



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JC:P7:LI:2009

Direct Line: 9926 0216

8 October 2009

The Hon. Kevin Greene, MP
Minister for Gaming and Racing
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Re: Liquor and Registered Clubs Legislation Amendment Bill 2009

A group of legal practitioners has alerted me to this Bill which is currently before the NSW Parliament. The clause which is of serious concern to the Law Society is clause 29 of Schedule 1.

This clause is intended to repeal section 80 and replace it with a new section 80. The proposed sub-section (9) of section 80 takes away the right of parties to be legally represented at the conference held by the Director-General to adjudicate the dispute. As far as I am aware, there has been no attempt at any consultation with the Law Society or the Bar Association or, indeed, any stakeholders regarding the removal of such a fundamental right.

The powers given to the Director-General by section 81 of the amending legislation include: imposing a condition on the licence for the licensed premises, or to vary or revoke a condition to which the licence is subject. These powers are significant. An adverse decision could seriously affect the income of the licensee and it is possible that losses could be very substantial. Therefore, to deny the right of legal representation in such circumstances is tantamount to a denial of procedural fairness to the affected party. It is a well established principle of the law, as pointed out by the High Court, that when administrative decisions affect the rights, interests and legitimate expectations of parties the common law rules of natural justice should apply: *Kioa v West* (1985) 159 CLR 550 at 584. Although there is no absolute right to representation even where livelihood is at stake, the principle of according procedural fairness, it is submitted, must be paramount.

If a licensee is to be given a fair hearing he or she must have representation to articulate properly his/her position to the decision maker. In order to be able to do that effectively the licensee must have the right to legal representation, if he/she chooses to do so. The same right is equally applicable to the complainant. The proposed amendment directly breaches one of the fundamental principles of natural justice, which is the right to be

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au



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OF AUSTRALIA
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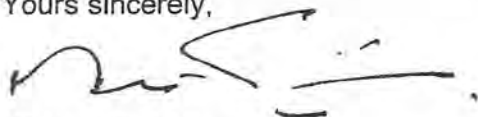
heard. It is submitted that the right to be heard does not simply mean giving the affected party the right to speak at the hearing. The right, it is contended, implies that the party is given the opportunity to present his/her case adequately and fairly. Invariably, this would mean that the party would need legal representation to do so. Therefore, to be given the right to be heard implies that the party should be given the opportunity to be legally represented.

Usually in matters of this nature the Commissioner of Police is represented by specialist licensing police officers. Similarly, the local council would be represented by specialist enforcement or planning officers. You will therefore readily accept that there is a massive imbalance when a licensee has to face the proceedings alone, whereas in a disturbance complaint initiated by the Commissioner of Police or the local council, the latter are both represented by experts. This imbalance clearly points out that the common law duty to act fairly is being deliberately removed by statute.

The Law Society appreciates that there is a need for neighbourhood problems to be addressed quickly and effectively but this should not be done at the expense of a denial of natural justice to one or both parties. The fear that the taking of decisive action would be delayed by interminable legal argument is misconceived. It is equally in the licensee's interest to have the complaint resolved quickly and expeditiously to prevent loss of income. The decision of the Supreme Court in *Smith v Director of Liquor and Gaming* [2009] NSW SC 837 is illustrative of this last point. In that case, the Court made orders for the provision of information by the police as the latter had failed to provide documentation to test the case of the complainant. This case did not result in a delay of the section 79 conference which was fixed for hearing the next day, but gave judicial guidance to the person tasked with being the decision maker in those proceedings.

The denial of the right to legal representation, especially when the other party is usually represented by experts in the field is one of the most alarming provisions of any legislation. The Law Society is therefore strongly opposed to it. It is submitted that the offending provisions of the amendment Bill should be deleted.

Yours sincerely,



Michael Tidball
Chief Executive Officer

c.c The Hon. Barry O'Farrell MP
Leader of the Opposition
Parliament House
Macquarie Street
Sydney 2000

The Hon. Greg Smith MP
Shadow Attorney General
Parliament House,
Macquarie Street
Sydney 2000.