



Northern Territory Branch AUSTRALIAN HOTELS ASSOCIATION



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Mr Tony Sievers MLA
Chair, Economic Policy Scrutiny Committee
Northern Territory Legislative Assembly

Via email: EPSC@nt.gov.au

Dear Committee Chair,

Re: Liquor Amendment Bill 2018

I refer to the Liquor Amendment Bill 2018 (hereafter “the Bill”) that was referred to the Economic Policy Scrutiny Committee (hereafter “EPSC”) on 28th November 2018 and thank the EPSC and the Legislative Assembly for the opportunity to provide a submission on the Bill.

At the outset we wish to make clear that the Association and our member venues take their responsibilities for the responsible service of alcohol very seriously. As an industry we also have very good working relationships with Licensing NT, NT Police and other NT Government agencies.

We support the NT Government’s initiatives to reduce the social harm caused from the abuse of alcohol in the Northern Territory and stand ready to work with Government, NGOs, the community and businesses to address this complex social issue.

Background

The Australian Hotels Association (NT Branch) was established in 1979 and is the leading Territory hospitality industry association representing the rights and interests of its members to Territory, Federal and local governments, other relevant parties and the community.

We currently have over 300 members, associates and sponsors ranging from small regional establishments to 5-star hotels, breweries, beverage suppliers, furnishings and many other diverse complimentary businesses.

Unique to the Northern Territory, the AHA (NT) membership base incorporates 5 divisions:

- Accommodation Hotel Sector
- Hotel / Tavern Sector
- Wayside Inn Sector
- Club Sector
- Restaurant Sector

AHA (NT) offers its members a unified approach to confronting the issues affecting the hospitality industry in the Northern Territory.

It is with the wide industry perspective that we wish to contribute to the public policy debate presented in the Bill before the EPSC.

At the outset, our Association would like to indicate its strong support of the scrutiny committee process and we are appreciative of the opportunity the scrutiny process provides to ensure legislation benefits from a proper and fulsome public and stakeholder submission process.

It is unfortunate that this process is not always adhered to and in fact, on one of the more recent amendments to the Liquor Act, we saw the rushed implementation of extraordinary police powers without the proper scrutiny and submission process being adhered to with this Bill.

We note that Sessional Order 13 establishing the scrutiny committees contains the relevant terms of reference for the EPSC and specifically draw the committee member's attention to the following:

(4) The functions of the scrutiny committees shall be to inquire and report on:

(c) in relation to any bill referred by the Assembly:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

(A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(B) is consistent with principles of natural justice; and

(C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(F) provides appropriate protection against self-incrimination; and

(G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether a bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

- (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
- (C) authorises the amendment of an Act only by another Act.

As per the Explanatory Statement we note that the purpose of the Bill before the EPSC is to:

- (a) amend section 33 of the Liquor Act to allow for the Liquor Commission, if it considers it appropriate, to hold public hearings as part of the process for variation of conditions of a licence;
- (b) add the circumstances where a customer appears to have purchased liquor for consumption away from the premises, or has liquor in their possession within the location boundaries already established by section 101ZK(1)(a), to the current two circumstances contained in section 101ZK(1)(b) (the customer appears to be purchasing or intending to purchase liquor for consumption away from the premises) in relation to point-of-sale interventions;
- (c) provide a power for a police officer or inspector to stop a vehicle and give reasonable directions to the driver of the vehicle to assist them in the exercise of powers under section 101ZK; and
- (d) provide for specific powers in the Liquor Act for police officers to engage in undercover operations where the police officer and the subject of the investigation are in the Northern Territory, including powers to seize, forfeit and dispose of things related to an offence.

Introduction

We submit that this Bill, when read alongside the numerous other amendments to the Liquor Act that have occurred in the Thirteenth Session of the Legislative Assembly of the Northern Territory and specifically the Liquor Amendment (Point of Sale Intervention) Bill 2018, does not have sufficient regard to the rights and liberties of individuals, including individual licensees.

This Bill does nothing to address the erosion of natural justice which goes against 4(c)(iii)(B) of the Terms of Reference of this Committee nor does it do anything to address the lack of sufficient definition and appropriate review as referenced in 4(c)(iii)(A) of the Terms of Reference for the Committee of the extraordinary power given to police in Section 48B of the Liquor Act (hereafter 48B). That extraordinary police power also not only reverses the onus of proof inconsistent with 4(c)(iii)(D) of the Terms of Reference of this Committee but goes further by removing the onus for proof in entirety.

We submit that given the Terms of Reference make it clear that the Bill needs to be considered on its merits against relevant considerations like appropriate limitations and oversights of administrative power and for natural justice principles, and the fact that this Bill, is the first time the Assembly has referred a liquor amendment bill to the scrutiny committee for any of the changes that occurred in 2018 (having previously deciding against referring the POSI and Minimum Pricing legislation) our concerns about breaches to the Terms of Reference as they relate primarily to 48B are relevant considerations for the EPSC in deciding whether to recommend to the Assembly amendments to this Bill.

This Bill, as currently drafted, does not have sufficient regard to the rights and liberties of licensees because it fails to correct the serious overreach of other Bills and amendments to the Liquor Act this Parliamentary Session that have effectively removed natural justice, removed the testing of

evidence and removed the right to a hearing from the regulation of liquor licensing in the Northern Territory.

In addition, we do not believe there has been sufficient evidence nor adequate justification provided as to confer immunity from proceedings or prosecution as is envisioned by the introduction of covert powers as proposed by the current Bill. This puts the current Bill in contradiction with 4(c)(iii)(H) of the Terms of Reference for this Committee.

We will now deal with two parts of the Bill.

Section 33

We support the amendment to section 33 of the Liquor Act to allow for the Liquor Commission, if it considers appropriate, to conduct public hearings when considering variation to licence conditions.

The history of why amendment to section 33 is required stems from the actions taken by the Liquor Commission in Tennant Creek whereby they implemented and then extended restrictions without a public hearing. There was some uncertainty and ambiguity as to whether the Liquor Act provided the power for them to hold public hearings to consider varying licence conditions where they thought appropriate.

There were substantial allegations being made, at a time when complex social issues were affecting the town. The failure to hold public hearings precluded natural justice in having such allegations tested. The alleged evidence was accepted as fact by media, community, regulator and the relevant Minister and there was no right of reply or testing of the 'evidence.'

This unfairly made licenced premises in the town the scapegoat of all the problems. This is a good case study as to why we strongly support the holding of public hearings. This will allow the appropriate scrutiny of allegations and purported 'evidence' being put to the Liquor Commission and outcomes that are just and equitable, have followed natural justice and are based on proven facts.

The Riley Review recommended the re-establishment of the Liquor Commission as the independent and arm's length decision maker with regards liquor licences including new applications, variations and disciplinary matters when dealing with breaches of licences.

This has been eroded by the introduction of the wide police power in section 48B of the Liquor Act whereby without any natural justice, requirement for a public hearing or testing of any evidence, businesses can be given as little as 30 minutes notice to shut down for up to 48 hours, and have their reputation and standing in the community tarnished all without a fair process.

This wide-reaching power, where police act as inspector, judge and jury, writing untested allegations to themselves and then finding sufficient 'grounds' to shut down a premise goes far beyond what was envisioned by the Riley Review.

It also goes against fifty years of legislative and administrative changes that removed Police from the primary regulator of alcohol across the nation. This was done based on sound evidence and numerous reviews following a proven track record of corrupt and intimidatory practices within police forces across the country when they retained their role as lead enforcer of liquor licensing.

Best integrity practice recommends police powers are kept separate from licensing powers, with numerous case studies from the states of eastern Australia, to indicate why this is the case, the Fitzgerald Inquiry in Queensland being one such case.

In re-creating the Liquor Commission as the independent decision maker, consistent with the half century of policy reform, Riley also recommended providing a limited 48 hour 'emergency' power.

The Riley Review recommended giving a similar power to the Police Commissioner as that of the Director-General's albeit for a limited 48 hours. It was very much explained as an extraordinary emergency power rather than a more day to day administrative power to be used regularly.

In fact, section 48B(a)(iii) "*a breach of the peace or threat to public safety*" is far wider than any emergency power the Director General has and goes far beyond what the Riley Review recommended.

These 'emergency' powers are typically for natural disasters, bona fide riots and public disturbances. Historically in these situations, local police have requested a venue cease trading and this has typically been complied with, all on a voluntary basis.

This shutdown 'penalty' is extraordinary when one considers there has been no finding of guilt or breach of licence and, should there be a breach found under relevant sections of the Liquor Act, the penalty imposed is often far less than the damage the 48-hour shut down causes to the business both in terms of financial and also reputational cost.

There is little relief or recourse for venues who believe the powers have been inappropriately used or want to test the allegations and provide evidence which conflicts with the unproven allegations that have formed the basis of the shut down notice. The only 30 minutes notice all but precludes injunctive relief and the general indemnities provided to the NT Police in the conduct of their activities make a successful damage claim very difficult to sustain. In this way these powers are quite unique in the Territory given their one sidedness, lack of natural justice or evidentiary basis and little relief afforded served parties.

These 48B shutdowns also affect innocent employees and third parties. Employees who have done nothing wrong face a reduction in their hours and commensurate pay, weddings and events can be impacted, musicians and bands lose gigs and patrons who have done nothing wrong all suffer and face disruption when there has been no tested evidence or proven wrong doing.

We have also been made aware from several licensees of allegations of police threatening 48B closures if more routine compliance matters were not corrected to the satisfaction of Police, if venues did not agree to 'voluntary' restrictions with Police around Footy or Show weekends or if the local police did not generally like the responsiveness of a venue's staff. If these allegations are correct, they indicate the power is being used, and threatened, far beyond the circumstances in the minds of members of the Legislative Assembly when they amended the Act.

This, we would argue, inappropriate application of a very wide police power is increasing the sovereign risk of investing in the Northern Territory. Our interstate colleagues are alarmed that such a power exists up here and we are viewed as a Kangaroo Court jurisdiction.

The issue of large discrepancies between unproven allegations and substantiated incidents has been dealt with by the Liquor Commission previously. There are cases where hundreds of allegations have been made against a licensed premise by NT Police and Licensing NT and through the Liquor Commission hearing process were found to be unfounded and could not be sustained.

We encourage Committee members to consider the strong disconnect between unproven allegations and complaint and substantiated incidents how the effective use of 48B is shutting down venues causing significant financial and reputational harm based on allegations not proven.

This is why the current 48B situation is causing considerable angst across the entire liquor industry.

We strongly support the return to the Liquor Commission becoming the independent decision maker of liquor licence matters and support the strengthening of their ability to be open and transparent as envisioned by the amendment to Section 33 as proposed by the Bill before the EPSC.

But committee members should be fully cognisant that without limiting the application of 48B to bona fide emergencies and / or include a public hearing or Liquor Commission style transparency and testing of allegations, this Bill does nothing to address the removal of natural justice from the liquor licensing and compliance regimes of the Northern Territory.

As such we encourage the Committee to consider recommending the Assembly amend the Bill to re-introduce natural justice and fair process in 48B by allowing an independent decision maker like the Liquor Commission the power to assess and approve applications made by the Police Commission for the use of 48B powers not in 'emergency' situations with appropriate input from affected licensees.

Undercover operations

We do not support the clauses in the Bill before the Committee that provide police with the power to undertake covert operations for the purpose of identifying breaches of the Liquor Act.

Given the issues and our concerns outlined above with regards the current application of 48B our real concern is that these covert powers will be used to issue more shut down warnings and notices all without any testing of allegations, natural justice or right to a fair hearing.

Without curing the problems with 48B there is real concern that providing Police with these additional powers, outside the scrutiny and independence of the Liquor Commission will further erode the trust in the liquor licensing system in the Northern Territory. We oppose the undercover operations parts of the Bill for the following reasons:

- Industry has shown enduring support for improving RSA practices – for decades, the local industry has consistently supported a wide range of voluntary and mandatory measures aimed at delivering best practice in patron care. Almost all of the costs of this ever-increasing compliance and training burden falls to industry.
- Undermines cooperation – industry has always taken a cooperative approach to meeting stringent RSA undertakings. Undercover operations amount to entrapment, for which the Police are now seeking indemnity for, which has the potential to further strain and undermine relations between industry, police and licensing.
- Duplication and confusion – Licensing NT is purportedly responsible for compliance of liquor licenses. This is despite the fact NT Police have recently formed the Alcohol Policing Unit with a duplication of responsibilities. The Liquor Commission is meant to be the decision maker for breaches of licence conditions and yet, through the use of 48B, has effectively been sidelined. So we have three bodies all with powers that can dramatically impact on a business' operations. This duplication causes confusion, especially when different regulators take a different approach or give conflicting advice to venues. All of this is occurring at a time of decreased business and consumer confidence compounding the sovereign risk that the Government's inconsistent alcohol policy has created.
- Riley Review did not recommend this course of action – instead it sought powers for Licensing NT to conduct 'mystery shoppers' akin to those operations that occur in Queensland by their Office of Liquor, Gaming and Racing. This additional Police power was not recommended in the Riley Review – which the Government fully supported or in-principle supported. Does that mean in the re-write of the Liquor Act we are likely to

see an additional 'mystery shopper' power provided to Licensing NT? Why would the NT Government seek to create yet more duplication between Licensing NT and NT Police, creating yet further disharmony and dysfunction between the two agencies, the brunt of which falls upon Territory licensed businesses.

- No evidence this needed – where is the evidence that these new powers, on top of the draconian powers given to Police under 48B are warranted? This wasn't recommended by Riley who, with broad consensus, was able to undertake an arm's length roots to branch review and make recommendations which industry has largely supported. Why undermine those efforts by bringing in yet more draconian powers without addressing the severe overreach of s 48B? We implore the Committee to seek evidence from NT Government agencies about the demonstrated high levels of compliance with almost no prosecutions of liquor licensees' in the Northern Territory for breaches of RSA laws. Why are these powers being championed now when there is no evidence that RSA compliance is a problem worthy of this cost and additional sovereign risk?
- Breach of Terms of Reference – As previously stated we do not believe there has been sufficient evidence nor adequate justification provided as to confer immunity from proceedings or prosecution as is envisioned by the introduction of covert powers as proposed by the current Bill. We submit, this puts the current Bill in contradiction with 4(c)(iii)(H) of the Terms of Reference for this Committee.
- Inappropriate checks and balances – we note the Minister's Second Reading speech where it is stated that 'transparency of process' will be achieved through the proposed 101ZIA(1) requirement for a more senior officer in the police to sign off on the operation and pursuant to 101ZII for the Police Commissioner to give a summary of the number of operations and outcomes to Parliament. With respect this does not address the concerns about natural justice that have been inflamed through the implementation of 48B. Police are being given too much power to be not only the investigative and enforcement functions of Government in this area but also, through 48B, the effective judicial function as well, all without anyone outside of the Police organisation being required to have any level of involvement or oversight until well after the fact. It is through this lens that industry looks at 101ZIA(1) and 101ZII with a level of scepticism having seen the lack of oversight 48C has on the use of 48B.

Our industry will continue to work cooperatively and consistently with the Government and all stakeholders to play our part in reducing the misuse of alcohol in the Northern Territory. The continual beating of the drum and ever-increasing police powers sends all the wrong signals to industry about the Government wanting to work constructively and transparently with businesses and the community to reduce alcohol related harm.

Our Association stands ready to assist the Economic Policy Scrutiny Committee in its deliberations and I would welcome the opportunity to attend a hearing and make further submission.

Sincerely



Des Crowe
Chief Executive Officer
Australian Hotels Association (NT Branch)