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Dear Premier

### **NSWCCL Opposition to Crimes Amendment (Intoxication) Bill 2014**

NSWCCL reaffirms its strong opposition to the unwise and dangerous expansion of mandatory minimum sentencing provisions in the Crimes Amendment (Intoxication) Bill 2014 currently before the NSW Parliament.

This is hastily conceived, inadequately thought-through, bad policy

NSWCCL again urges the Government to reconsider its approach to the complex problem of violence in public places and abandon this element of its response.

We urge the NSW Parliament to act in the public interest and block this legislation if the Government proceeds with it in the face of overwhelming contrary argument and growing community opposition.

The reasons for widespread opposition to this legislation –both principled and pragmatic–have been thoroughly canvassed in the public arena over the last month. In summary:

- Mandatory minimum sentencing will inevitably lead to inappropriate and unjust outcomes for individuals. This is the most important reason for opposing the Bill.

In this case, the potential injustice is serious with major impact on a person's life. The minimum mandated sentences range from 3-5 years. If imposed regardless of specific circumstances which would otherwise have led to a lesser sentence, this is a very serious injustice.

In Australia, it has long been accepted that we can only be deprived of our liberty through an independent judicial/court process conducted fairly and on the merits of the case. This Bill will seriously undermine that principle and protection.

- The disadvantaged and in particular indigenous and homeless people will be disproportionately impacted by the resulting inappropriate and unjust mandatory sentences.
- The Bill will lead to irrational and indefensible anomalies in sentencing outcomes.

What possible logic or justice is there in mandating more severe punishment for assaults committed when drunk/.under the influence of drugs than for the same crime committed with intent and in full sobriety? Why mandate different punishment for assaults in public and private spaces?

It appears the Sexual Assault amendment had to be withdrawn for further consideration of unacceptable anomalies

- It will not achieve the goal of a reduction in the targeted violent behaviour.

The Government has not produced any precedents, research findings or other evidence to substantiate its apparent confidence that mandatory minimum sentencing for serious offences will have a deterrent effect. NSWCCCL is not aware of any significant supporting evidence. Indeed, in 2012 the Bureau of Crime Statistics and Research reported that it is not the severity of punishment that deters, but the likelihood of being detected and brought to account

As has been noted in the public commentary, it seems perverse that the NSW Government should be dashing headlong into such a major and radical change to our criminal law system at

the same time as long term mandatory minimum sentencing regimes are being extensively repealed across the USA .

- The definition of intoxication is open to misuse. A person can be declared intoxicated on the basis of observation that ‘speech, balance, coordination or behaviour is noticeably affected’ These are not objective criteria for proof of intoxication and can be easily misused- deliberately or otherwise. This ‘test’ can replace the more objective –but also flawed- criterion of a set concentration of alcohol in a person’s breath or blood.

The Premier’s media release indicated this was inserted following a request from the NSW Police Force. This is not a surprising request from the Police. This more open-ended, subjective definition will make it easier for Police to include intoxication in the charge. It will of course also make it easier for a charge of intoxication to be made wrongly – deliberately or otherwise.

- There is a larger issue of the very real potential for the key decisions about eventual sentencing outcomes to be made by police and prosecutors before the courts become involved.

All the offences in this Bill have alternative offences that a person could be charged with. Police and prosecutors will have considerable discretion in determining whether to charge a person with an offence carrying a mandatory minimum sentence or an alternative which does not. The potential sentencing outcomes for the same behaviour will be dramatically different.

This discretion can be used to advantage or disadvantage a charged person.

Our justice system and our community are much safer when sentencing discretion is exercised by the courts. That is why we have a deep principle of the separation of powers embedded in our approach to democratic government and rule of law.

NSWCCL welcomes the Government’s compromise to drop three of the lesser offences<sup>1</sup> from the mandatory minimum sentencing provisions. Presumably this was a belated recognition of the magnitude of the impact (numbers of offenders caught up, dramatic growth in prison population,

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<sup>1</sup> Though no longer attracting a mandatory minimum sentence it is disturbing to note that the definition of the offence of Affray will be amended by the specific exclusion of existing 93C(1) which states: ‘For the purpose of this section a threat cannot be made by the use of words alone’. This is unexplained and unacceptable in that it considerably loosens the definition of ‘affray’. It should be reinstated.

pressure on courts and major budgetary implications) and a wish to appease the widespread opposition to the initial proposal.

It does not, however, lessen the strength of our opposition to the current Bill. The Bill retains the more serious offences with heavier mandated minimum sentences. The potential injustice to an individual from an inappropriate mandated minimum sentence is very serious.

The mandatory minimum sentencing concept is flawed. It is widely and vehemently opposed because it offends against very important principles of our justice system. It has a bundle of major operational problems and will carry major financial consequences to the State.

Mandatory minimum sentencing is opposed by prominent, informed individuals and by legal, civil liberties and community organisations. No authoritative professional body from within the legal profession has publicly supported it. There are credible media suggestions that the Attorney-General's and Justice Department strongly opposes it and has been excluded from the advising and drafting process. The current Attorney General Greg Smith SC and the previous Liberal Prime Minister John Howard are on record as being opposed to it.

There are indications that community opposition is growing with one newspaper reporting 58% of voters and 78% of 18-24 year olds expressing opposition.<sup>2</sup>

More broadly NSWCCCL finds the overall process by which this Bill and its predecessor (the wrongly described 'One Punch' Bill<sup>3</sup>) has been developed and rushed into Parliament disturbing. It appears to have been rash and less than competent.

The 'One Punch' legislation was forced through both houses of Parliament on the same day it was introduced with disgraceful disregard for reasonable parliamentary discussion or scrutiny of such radical legislation.

All public indications are that it was conceived and drafted with similar undue haste. Not surprisingly the result was flawed legislation which is already being amended in this current Bill.

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<sup>2</sup> Kirsty Needham: NSW alcohol laws unpopular with young voters Sun Herald 2/3/14

<sup>3</sup> The Crimes and other Legislation Amendment (Assault and Intoxication) Bill 2014

NSWCCL understands there is strong pressure on the Government to take visible action against alcohol and drug affected violence in public places. In our view the Government should focus on the strategies relating to better licensing laws, higher fines for venues and more policing in trouble areas as well as the more complex but critical issues of effective alcohol and drug education and treatment programs.

While not advocating them, we do not object in principle to increases in maximum sentences for these offences -if the Government is convinced this is in the community interest. There will of course be flow-on increases in the prison population with all the consequences that brings – for the community and for prisoners.

It is difficult to understand why the Government persists with the flawed and discredited minimum sentencing strategy as part of its solution to the problem of alcohol/drug violence in public places

**NSWCCL urges the Government to reconsider.** This proposal for mandatory minimum sentencing provisions should be withdrawn.

**Failing that, NSWCCL urges the NSW Parliament to oppose this Bill** in the public interest.

Yours sincerely



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