THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg: 522019

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18 July 2011

The Hon. Greg Smith, SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Summary Offences Amendment (Intoxicated and Disorderly Conduct) Bill 2011

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) have reviewed the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Bill 2011* and make the following comments for your consideration.

Criminal Law Committee and Juvenile Justice Committee position

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) are strongly opposed to the Bill. The Committees have serious concerns 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 *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.

Concerns about the proposed offence

The two most concerning aspects of the proposed offence are:

1. Proposed 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 proposed section 9(1)(b) provide that the further behaviour can happen in "the same *or another* public place". The Committees queries 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.

Impact on Aboriginal people

This legislation is likely to have a significant impact on Aboriginal people. It is well known that Aboriginal people are overrepresented in full-time custody. Aboriginal people represent just over 2% of the NSW population and yet account for 23% of the NSW adult custody population.

The two biggest problems with the proposed legislation (beyond increasing the lockup rate) for the Aboriginal community are:

1. The likelihood of increased tension between particular police and the community resulting in an increase in the number of 'trifecta' (offensive language, resisting arrest and assaulting a police offer) matters.

2. The downstream consequences of potential over-policing of the Aboriginal community (and see 1).

The more coercive powers police have, the more they tend to use (consider the introduction of OC spray and tazers and their increasing use). Powers of the type proposed in this legislation increase the potential for arbitrary use and abuse.

The proposed 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.
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> 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.
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> 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.

Recommendation 85: That:

(a) Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;

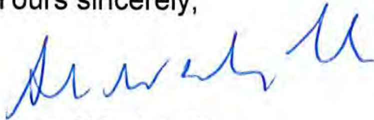
(b) The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences. Such monitoring should also assess differences in police practices between urban and rural areas; and

(c) The results of such monitoring of the implementation of the decriminalisation of drunkenness should be made public.

The offence of drunk and disorderly was removed from the statute books many years ago and should not be reintroduced.

Please do not hesitate to contact me if you would like to discuss this submission further.

Yours sincerely,



Stuart Westgarth
President