

## Issues Paper: Questions for consideration

### *Summary Offences Act 1988* Section 9: Continuation of intoxicated and disorderly behaviour following move on direction.

You may use this document as a guide to help you with the preparation of your submission.

---

#### **Optional**

Your name: Sacha Blumen

Organisation: NSW Council for Civil Liberties (NSW CCL)

Contact Details: Co-Convenor, Police Powers and Civil Rights Subcommittee, NSW CCL,  
office@nswccl.org.au, sachablumen@gmail.com, PO Box A1386 Sydney South NSW 1235, ph: 02  
8090 2952

---

#### Interpretation of Disorderly

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

The lack of definition of 'disorderly', and subsequent high level of discretion granted to police in determining whether behaviour is disorderly, greatly concerns the NSW Council for Civil Liberties (NSW CCL) on a number of grounds.

First, the lack of a definition means that it is not clear to any person reading the legislation - including the police - what it is that Parliament has legislated for. The interpretation of this provision will vary across members of the public and different police officers.

It is undesirable for Parliament to legislate to impose sanctions on a category of behaviours that it has not specified, and whose specification is made by the police on a case-by-case basis. For Parliament to do this is to effectively allow a branch of the Executive Government to determine which behaviours are to receive sanction. This reduces the predictability and clarity of the law for all and the transparency in how the law is being enforced.

Second, the wide discretion granted to police has the potential to increase the range of police behaviour that impinges on the freedoms of people in NSW without adequate supervision and transparency. While it may be appropriate for police have a degree of discretion in the way they undertake their duties, the level of discretion they may exercise in respect of determining whether behaviour is disorderly is too great. In effect, behaviour may be taken as being disorderly on a decision of a police officer, a breadth of power that the NSW CCL opposes. The NSW CCL considers that, if police officers are to have a broad degree of discretion, individuals must have the effective ability to challenge decisions by the police that behaviour is disorderly, and there must be systemic and adequate oversight of any such decisions made by the police.

Third, the broad degree of discretion granted to police officers may lead to persons who are mentally ill or otherwise have mental or physical conditions being considered to be acting in a disorderly way when this behaviour is merely a manifestation of their illness or condition. This

is greatly concerning as such persons may otherwise be vulnerable and marginalised, and the exercise of this discretion has the potential to exacerbate this vulnerability and/or marginalisation.

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

In the view of the NSW CCL, behaviour can only be considered 'disorderly' if it disrupts the order of the environment for other people at the time the behaviour takes place or some in the future - behaviour can only be considered 'disorderly' in respect of its impact on other people. It makes no sense for behaviour to be considered disorderly if there is no disorder created for one or more other persons.

Given this, the NSW CCL considers that the police should take the following matter into consideration in determining whether behaviour is disorderly:

- the behaviour is likely to injure or otherwise hurt one or more members of the public.

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?

Yes, for the reasons given above.

## Information and Warnings

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?

The information and warnings to be provided to the police must be clear and able to be understood and comprehended by the person being provided the information/warning.

The NSW CCL has no views about whether one or two warnings should be provided, except that the warning(s) must be clear and comprehensible to the person receiving the warning.

The NSW CCL considers that it is likely that an intoxicated person who is provided information or a warning by the police may have a reduced understanding of the contents of the information or warning. They may also have reduced comprehension of the potential impacts of their future behaviour. Given this, the NSW CCL considers that section 201(2D) of the LEPRA should be amended to ensure that a police officer must make a reasonable effort to ensure that a person to whom they provide a warning understands the nature of the warning.

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

The NSW CCL has not received any complaints regarding these safeguards.

## Move on directions must be reasonable

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

The matters that should be taken into consideration should be in line with the matters the police take into consideration in deciding whether behaviour is disorderly. In particular, the following matter should be taken into consideration:

- the behaviour, if it did not cease to occur in the area, would be likely to injure or otherwise hurt one or more members of the public.

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?

While the NSW CCL has not received information relating to this, we consider there are factors that may impede the police in Sydney from using move on powers effectively. These factors include:

- the lack of trains and limited numbers of buses after midnight;
- the potential limited availability of taxis (especially during the 3am change-over time);
- potential language barriers;
- potential reduced understanding by intoxicated persons of their requirements to 'move on' and potentially reduced ability of intoxicated persons to comply with the requirement. In particular, taxis may refuse to pick up an intoxicated person, and intoxicated persons may not have sufficient money to take a taxi, bus or train.

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.

The NSW CCL has not received any complaints regarding move on directions by police.

### Police discretion relating to offences

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 NSW CCL considers that the sanctions arising under two Acts for the same behaviour should be the same. The NSW CCL does not have a view about the optimal way this should be achieved.

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?

As the sanctions under the two Acts should be the same, the NSW CCL does not have a view.

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

The police should use their discretion not to take proceedings in the following circumstances:

- the person genuinely attempted to comply with a move on direction but was unable to for reasons outside their control;
- the person did not understand the move on direction;
- the person was acting in a disorderly way as a result of mental illness or other mental or physical condition;
- a person was unable to leave a public place due to homelessness or other genuine lack of means.

### Interpretation of s.9

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?

To ensure clarity for individuals and police officers, any uncertainty in section 9(1) of the Summary Offences Act should be clarified.

It is not clear to the NSW CCL that s. 9(1) of the Summary Offences Act is referring to both s.198(1)(a) and s.198(1)(b) of the LEPR, however this is a reasonable interpretation.

The NSW CCL supports amending s.9 of the Summary Offences Act to put beyond doubt that it includes directions under s.198(1)(a) and (b) of the LEPR.

### Reasonable Excuse

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 the following factor:  
- the person has a mental illness or other mental or physical condition that makes it appear as if they are acting in a disorderly way even if they are not intoxicated.

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

Yes, if that would assist individual police officers.

### Impact on Aboriginal communities

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.

The NSW CCL has not received information about this.

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

The NSW CCL has not received information about this.

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 NSW CCL has not received information about this.

### Impact on Vulnerable Groups

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

The NSW CCL agrees with the concerns of the NSW Law Society, as laid out in the Issues Paper, that the legislation may adversely impact vulnerable people - particularly people experiencing homelessness. People who are homeless may not have the ability to leave the public space, and hence could be adversely affected by the operation of a move on order even if they attempted to comply with a such a direction. This is an absurd situation.

The NSW CCL is also greatly concerned about the potential impact of the legislation on mentally ill persons. Persons suffering mental illness are often at the margins of society and may have limited means and knowledge of support networks. It is plausible that a mentally ill person may be adversely impacted by a police officer misinterpreting their behaviour as disorderly, or by potentially being less able than other persons in complying with a move on order.

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

As mentioned in our response to question 11, police should use their discretion to not take proceedings in the following situations.

- the person genuinely attempted to comply with a move on direction but was unable to for reasons outside their control;
- the person did not understand the move on direction;
- the person was acting in a disorderly way as a result of mental illness or other mental or physical condition;
- a person was unable to leave a public place due to homelessness or other genuine lack of means.

This should be incorporated into the legislation.

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.

The NSW CCL has not received information about this.

### Custody and police discretion

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?

The NSW CCL does not have a view on this.

### Detention under s.206 of the LEPRA

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

It would appear that the number of intoxicated people in police custody would probably increase for the reasons described in the Issues Paper.

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)

It is unclear how a 'sobering up' centre would provide an additional option to police in dealing with seriously intoxicated people, as the NSW CCL understands that they are planned to be non-mandatory. It is plausible that some intoxicated people may consider a 'sobering up' centre to be an inexpensive form of accommodation - particularly if they need to travel a long way home. This may create incentives for intoxicated people to act in a disorderly way.

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

The NSW CCL does not have a view on this.

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 NSW CCL does not have a view on this.

## Penalty notices

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?

The NSW CCL strongly opposes any move by the NSW Police Force to be exempt from the operation of s.24(2) of the Fines Act.

It is imperative that the NSW Police Force implement this provision as soon as possible to ensure that the internal review processes are available to vulnerable people - in particular people experiencing homelessness, who have a mental illness, or who are otherwise mentally impaired.

## Other comments/additional information

The NSW CCL has no further comments.

## When completed, your submission may be sent:

By email: [review@ombo.nsw.gov.au](mailto:review@ombo.nsw.gov.au)  
(please include Summary Offences Amendment review in the subject line).

By Fax: 02 9283 2911

By mail: Summary Offences Amendment Review  
NSW Ombudsman  
Level 24, 580 George Street  
SYDNEY NSW 2000