

To the Hon. Dr Brad Pettitt MLC
Member for South Metropolitan Region
4/1 High Street, Fremantle WA, 6160

23rd November 2022

Dear Dr Pettit,

RE: Protected Entertainment Precinct Regime Concerns.

We write to you as a group of peak organisations concerned relation to the proposed Protected Entertainment Precinct (PEP) regime to be introduced as an amendment to the *Liquor Control Act 1988 (WA) (Liquor Control Act)* pursuant to the *Liquor Control Amendment (Protected Entertainment Precincts) Bill 2022 (WA) (PEP Bill)*.

We previously wrote to Minister Buti, Minister Papalia, and the Premier on the 11th October, expressing the concerns outlined below, and requesting a briefing to discuss these. Our correspondence was referred to Minister Buti, and we did not receive a response from his office.

As the legislation has now passed through the Legislative Assembly, and we understand it is now to go through the Legislative Council, we are referring our concerns to you as we assume there will be no opportunity for further discussion prior to them passing Parliament.

The contents of our previous letter are below, please note it was written prior to legislation being tabled in Parliament, so some of the points seeking clarification are now null.

The parties signed to today's letter are WA Council of Social Services, Community Legal WA, Youth Affairs Council of WA, Community Legal WA, WA Network of Alcohol and Other Drug Agencies, WA Association for Mental Health, ConnectGroups, the WA Justice Association, Justice Reform Initiative, and Social Reinvestment WA.

While we support the WA Government's commitment to improving community safety, we are concerned that the proposed legislative measures may have a detrimental and disproportionate effect on some of our most disadvantaged community members, without achieving a reduction in the anti-social behaviour which the regime is designed to address.

The extension of police powers to potentially impose six month to five year bans for antisocial behaviour without judicial oversight is cause for concern, particularly when there is a history of exclusion zones and move on notices being used discriminately against Aboriginal and Torres Strait Islander people, and people experiencing homelessness, or mental health issues.

It is also unclear from publicly available information whether police will have the power to issue punitive orders on a mere belief (as opposed to a *reasonable* belief). This means a 6 month exclusion notice would be valid on appeal even if the notice is based on an unreasonable belief. This potential, and additionally the use of mandatory sentencing regardless of circumstances or rehabilitation of the individual exposes the community to unfair punishment.

Furthermore, existing legislation already provides WA Police and the Director of Liquor Licensing with powers that are broadly similar in effect to the proposed exclusion orders. As such, we are concerned that the proposed exclusion order regime may not have the intended material impact on

community safety over and above outcomes already achieved through existing legislative measures. The purported benefits of the regime must therefore be weighed against the prospect of serious unintended consequences.

These concerns are compounded by the **relative lack of publicly available information outlining the specifics of the proposed legislative reforms, and engagement process leading to their development.**

We therefore respectfully request that you or your office provide a briefing on the PEP Bill and an opportunity for us to discuss the concerns outlined below in this letter.

1. Disproportionate impact on disadvantaged West Australians

We consider that the PEP regime may have significant unintended consequences, including disproportionate impact upon disadvantaged West Australians.

Based on the details of the regime which are publicly available, we consider that the proposed short-term exclusion orders issued by the Commissioner of Police would likely be similar in their effect and application to 'move on orders' issued pursuant to section 27 of the *Criminal Investigation Act 2006* (WA) (**Criminal Investigation Act**).

Move on orders already disproportionately impact vulnerable members of our communities, especially people who are experiencing homelessness, those living with mental illness and Aboriginal and Torres Strait Islander people, who are most likely to occupy all three intersections.

There is a wealth of evidence proving that Aboriginal West Australians are disproportionately affected by move on orders, and we consider that the proposed PEP regime will have a similarly disproportionate impact. In 2011 alone, approximately 10,000 move on orders were issued to people of Aboriginal descent even though there were Western Australia has an Aboriginal population of only 80,000.¹ Western Australia also has the highest rate of Aboriginal incarceration in the entire nation and we are highly concerned that the proposed PEP regime will only serve to exacerbate, rather than address, this issue.

The penalty for breaching a move on order is a fine of up to \$12,000, or imprisonment for up to 12 months,² which is similar to the proposed penalty for breaching an exclusion order. This is a significant cost for most people, let alone those who are living in poverty or experiencing disadvantage.

Further, we are concerned that if the regime is not carefully prescribed and subject to judicial oversight there is the possibility for the proposed exclusion orders to have an unintended punitive effect on vulnerable members of our community.

Accordingly, there must be a clear basis for the introduction of PEP measures and safeguards enshrined in legislation to protect the most vulnerable members of society, which we cannot identify from the currently available information.

2. PEP regime may provide limited additional benefits over and above existing legislation

Existing legislation provides WA Police and the Director of Liquor Licensing with powers that are broadly similar in effect to the proposed exclusion orders under the PEP regime. As such, we query whether the proposed PEP regime will have a substantive impact on violent crime or provide a material benefit to the community.

¹ Kelly, Miriam and Tubex, Hilde (2015) "Stemming the Tide of Aboriginal Incarceration," *The University of Notre Dame Australia Law Review*: Vol. 17, Article 2.

² *Criminal Investigation Act 2006* (WA), s 153.

As outlined above, we consider that the proposed short-term exclusion orders will likely be broadly similar in application and effect to move on orders issued pursuant to the Criminal Investigation Act. Further, both the short-term and extended exclusion orders will share significant similarities with 'prohibition orders' that can be imposed by the Director of Liquor Licensing pursuant to Part 5A of the Liquor Control Act to prohibit individuals from entering either a specific licensed venue, a class of licensed venues or all licensed venues.

Move on orders already enable WA Police officers to respond immediately to situations where they consider there is a risk of violence by providing them with the power to order an individual to leave a particular area. Where WA Police considers that an individual represents an ongoing risk to public safety in relation to licensed venues such that they should be excluded from entering them, the Commissioner of Police can apply to the Director of Liquor Licensing for a prohibition order to prohibit that individual from entering licensed premises, including any licensed venues inside the proposed PEPs.

We would like to see further evidence of the prevalence of incidents of violent crimes in PEPs where move on orders or prohibition orders either would not have applied or would not have been effective at preventing the incident from occurring but one of the proposed exclusion orders would have applied and would have been effective.

Absent such evidence, we query whether the proposed PEP regime will provide a significant benefit to the community through a reduction in violent crime such as to outweigh the significant potential for unintended adverse consequences outlined in this letter.

3. Exclusion orders must, at a minimum, provide the same degree of procedural fairness afforded under Liquor Control Act prohibition order regime

Further to the above, we note that the proposed process for making an extended exclusion order appears to share similarities with the process for making 'prohibition orders' prescribed by Part 5A of the Liquor Control Act, as both prohibition orders and the proposed extended exclusion orders are to be made by the Director of Liquor Licensing upon an application being made by the Commissioner of Police.

We consider that the process for making extended exclusion orders should, therefore, provide at least the same degree of procedural fairness afforded to individuals who are the subject of an application for a prohibition order, including, at a minimum:

- (a) requiring the Commissioner of Police to justify why an order should be made; and
- (b) providing the subject of an application to impose an order with an opportunity to make submissions or be heard in relation to the application.

We are, however, concerned that the proposal to provide the Commissioner of Police with the power to issue short-term exclusion orders may not afford the same degree of procedural fairness as currently provided to the subject of an application for a prohibition order. Both an extended and a short-term exclusion order would effectively prevent an individual from attending any licensed venues within that PEP and would therefore act as a de facto prohibition order. As a consequence, we consider that the prescribed mechanism for imposing both short-term and extended exclusion orders should afford, at a minimum, a similar degree of procedural fairness as currently provided for under the prohibition orders regime.

4. Effect of exclusion orders reminiscent of historical discriminatory policies

The proposed PEP regime must also be considered in light of the similarities it shares with previous policies that imposed discriminatory restrictions on the movement of Aboriginal and Torres Strait Islander people throughout the Perth region.

As outlined above, we consider that the proposed PEP regime will have a disproportionate impact on Aboriginal West Australians and will therefore likely affect their ability to move freely throughout the Perth CBD. The effect of the regime will, therefore, be reminiscent of the prohibitions imposed on the movement of Aboriginal and Torres Strait Islander people throughout the Perth region between 1927 to 1954 pursuant to the the *Aborigines Act 1905* (WA).

This legislation, which we can all identify as racist and discriminatory, eventually proved to be ineffective and incredibly resource intensive. While the proposed PEP regime will not specifically target the Aboriginal community, its outcomes may be reminiscent of oppressive policies from a very dark time in WA's history. This must be taken into consideration in order to ensure that future policies work towards rectifying our past and not reliving it.

5. Mandatory sentencing is ineffective

The proposed measure to impose mandatory exclusions orders on individuals convicted of committing a serious offence in a public place in a PEP will preclude the exercise of judicial discretion and will amount to another form of mandatory sentencing. Mandatory sentencing laws have a disproportionate effect upon Aboriginal Australians and are opposed by both the Law Council of Australia and the Law Society of Western Australia. Further, there is no evidence to suggest that mandatory sentencing deters criminal offending.

6. Punitive measures reduce vibrancy but not violent crime

The PEP measures purport to improve the vibrancy of our entertainment districts whilst reducing violent offending, however punitive measures notoriously have the opposite effect, as evidenced by Sydney's lock out laws. Enforcing exclusion zones has no impact upon the incidence of violent crime, as such measures merely move the violent crime beyond the bounds of the exclusion zone, rather than addressing the causes of crime. We advocate for a pre-emptive rather than a reactive response to crime and suggest that the proposed measures will not deter future offenders and will not offer a significant benefit to community safety.

Briefing request

We request a briefing on the proposed PEP measures. We seek a response to the concerns that we have outlined above and further clarification on the below:

1. The specific grounds for the making of short-term and extended exclusion orders, and the process by which such orders are to be made.
2. Specific details of the exemptions to the proposed exclusion orders, including whether an individual must apply for an exemption or if the exemptions will apply as a defence to the breach of an exclusion order.
3. The grounds for appealing an exclusion order and the available avenues of appeal, including whether there will be a right of appeal to the State Administrative Tribunal.
4. The power afforded to the Commissioner of Police to extend short-term exclusion orders and the proposed constraints on this power, including whether the Commissioner of Police can issue consecutive short-term exclusion orders in respect of one individual or if a short-term order can only be extended by applying to the Director of Liquor Licensing.
5. The proposed time periods during which the PEP zones will operate.
6. The consultation process undertaken in developing the PEP regime.

We appreciate the opportunity to share our concerns regarding the proposed PEP measures. We support attempts to improve community safety, although we believe that the proposed measures will not achieve their intended objectives and will fail to materially decrease instances of violence.

We anticipate that the measures will have a detrimental impact upon vulnerable West Australians and strongly advocate for a shift to responding to the underlying causes of violent offending, rather than implementing additional reactive measures.

Signed by,



Sophie Stewart, Executive Manager
Social Reinvestment WA



Louise Giolitto, CEO
WA Council of Social Services



Chelsea McKinney, CEO
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The Hon. Brad Pettitt MLC
Member for South Metropolitan
4/1 High Street
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By email to Hannah.Fitch-Rabbitt@mp.wa.gov.au

23 November 2022

Dear Dr Pettitt MLC

Protected Entertainment Precinct Regime

The WA Justice Association (**WAJA**) is a university student-led organisation that supports various non-government organisations in research and advocacy work relating to criminal justice reform in Western Australia. We provide this letter in relation to the proposed Protected Entertainment Precinct (**PEP**) regime, to be introduced as an amendment to the *Liquor Control Act 1988* (WA) pursuant to the *Liquor Control Amendment (Protected Entertainment Precincts) Bill 2022* (WA) (**PEP Bill**).

This letter is intended to supplement, and further, the concerns outlined in the letter being sent to your office by Social Reinvestment WA, which WAJA has endorsed. Specifically, this letter provides additional points of concern following a thorough review of the PEP Bill, its Explanatory Memorandum and recent comments made in Parliament.

We emphasise that although we have worked closely with Social Reinvestment WA on this issue, this letter has not received endorsement from Social Reinvestment WA coalition members. Although this was our intention, this endorsement has not been feasible given the Government's desire to push through the PEP Bill in a short timeframe. Accordingly, as a matter of urgency, we have drafted this letter to express our deep concerns over two aspects of the PEP Bill.

Summary

The **lack of judicial oversight** in relation to the imposition and appeals of exclusion orders and extended exclusion orders under the PEP Bill is entirely unnecessary and concerning. Such extraordinary measures require equally stringent checks and balances. With respect, the Liquor Commission is not appropriately equipped to provide a stringent oversight mechanism for a regime of this nature.

We are also deeply concerned at **the nature of the Commissioner of Police's guidelines** with respect to the issuing of exclusion orders. Not only do they give **inappropriate deference to the Commissioner of Police to define the scope of Police powers** under the PEP Bill, but the public will not even know what the scope of these powers are by virtue of the **guidelines not being made public**.

We therefore respectfully request that the Government at a minimum amend the PEP Bill to provide:

- (a) for judicial oversight and review of exclusion orders, including the making, amendment, and repeal of those orders; and
- (b) that the Commissioner of Police's guidelines under the PEP Bill are made public so that the community understands precisely the types of behaviours that are likely to result in the imposition of an exclusion order, and the circumstances and manner in which such orders will be imposed (particularly with respect to vulnerable groups).

1. Lack of judicial oversight

We are deeply concerned that the extraordinary and untested powers created by the PEP Bill are not subject to any form of judicial oversight. Such powers must have stringent checks and balances in place to ensure that they are exercised appropriately and that affected persons are afforded administrative and procedural fairness. Despite this, the PEP Bill does not provide affected persons with a right to apply for judicial review of exclusion orders – they must instead appeal to the Liquor Commission. Similarly, applications for extended exclusion orders are made by the Commissioner of Police not to a court but, again, to the Liquor Commission.

We consider it entirely inappropriate for such coercive orders to be overseen solely by the Liquor Commission with no judicial oversight. With respect, the Director of Liquor Licensing is not appropriately placed to decide an application or review a decision to exclude a person from culturally significant areas of Perth for up to half a decade. **That power, if it is to exist, must rest with a judicial officer given the serious nature of its effect on the relevant individual and the community.** Indeed, the courts and/or the State Administrative Tribunal are already required to deal with applications and appeals for orders of a similar nature to the proposed exclusion orders. They are, for a number of reasons, more appropriate bodies for oversight of the proposed PEP regime than the Liquor Commission.

The Law Society of Western Australia has expressed similar concerns, commenting that the exercise of the powers under the PEP Bill “...*should always be subject to judicial consideration particularly to ensure procedural fairness is afforded to a person affected. The Liquor Licensing Commission is not resourced appropriately to be making decisions of this nature.*”¹

2. The Commissioner of Police should not be required to define the boundaries of the Police's power to impose exclusion orders without parliamentary oversight or public scrutiny

We are concerned that the PEP Bill requires the Commissioner of Police to make guidelines for the exercise of its own power to issue short term exclusion orders, which will not be subject to parliamentary oversight or available for public scrutiny.

The PEP Bill requires the Commissioner of Police to issue guidelines in relation to the exercise of the power to issue short term exclusion orders. These include the types of behaviour that justify a person being issued an exclusion order, and the circumstances and manner in which exclusion orders will be issued by members of the WA Police. We have two principal concerns with this aspect of the PEP Bill.

First, we are of the view that it is entirely inappropriate for the Commissioner of Police to, in effect, be given the power to govern the exercise of its own extraordinary power to impose exclusion orders. The guidelines must be taken into account by a person exercising the power to impose a short term exclusion order. They will, therefore, materially affect the scope and operation of the PEP regime. We consider that the power to make these guidelines should not rest with the WA Police, and must be subject to appropriate oversight. We note that the President of the Law Society of Western Australia, Rebecca Lee, expressed similar concerns, stating that “*The police should not be able to make guidelines for their own purpose. The making of guidelines should be used in limited circumstances and be subject to Parliamentary oversight.*”²

¹ Law Society of Western Australia, *Law Society Raises Concerns on the Liquor Control Amendment (PEP) Bill 2022*, accessed 21 November 2022, <https://www.lawsocietywa.asn.au/news/law-society-raises-concerns-on-the-liquor-control-amendment-pep-bill-2022/>

Second, Dr Tony Buti stated in Parliament that the guidelines "...will not be available for general public access or subject to application under freedom of information legislation...".² We are of the view that it is entirely inappropriate for the guidelines to be withheld from the public. The publicity of laws – that is, the rules of our society being widely known to the public – is a cornerstone of the rule of law in a democracy such as ours. Preventing the guidelines from being made public is fundamentally inconsistent with this aspect of the rule of law.

Thank you for taking the time to read and consider this letter.

Yours faithfully,



Tom Penglis
Co-founder



Julian Sanders
Co-founder

² Hansard, *Parliamentary Debates: Legislative Assembly* (Wednesday, 16 November 2022) p 5418, accessed 21 November 2022 ([A41 S1 20221116 All.pdf \(parliament.wa.gov.au\)](#)).



Aboriginal Legal Service of Western Australia Limited

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26 October 2022

The Hon Dr Brad Pettitt MLC
Member for the South Metropolitan Region
Legislative Council
Parliament of Western Australia
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FREMANTLE WA 6160

By Email: Brad.Pettitt@mp.wa.gov.au

Dear Dr Pettitt,

Protected Entertainment Precincts

ALSWA writes to express its concern in relation to the proposed introduction of new laws to ban individuals from Protected Entertainment Precincts.

ALSWA is profoundly concerned about these laws for the following reasons:

- (a) No attempt was made to consult with ALSWA in relation to the impact of the laws on Aboriginal people.
- (b) It is unarguable that these laws will disproportionately impact Aboriginal people; there will be more Aboriginal people having adverse interactions with WA Police, breaches of orders are inevitable, Aboriginal people will become further enmeshed in the court system and this will have a flow on negative impact in relation to Aboriginal rates of imprisonment.
- (c) The new laws will also disproportionately impact the most vulnerable Aboriginal people in the community, including those suffering from physical and mental ill health, substance abuse and homelessness. As you would be aware, this cohort of Aboriginal people frequently live rough within the proposed Protected Entertainment Precincts (PEPs). Further, many of the community services on which this cohort rely on a daily basis are located within the PEPs. It is fanciful to think that 'carve out' provisions designed to enable access to community services within PEPs will operate in a way which will ensure that PEPs are not breached. Further, most PEPs have little or no issues with anti social behaviour and violence during daylight hours, which also begs the question as to why the new laws need to operate 24/7.

- (d) The new laws fly in the face of WA's commitment to Closing the Gap and, in particular, Target 17.
- (e) The power of WA Police to issue exclusion orders for up to six (6) months, without judicial oversight, will inevitably lead to abuses of police powers against vulnerable Aboriginal people. This is especially so, given it appears that the threshold for the exercise of police discretion to issue an exclusion order will only involve a belief by police that an individual has behaved in a disorderly manner and could cause public disorder. This will mean that the act of drunken swearing at police may warrant the issue of an exclusion order.
- (f) It provides no comfort to ALSWA that government and police have asserted that exclusion orders will be subject to stringent police guidelines and used sparingly. ALSWA's experience with vulnerable clients charged with breaching police issued move on orders is that the homeless, the mentally ill and those with substance abuse issues are disproportionately over represented when it comes to issuing move on orders and in breaches of them. As well, ALSWA frequently acts for homeless clients charged with minor offences such as disorderly behaviour where police imposed bail conditions prevent them from entering Northbridge and the Perth CBD. The exquisite irony and injustice involved in the imposition of bail conditions of this type is that an arrest for the breach of these bail conditions will usually involve a refusal of police bail and an overnight remand in custody in relation to an offence which does not have imprisonment as a penalty.
- (g) It is the function of the legislature to enshrine in legislation the factors which determine whether an exclusion order be issued. To leave this crucially important issue in the hands of police is to run a serious risk that exclusion orders will be issued indiscriminately, used as a mechanism of social control and lead to a form of de facto apartheid where significant numbers of Aboriginal are excluded from public space.
- (h) It is inherently unlikely that Aboriginal people will have the resources and wherewithal to be in a position to seek an exception to exclusion orders for work, residential, education, health and other approved purposes. The first time that organisations like ALSWA will be aware that an exclusion order has been issued against an individual will be when the individual appears in court charged with a breach.
- (i) There is a plethora of powers currently available to police and courts to restrict the movement and activities of individuals. Current move on orders provide police with sufficient powers to exclude individuals behaving in an anti-social manner from PEPs. In addition, bail and parole conditions, Post Sentence Supervision Orders and High Risk Serious Offender supervision orders provide ample scope to restrict the movement of individuals charged with, and/or convicted of, violent offences.
- (j) The appeal process is a ruse. To require Aboriginal people to appeal against an exclusion order to the Supreme Court is laughable. Further, it will likely be completely beyond the capacity of ALSWA to assist with appeals.
- (k) The new laws will shamelessly give the families of victims of violent crime in PEPs false hope. Violent crime in PEPs invariably involves a drunken, spur of the moment, spontaneous outburst. The new laws will have little or no capacity to deal incidents of this nature.

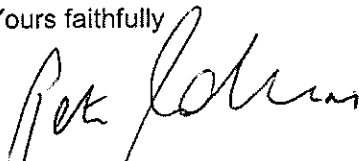
- (l) At ALSWA's briefing with the relevant Minister, Dr Tony Buti, it was revealed that there is no empirical, evidence based research which establishes that PEPs will achieve the government's desired outcomes. ALSWA was informed that the government had been in contact with its counterparts in the Queensland Government, which had advised that the Queensland laws (which are much less restrictive) were 'working' (whatever that means).
- (m) It will be only a matter of time before PEPs are extended to entertainment precincts in regional areas; eg the Chinatown area in Broome, further excluding vulnerable Aboriginal people from public space on their own country. It is also a very short step from PEPs to the introduction of laws to declare retail areas like shopping centre protected precincts.

ALSWA calls for the laws to be abandoned but failing that, urge the following amendments and suggestions be considered:

- the inclusion of an Aboriginal impact clause in the new laws which enables the monitoring of the impacts of the new laws on Aboriginal people and the recording of relevant data in this regard;
- increase the funding for, and the capacity of, the Nyungar Patrol to assist Aboriginal people in PEPs to enable them, when needed, to exit a PEP to a safe place;
- employ social workers in PEPs at night to provide practical assistance and address underlying issues;
- make it mandatory for all clubs and bars etc to employ Aboriginal security officers;
- amend the exclusion time to between 7pm and 7am only;
- exclusion orders to be issued only by a court, rather than police;
- the relevant factors to be taken into account by a court in issuing an exclusion order be included in the new laws; and
- reduce the size of proposed exclusion areas to minimise the impact of the new laws on the most vulnerable and disadvantaged.

Thank you for your consideration and I would welcome the opportunity to further discuss ALSWA's concerns with you, if needed.

Yours faithfully



PETER COLLINS
Director, Legal Services