairns – 11 September 2017**

### **Public hearing – Mackay – 12 September 2017**

- Mrs Julieanne Gilbert, Member for Mackay
- Mr Jim Pearce, Member for Mirani