LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT BILL 2014

NSWCCL COMMENT May 2014

The NSW Council for Civil Liberties (NSWCCL) supports those aspects of the Law Enforcement (Powers and Responsibilities) Amendment Bill 2014 (the Bill) which bring about greater clarity and operational efficiency without weakening the intent and effectiveness of the original Law Enforcement (Powers and Responsibilities) Act 2002 **(**LEPRA 2002). Most of the proposed amendments in this Bill are largely consistent with this objective.

However, we oppose[1]a number of amendments which unnecessarily weaken responsibilities and protections thereby undermining the appropriate balance between effective police powers and individual rights and liberties.

Our underlying concern is that, over time, the original intention of the LEPRA legislation to provide such a balance post the revelations of the 2009 Wood Royal Commission into the NSW Police Service, is being progressively weakened though amendments which incorporate incremental extensions in police powers and reductions of safeguards alongside the legitimate and necessary tidying up of the legislation.

NSWCCL COMMENTS ON LEPRA BILL

(These comments were emailed to the Premier, Attorney General, Police Minister and the Shadow AG, Police Minister and selected other NSW members of parliament when the bill was introduced into the lower house on 27th May 2014.)

NSWCCL has analysed the LEPRA amendment Bill and makes the following comments.

We support many of the amendments as being largely clarifications or improvements relating to effectiveness of policing operations- and not weakening important protections for individuals.

We are however concerned about a number of the amendments – and strongly oppose some of these – because they do unnecessarily and inappropriately weaken these protections and are a further step in undermining an important objective of the original LEPRA Act post the Wood royal Commission into the NSW police Service. We will be issuing a detailed statement today. The major areas of our concern are:

Part 9

- **Section 115 Extension of maximum investigation time** NSWCCL opposes this strongly. No persuasive case is made in the Tink and Whelan Review nor in the Explanatory memo. The police concede that 4 hours is sufficient in most cases. For the minority of cases for which it is not sufficient the Act provides for an application for an extension.

[1] As we have in the context of previous amendments to the LEPRA Act 2002. Eg 2013 2009 bills

Police argue that this process can take longer than the extended time needed. If this s the case, the focus should be on improving the efficiency in this process- not extending by 50% the permitted detention time. NSWCCL opposes the increase in investigative time because: it is not necessary for most cases; the loss of liberty is a hugely important right and 6 hours is an onerous period of detention- particularly at night and for the young and vulnerable.

- **Section 110 : Replacement of 'deemed' suspect' with 'protected suspect'** NSWCCL accepts that there is confusion with the current definition of those 'deemed arrested" and that a clarification is needed. However, we do not consider the current amendment to be appropriate because it excludes a significant category of persons who should be covered by the relevant protections of Part 9. The amendment should be rewritten to incorporate those not formally arrested, not explicitly told they are entitled to leave. These persons may nonetheless consider they are not free to leave and may not understand that they do not have to participate in an interview. There are many vulnerable persons who find themselves in this situation. The amendment should be rewritten so it incorporates the following criterion: *' the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so; ' (*Section 23B(2) of the Commonwealth *Crimes Act,*)

Part 15

- **Section 201 and 202. These sections specify information police must provide when exercising powers and when they must do so.** It is argued by the police and others that the current time requirements are too complex for police to understand and apply. ('*(a) as soon as it is reasonably practicable to do so, or(b) in the case of a direction, requirement or request to a single person—before giving or making the direction, requirement or request'.)* It is difficult to see how these are too complex or difficult to understand or apply. NSWCCL does not accept the rationale for the need to simplify these.

The amendment only requires police to comply '*as soon as it is reasonably practicable to do so'.* NSW considers this an unnecessary weakening of an important safeguard and accountability mechanism. Our preference is for maintenance of the current provisions.

- **Section 204A Validity of exercise of powers**

Currently failure to comply with the provisions of Sections 201 renders the exercise of the powers unlawful and is a powerful incentive for compliance. The Bill proposes to explicitly remove this provision. 9*' (1) A failure by a police officer to comply with an obligation under this Part to*
provide the name of the police officer or his or her place of duty when exercising a power to which this Part applies does not render the exercise of the power unlawful or otherwise affect the validity of anything resulting from the exercise of that power.'

NSWCCL strongly opposes this amendment. It is a major weakening of important safeguards and accountability provisions. Police irritation with the exercise of their powers being declared unlawful in courts should not be addressed by the removal of appropriate and necessary legal provisions- but by police complying with them. This is a dangerous slippage of safeguards and accountabilities.
NSWCCL urges the Government and the Parliament to block this amendment.

NSWCCL has other concerns but these are the most significant. We will be issuing a more detailed statement**.**

NSWCCL FURTHER COMMENT ON LEPRA BILL

(These comments were emailed to the Premier, Attorney General, Police Minister and the Shadow AG, Police Minister and selected other NSW members of parliament on the 28th May 2014.)

Noting the broad support for the LEPRA Bill in the LA yesterday, NSWCCL reluctantly concedes it is likely the Bill will pass the LC without significant amendment. In that context we would like to propose an amendment which might be acceptable to all parties. There is difference of opinion as to the long term implications of the Section 204A which repeals the current provision that failure to give name and place of duty will render the exercise of the powers unlawful. NSWCCL thinks this is a seriously retrograde- and unnecessary - step. The Government appears to think it has problematic implications and have therefore provided for a review by the Ombudsman.

> *(1) For the period of 12 months after the commencement of section 204A of this Act (as inserted by the Law Enforcement (Powers and Responsibilities) Amendment Act 2014), the Ombudsman is to keep under scrutiny compliance by police officers with the obligation under Part 15 of this Act to provide information about the name and place of duty of a police officer when exercising a power to which that Part applies*

Providing for an Ombudsman's review is a wise safety net and will provide an opportunity for an informed assessment of the operational implications of Section 204A. However, the impact of this change –which removes a powerful incentive for police to abide by lawfully prescribed safeguards in their exercise of powers- will be by slippage over time. A one year period of active Ombudsman's review will not provide an sound basis for understanding the longer term impact on behaviour and culture. It would be a much more useful safety net if the period of review was over three years with preliminary reports at annual intervals.

NSWCCL urges the Government and the Parliament to consider extending the period of the Ombudsman's review of the operation of S204A from one to three years and to amend the LEPRA Bill 2014 accordingly.

Of course we stand by our broader concerns about aspects of the Bill as set out in our email yesterday.

With regards

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