

12 November 2003

Our ref JAS:JI  
Phone +61 2 9360 1847  
Email jane.irwin@freehills.com  
Doc no Sydney\004531110

Jan Burnswoods MLC  
Chair, Standing Committee on Social Issues  
Parliament House  
Macquarie Street  
SYDNEY

Dear Ms Burnswoods

### **Inquiry into the Inebriates Act**

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. It has been operating since 1993 and currently has 4 solicitors, 2 legal assistants and a number of volunteers.

The Shopfront is based in the inner city, but also assists young people in other parts of the Sydney metropolitan area. The majority of our time is spent representing clients on criminal matters. However, we also advise and act on a range of other issues including victims compensation, family law and civil matters.

The majority of the Shopfront's clients are homeless. A substantial number have a dependency on alcohol or other drugs. This is often combined with other problems such as a mental illness or an intellectual disability. We have first hand experiences of the difficulties associated with treating people for substance abuse problems. As such, we believe we are in a position to make a contribution to the inquiry into the *Inebriates Act*.

### **The appropriateness and effectiveness of the Act**

Our primary submission is that the provisions of the *Inebriates Act 1912* do not reflect contemporary community standards and should be repealed. More recent legislation, in particular the *Guardianship Act 1987* and the *Mental Health Act 1990*, more effectively deal with the conditions and problems that arise from

severe alcohol or other drug abuse. There is a wealth of criminal justice legislation which is adequate to deal with offenders who are alcohol or drug dependent.

The *Inebriates Act* contains antiquated language and concepts. The procedures established by the Act do not reflect current practice and do not sit well within the current legal system of NSW.

Indeed, His Honour Buddin J in *R v Robert John Strong* ((2003) NSWCCA 123 at para 110), when referring to the *Inebriates Act 1912* and the *Habitual Criminals Act 1957* stated that, “The procedures under the Acts are archaic and do not correspond with current practice.”

Although the Act has been amended at various stages, it would appear that most of these amendments have been merely incidental and have not been based on a thorough review of the legislation.

The *Inebriates Act 1912* is inconsistent with contemporary community standards for several reasons. Firstly, the Act deals with alcoholism as though it is an offence. Alcoholism is treated in a punitive fashion rather than in a remedial one. Examples of this can be seen in Part 3 of the Act entitled *Applications to commit inebriates*. Subsections 1(e) – (f) set out orders which may be made by a Court whereby those declared “inebriates” may be committed to State institutions for up to 12 months. Pursuant to the Act, the court may also order an inebriate to enter into a good behaviour bond to abstain from intoxicating liquor for 12 months or more. As the Chief Magistrate of the NSW Local Court has pointed out, courts seldom make use of such bonds as they are “rarely inclined to accept undertakings of chronically intoxicated persons to abstain.” (*Alcohol Summit, Report of Proceedings, Wednesday 27 August, 2003, p13*). Courts have recognised that the problems of alcohol and drug abuse are more complex than enforcing an undertaking from a person who has little real capacity to abide by one.

The Act makes no mention of the importance of the interests of the person in question or that alcoholism or drug dependency is a medical condition. The language and effect of the Act generally points to the belief that alcoholism is considered more in the character of criminal behaviour. An example of this can be found in s3(1B) which states that a person declared an inebriate may be arrested should they escape from the custody set out in the order, despite the fact that they have not been found guilty of any offences.

### **Examples of how the *Inebriates Act* has been applied**

A practical example of how the application of the Act leads to inappropriate outcomes can be found in the case of *Eller v Medical Superintendent, Gladesville Macquarie Hospital and Others* (unreported 5 July 1996 NSW Supreme Court). This case concerned the declaration of a man whose condition was described as “found grossly inebriated on a number of occasions and in circumstances which disclose a high degree of alcoholism” (Dunford J at p2). The man was declared an inebriate and orders were subsequently made under s3(1) of the Act. In short, the effect of the orders was that the man was placed in a locked ward of a psychiatric institution at Gladesville Hospital for a period of 12 months.

The case shows that, in the unusual instance of custodial orders being made pursuant to the Act, there is a clear lack of adequate facilities in which to effectively accommodate the person. It is highly questionable as to whether a closed ward in a psychiatric institution is the appropriate place for a person who is

suffering from severe alcoholism or drug dependency. The treatment available in such a facility is unlikely to meet the person's special needs.

Another practical example of the shortcomings of the Act is the recent case of *R v John Joseph Kurzynski* BC200105277 [2001] ACTSC 90, in which the defendant pleaded guilty to culpable driving, whilst extremely inebriated, causing death. The defendant had previously been committed in 1979 as an "inebriate" under the Act. However, that earlier Order under the *Inebriates Act* did not address his problem of alcoholism in any way. He committed a further five drink driving offences after that order and then tragically committed the offence of culpable driving.

These cases illustrate the fact that the Act does not deal with people suffering from alcoholism or drug abuse in a way that meets their needs or serves the interests of the community. The fact that the Act is rarely used by magistrates and judges is reflective of its shortcomings.

### **Compulsory Treatment - is it effective or necessary?**

There is scant research to support the notion that coerced treatment for offenders is an effective mechanism to deal with alcohol or other drug abuse problems. Instead, a review of the literature found that compulsory treatment of alcohol dependent offenders for offences other than drink-driving is ineffective (Hall, Wayne "The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems" 30 *The Australian and New Zealand Journal of Criminology* June 1997 at 8). There is strength in the argument that self help and voluntary participation are vital ingredients in any attempt to address problems of alcohol or drug abuse.

Although there is a widely-held perception that many drug or alcohol dependent people will not accept treatment, our experience suggests that many people want treatment but find it very difficult to access. There are rigid criteria for entry into most rehabilitation programs. People with dual diagnosis (ie a mental illness and a substance abuse problem) are usually excluded. There are often long waiting lists, and a lack of co-ordination between services. If there were more and better resources available, we believe there would be a lot more people seeking and accessing treatment.

### **The Guardianship legislation as the proper alternative**

The appropriate mechanism with which to deal with persons who are so affected by alcohol or drug dependency such that they are unable to manage their affairs is the *Guardianship Act 1987*. It is our submission that this legislation allows the Guardianship Tribunal to make orders in those very extreme cases in which the effects of serious alcohol or drug dependency has altered a person's capacity to make decisions or manage their life.

This Act allows concerned family members or any other person who has a genuine concern for the welfare of the person to make an application for a guardianship order to the Guardianship Tribunal. An order can be made with regard to "a person who is in need of a guardian who, because of a disability, is totally or partially incapable of managing his or her person" (sec 3).

“A reference to a disability includes: a reference to a person:

- (a) who is intellectually, physically, psychologically or sensorily disabled,
- (b) who is of advanced age
- (c) who is a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, or
- (d) who is otherwise disabled,

and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.” (S. 3(2))

The principles of this Act are set out in Section 4 and in short, are that the welfare and interests of persons dealt with by the Guardianship Tribunal are paramount, and their freedom of decision making and freedom of action should be restricted only as far as is necessary for their welfare, and that they should be encouraged as much as is possible to lead a normal life in the wider community.

In those extreme cases in which a severely alcohol or drug dependent person’s capacity to make appropriate personal decisions is restricted an application may be made to have a guardian appointed under the *Guardianship Act*. The order may be temporary, continuing or may be limited to certain decisions. For example, an order may allow a guardian to make decisions about where a person should live, whether medical or dental treatment is needed and what other services a person may need, such as rehabilitation programs or home care support.

The Guardianship Act allows for a guardian in many cases, and the Guardianship Tribunal in some cases, to consent to medical or other treatment in those extreme cases in which a person is incapable of giving consent and is placing themselves or their health at serious risk. However, a guardianship order will only be made in the context of the principles of the legislation which describes the interests and the welfare of the person who is being dealt with by the Tribunal as paramount, and their freedom of decision making and action should be restricted only as far as necessary for their welfare.

### **Drug and Alcohol related offending**

There is no doubt that alcohol or other drugs, in numerous cases, are a trigger for serious criminal conduct. It is our submission that the criminal justice system already deals with this conduct, although there is much room for improvement.

The Chief Magistrate of the Local Court of New South Wales, his Honour, Judge Price states, extra-judicially, that “The excessive consumption of alcohol ...is a substantial factor in bringing persons into contact with the justice system.” (*Alcohol Summit, Report of Proceedings, Wednesday 27 August, 2003, p11*). The Chief Magistrate commends the developments made in alternative sentencing and diversionary programs for offenders with illicit drug dependence. However, notwithstanding the fact that alcohol abuse is linked to the commission of numerous crimes, the NSW justice system has failed to institute adequate diversionary programs for offenders suffering from alcohol abuse.

We have seen such an approach taken in relation to illicit drug use, with the development of the Drug Court, the Youth Drug Court and the Magistrates Early Referral into Treatment program (MERIT), which is a pre-plea diversion program for offenders with illicit drug problems. We understand that the Youth Drug Court also deals with matters that are alcohol-related. Instituting alternative measures such as these in relation to alcohol dependence would be preferable to the outdated provisions of the *Inebriates Act*.

Judge Price is an advocate of extension of the MERIT program to offenders with alcohol problems (*Alcohol Summit, Report of Proceedings, Wednesday 27 August, 2003, p12*). His Honour states,

“The court at the present time does not have the option to direct offenders into supervised treatment for alcohol use whilst on bail and prior to sentence. The extension of MERIT in such a way would have the advantage of linking offenders at an early stage to services, government or private, which may assist in stabilising their lifestyles and address the causation of their alcohol abuse.” (*Alcohol Summit, Report of Proceedings, Wednesday 27 August, 2003, p12*).

His Honour, Judge Price when referring to the powers under the *Inebriates Act* said,

“Whilst the numbers of applications made under the Act are limited, orders made for compulsory treatment are productive of unnecessary tension between the justice system and the New South Wales Health Department.” (*Alcohol Summit, Report of Proceedings, Wednesday 27 August, 2003, p13*).

### **Summary and Recommendations**

In summary, we submit that the *Inebriates Act* is ineffective, rarely used and inappropriate in dealing with persons who are alcohol or drug dependent.

The *Guardianship Act* is the more appropriate legislation to deal with persons with severe alcohol and/or drug dependence who have not committed offences, and is more effective in linking those persons to suitable treatment facilities. Criminal legislation already deals with alcohol and/or drug dependent persons who commit offences. However, an expansion of diversionary programs in criminal courts would serve to greatly assist such persons to link in with treatment programs and focus more appropriately on prevention and rehabilitation.

#### **We make the following recommendations:**

- That the *Inebriates Act (1912)* be repealed.
- That, (in the event the Standing Committee is not of the view that the *Guardianship Act* adequately covers persons with severe alcohol and/or drug dependency), that the *Guardianship Act* be amended to include persons incapable of making decisions because of severe alcohol and/or drug dependence.
- We recommend that the adult and youth Drug Court pilots be extended to other areas of NSW.

- We recommend that the adult Drug Court criteria be broadened to include people with alcohol problems, and people who commit violent offences such as robbery. Currently the youth Drug Court program includes these types of offenders.
- We also recommend the rollout of the MERIT Program to all Local Courts in NSW, and the inclusion of people with alcohol problems.

Yours faithfully

**Jane Sanders**  
Solicitor

**Jane Irwin**  
Solicitor