THE LAW SOCIETY
OF NEW SOUTH WALES

13 February 2013

Mr Bruce Barbour
NSW Ombudsman
Summary Offences Act Review
Level 24, 580 George Street
SYDNEY NSW 2000

Dear Mr Barbour,

Summary Offences Act Review

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) welcome the opportunity to make a submission to the review of the new offence created under the *Summary Offences Amendment (Intoxication and Disorderly Conduct) Act 2011*.

The Committees maintain their objection to the introduction of the new offence. The *Law Enforcement (Powers and Responsibilities) Act 2002* already contains an offence provision which is more than adequate to deal with people who do not obey move on directions; this also covers people who return to a public place after having been directed to leave and not return for a certain period of time (sections 198 and 199). Part 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002* also contains adequate powers for police to remove and detain intoxicated persons without the need to criminalise them.

The Committees remain concerned about the implications of the new provisions, especially in relation to vulnerable people in the community including homeless people, people with a mental illness and Aboriginal people.

The legislation is contrary to the recommendations of the 'Royal Commission into Aboriginal Deaths in Custody' in relation to arresting, detaining and criminalising people for public drunkenness, and in particular:

> Recommendation 79: That, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness.
>
> Recommendation 80: That the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain non-custodial facilities for the care and treatment of intoxicated persons.
>
> Recommendation 81: That legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.

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The Government stressed that the policy was not about targeting the homeless, the mentally ill, the Aboriginal community or the disadvantaged in society; rather it was about managing anti-social behaviour in entertainment districts on weekends. However, there is nothing in the legislation that limits its application in this way. The Committees query whether there is any evidence to suggest that the legislation has had any impact on the control of anti-social behaviour.

The Committees are extremely concerned that while the Aboriginal population rate in NSW is approximately 2.5%, the NSW Police Force data referred to in the Issues Paper indicates that one third of people subject to this legislation between October 2011 and May 2012 were Aboriginal.

The Committees have addressed the questions in the Issues Paper in the attached submission. I have been informed that the Aboriginal Legal Service strongly endorses the Committees' submission.

Should your office require further detail, the policy lawyer with responsibility for this matter, Rachel Geare, can be contacted on (02) 9926 0310, or at rachel.geare@lawsociety.com.au.

Yours sincerely,

John Dobson
President

1. What are your views about the discretion provided to police to determine whether behaviour is disorderly?

The Committees have concerns about the phrase "disorderly behaviour" which is vague and effectively provides no guidance to police on the parameters of the discretion.

2. Which matters should police take into consideration in determining whether behaviour is disorderly?

The police should adopt a reasonable person test, similar to that used for offensive behaviour/language. Police should take into consideration the precise behaviour of the person (whether the person is likely to cause injury to another person, damage property etc.), the location and the time.

3. Should there be a requirement that a member of the public needs to be present at the scene or affected by the behaviour to allow police to give a direction to move a person on under s.198 of the LEPRA?

No. See response to Question 2.

4. In your view, are the safeguards relating to the information and warnings to be provided by police adequate. If not, how should they be amended? Do you think the requirement for police to give warnings under both 201(2C) and 201(2D) of the LEPRA should be simplified?

In the Committees' view the safeguards in relation to the information and warnings to be provided by police are adequate and do not require amendment or simplification.

The Committees are of the view that "simplifying" the safeguards could lead to unfairness. When a person is being issued with a direction, it is vital that they are adequately warned about the potential criminal consequences that may ensue.

5. We are interested to receive details of any incidents that illustrate the effectiveness or otherwise of the safeguards relating to information and warnings.

Due to the nature of the offences, practitioners from Legal Aid, the ALS and the private profession have had little contact with people who have received these types of directions. Offences under this legislation are usually dealt with via penalty notice; people issued with such penalty notices are often vulnerable people who are unlikely to seek legal advice. Where matters do proceed to court, they generally do not fall within Legal Aid guidelines because they are fine-only offences. This does not mean that the safeguards relating to information and warnings have been unproblematic, but that the Committees are not in a position to provide details of incidents that illustrate their effectiveness or otherwise.

The Committees suggest that the Ombudsman should call for the NSW Police Force to furnish the data as to:

- How many (and the percentage) elections to refer to a court were received, and what % were from Aboriginal people.

- How many (and the percentage) of fine notices were paid within the prescribed period.

The above information may provide some insight as to how people are responding to the notices.

6. In your view, what matters should police take into consideration in determining whether a move on direction is reasonable in the circumstances?

Police should take into consideration the precise behaviour of the person (whether the person is likely to cause injury to another person, damage property etc.), the location and the time.

The police should also consider the practicalities of complying with the direction, e.g. the availability of transport, any disability that may impede the person from complying, and any circumstances (e.g. high level of intoxication, risk to the person's health or safety) which may suggest that it is more appropriate to deal with the person under Part 16.

7. Are there any impediments, such as a lack of public transport that may impede police in your community from using the move on powers effectively?

The Committees are not aware of any impediments that would prevent police from using the move on powers. The impediments relate to compliance. Lack of public transport, homelessness, mental illness and cognitive impairment are impediments that impact on a person's ability to comply with the direction and can result in unnecessary prosecution.

8. We are interested to receive details of any incidents that illustrate move on directions by police that were reasonable or unreasonable in the circumstances.

Case study

Bill (aged in his early 20s) was spoken to by police outside a nightclub. A police officer formed the view that he was intoxicated and directed him to leave the area. The direction was issued informally without complying with section 201 of LEPRA. It is unclear which power the police officer was exercising, but it appears that he was relying on his power under section 198. When Bill did not move on as directed, he was physically escorted from the scene. This led to a struggle and to "trifecta" type charges (offensive language, resist police, assault police, intimidate police) which are still before the court.

The Committees are concerned that when police give a move on direction they are not explicit as to the reason for the direction.

9. Should the legislation be amended so that the offences under s.199(1) of the LEPRA and s.9 of the SO Act are made mutually exclusive?

The offences under section 199(1) of LEPRA and section 9 of the *Summary Offences Act 1988* are already mutually exclusive. Section 9(4) provides that a person cannot be proceeded against or convicted for both an offence against section 199 of LEPRA and section 9. It may be useful to insert a similar provision into LEPRA to make this abundantly clear.

The two most concerning aspects of the section 9 offence are:

1. Section 9(1)(b) of the *Summary Offences Act 1988* provides that the offence is committed if "*at any time* within six hours after the move on direction is given", the person is intoxicated and disorderly. That construction has the consequence that the person literally commits the offence *immediately* upon being given the move on direction and *continuing* to be drunk and disorderly, even if they are actually complying with the move on direction. For instance, if the person walked away, presumably still intoxicated, and told the police officer what they thought about them, they would commit the offence despite substantively complying with the direction and not committing any other offence. This circumvents the purpose of a move on power, which is to give a person an opportunity to leave the area before they commit an offence.

2. The last words of section 9(1)(b) provide that the further behaviour can happen in "the same *or another* public place". The Committees query where a homeless, intoxicated, mentally ill person could conceivably go that would enable them to avoid committing this offence. The consequence of this drafting is that a homeless person moves from one place to another and still commits the offence, although they are substantively complying with the direction.

The Committees' strong preference is for section 199 to be retained and section 9 repealed.

10. If not, what matters should police take into consideration when deciding whether to proceed under s.199(1) of the LEPRA or s.9 of the SO Act?

Not applicable.

11. In what circumstances, if any, should police use their discretion not to take proceedings? (i.e., to 'walk away').

The Committees encourage greater use of the discretion not to take proceedings.

12. In your view, should the definition of a move on direction under s.9 of the SO Act be amended to put beyond doubt that it includes directions under s.198(1)(a) *and* (b) of the LEPRA? If so, how should it be amended?

It is the Committees' position that section 9 should be repealed.

13. In your view, what factors should police consider in assessing whether a person may have a reasonable excuse for behaving in a manner that appears to be a result of intoxication, but is not?

The police should consider matters such as whether the person has a physical or mental disability, and whether the person has been a victim of a recent trauma. Police should exercise common sense and consider issues such as time and location, and the person's specific behaviour.

It is extremely important that police receive adequate training, by experts in the field, to recognise and deal with cognitive impairment, mental illness, and other types of disability.

14. Should the NSW Police Force develop guidelines to assist police in respect of this issue?

While it would be helpful for police to develop guidelines, the Committees' concern is the extent to which they are followed and whether they receive adequate training from experts in the field.

15. What have been the most common circumstances in which Aboriginal people in your community have been subjected to the new powers? Please include the location.

Experience shows that the approach is very much dependent on the culture created by the individual Local Area Commander.

16. How has the implementation of the new provisions impacted on the relationship between local police and your Aboriginal community?

The impact on the relationship is dependent on how police use the powers in the various Local Area Commands. Over use, or unreasonable use, of such powers leads to greater conflict and tension and affects the relationship between the Aboriginal community and police.

The Committees again note their concern that while the Aboriginal population rate in NSW is approximately 2.5%, the NSW Police Force data referred to in the Issues Paper indicated that one third of people subject to this legislation between October 2011 and May 2012 were Aboriginal.

The Committees refer to the Ombudsman's 2009 Report, '*Review of the Impact of Criminal Infringement Notices on Aboriginal Communities*'. The Report found that the number of CINs issued to Aboriginal people has grown significantly since the scheme was extended state-wide. The Report also found that Aboriginal people are less likely to request a review or elect to have the matter heard at court, and that nine out of every 10 Aboriginal people issued with a CIN failed to pay within the time allowed, resulting in much higher numbers of these recipients becoming entrenched in the fines enforcement system.

The Committees suggest that the Ombudsman take heed of its own findings when considering the impact of the section 9 offence, and the overrepresentation of Aboriginal people in the criminal justice system.

17. Have there been any strategies, other than the use of move on directions, in your community involving police and Aboriginal people working together to address alcohol related crime? If yes, please provide details.

The Committees encourage different strategies other than the use of move on directions to address alcohol related behaviour.

The Committees note the use of community foot patrols in some Aboriginal communities. The community foot patrols consist of members of the Aboriginal community who voluntarily drive a bus, pick up intoxicated people, and take them home. This initiative requires greater funding and support as it is not well resourced.

18. What is your view about the potential impact on vulnerable groups of the introduction of this legislation?

The Committees have serious concerns about the implications of the legislation, especially in relation to vulnerable people in the community including homeless people, people with a mental illness or cognitive impairment and Aboriginal people.

The Committees query where a homeless, intoxicated person could conceivably go that would enable them to avoid committing the offence. The consequence of the legislation is that a homeless person moves from one place to another and still commits the offence, although they are substantively complying with the direction.

Anecdotal evidence suggests that people suffering from mental health issues or cognitive impairment, Aboriginal people and young people very rarely seek legal advice. Vulnerable groups are less likely to pay the infringement notice on time and due to fine default become entrenched in the criminal justice system.

People in rural and remote areas do not have the same access to legal advice as those living in metropolitan areas. For instance, in remote areas where there are no private practitioners or Legal Aid offices, the only avenue to obtain advice is on a Court session day and in some locations this only occurs once a month. The timeline to pay an infringement notice can expire before the person has had an opportunity to obtain legal advice.

Again, it would be useful for the Ombudsman to request the following data from the NSW Police Force:

- How many (and the percentage) elections to refer to a court were received, and what % were from Aboriginal people.

- How many (and the percentage) of fine notices were paid within the prescribed period.

The above information may provide some insight as to how vulnerable people are responding to the notices.

19. Should the legislation be amended to include further safeguards to protect vulnerable people? If so, how?

The Committees' position is that section 9 should be repealed.

20. Do you know about any occasions involving a vulnerable person being subject to a move on direction for intoxicated and disorderly behaviour, or a s.9 of the SO Act offence? If so, please outline the circumstances and the outcome of the incident.

Members of the Committee lack specific examples because people are not receiving legal advice for these matters.

21. What is your view about how police should use their discretion either to detain the person under s.206 of the LEPRA, or to take proceedings under s.9 of the SO Act?

When an intoxicated person is first encountered, the question for police is whether to give them a move on direction under section 198 or detain the person under section 206.

If a move on direction is given and not followed, or if a person is found to be intoxicated and behaving in a disorderly manner in another public place, police should usually use the power to detain the person for their protection and take the person to a place of safety rather than take proceedings for the offence.

22. In your view what impact, if any, will the legislation have on the number of intoxicated people in police custody?

The more coercive powers police have, the more they tend to use them (consider the introduction of OC spray and tasers and their increasing use). Powers of the type in this legislation increase the potential for arbitrary use and abuse and will potentially lead to an increase in the numbers of people in police custody, particularly in relation to vulnerable people.

The Committees are concerned that the number of Aboriginal people in the custody of both the police and Corrective Services will increase due to criminalising intoxication offences.

23. Do you believe 'sobering up' centres would be a useful option for police to have in dealing with seriously intoxicated people who are disorderly? (Please give reasons for your answer)

The Committees do not support sobering up centres that are attached to police stations or under the control of police. Health care professionals should run sobering up centres. Police should only use sobering up centres as a last resort when family members or the local community cannot assist the person as an alternative to detention, similar to the "proclaimed places" that previously existed under the *Intoxicated Persons Act 1979*. The Committees do not agree with mandatory charge recovery as suggested by the Government.

24. In your view, what obstacles may there be to setting up effective 'sobering up' centres?

The suggestion of imposing cost recovery would be an obstacle in setting up an effective sobering up centre.

25. If a police officer decides to detain a person who is intoxicated and disorderly, what matters should police consider in exercising discretion about whether the person is detained under s.206 or under s.99 of the LEPRA?

The question ought to be whether the police decide to detain a person who is intoxicated and disorderly under section 206 or prosecute the person for an offence under section 199 or under section 9 of the *Summary Offences Act*. The decision whether to arrest (having regard to section 99(3) of LEPRA) only comes into play once a decision is made to prosecute the person for an offence. The Committees' preference is for detention under section 206 in most circumstances.

26. In your view, should the NSW Police Force be exempt from the operation of s.24(2) of the Fines Act? If so, should the NSW Police Force develop guidelines that ensure penalty notices are reviewed consistent with these provisions?

Firstly, the Committees note that there the *Fines Act* does not contain a section 24(2). The Committees presume the reference is to section 24E(2).

The NSW Police Force should not be exempt from the operation of section 24E(2) of the *Fines Act*. NSW Police should be held to account and develop guidelines to ensure that penalty notices are reviewed in a manner consistent with the provisions of the *Fines Act*.