

Issues Paper

Summary Offences Act 1988

**Section 9: Continuation of intoxicated
and disorderly behaviour following move
on direction.**

December 2012

Any submissions or correspondence in relation to this review should be sent by 15 February 2013 to:

Summary Offences Act Review
NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

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

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
Facsimile: 02 9283 2911
Telephone typewriter: 02 9264 8050
Email: nswombo@ombo.nsw.gov.au
Website: www.ombo.nsw.gov.au

ISBN 978-1-921-884-84-9

NSW Government Publication
© NSW Ombudsman December 2012

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.

Contents

Chapter 1. Introduction	1
1.1 Background.....	1
1.2 Our role and the purpose of this paper.....	1
1.3 Invitations for submissions or information.....	1
Chapter 2. Objectives of the legislation	2
2.1 NSW Government policy objectives.....	2
2.1.1 Extension of move on powers to individuals	2
2.1.2 Intoxicated and disorderly behaviour offence	2
2.1.3 Safeguards	2
2.2 Parliamentary debate	3
Chapter 3. Legislative framework	5
3.1 Move on Powers	5
3.1.1 Directions generally relating to public places.....	5
3.1.2 Move on directions to intoxicated people in public places	5
3.1.3 Addition of ‘disorderly behaviour’ as a reason for moving intoxicated people on.....	5
3.1.4 Failure to comply with direction	5
3.1.5 Failure to provide identification	5
3.2 New Offence: Continuation of intoxicated and disorderly behaviour	6
3.3 Safeguards for move on powers.....	6
3.4 Penalties in relation to s.9 of the SO Act.....	6
3.5 Safeguards in relation to CINS	6
3.6 Detention of an intoxicated person	7
3.7 Jurisdictional comparison.....	7
Chapter 4. Key Issues and Questions	8
4.1 Interpretation of ‘disorderly’ behaviour when giving a move on direction.....	8
4.2 Safeguards relating to move on powers	9
4.2.1 Information and Warnings	9
4.2.2 Move on directions must be reasonable in the circumstances.....	9
4.3 Interpretation of s.9 of the SO Act	10
4.3.1 Police discretion to proceed under s.199(1) of the LEPRA or s.9 of the SO Act.....	10
4.3.2 Interpretation of the elements of the offence under s.9 of the SO Act.....	11
4.3.3 There must be no reasonable excuse for the conduct.....	11
4.4 Impact on Aboriginal and other vulnerable people	12
4.4.1 Aboriginal communities	12
4.4.2 Vulnerable people	13
4.5 Custody issues	14
4.5.1 Police discretion	14
4.5.2 Possible impact on custody numbers	14

Chapter 5. Penalties	16
5.1 Penalty Notices.....	16
5.2 How CINS work.....	16
5.3 Why is a CIN the preferred way of dealing with a s.9 offence?	17
5.3.1 No criminal conviction recorded	17
5.3.2 No fingerprints retained.....	17
5.3.3 Young people protected.....	17
5.4 Implications of penalty for vulnerable people	17
5.4.1 Internal Review Process	17
Chapter 6. Questions for consideration	19
Chapter 7. Invitation to make a submission	21
Appendix 1	22
Appendix 2	24
Appendix 3	27
Appendix 4	28
Appendix 5	30
Appendix 6	31

Chapter 1. Introduction

1.1 Background

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) provides police with powers to give directions to people in a public place to ensure public safety and to prevent crime.

On 30 September 2011 the NSW Parliament passed legislation to enhance police powers relating to intoxicated people. The *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (Amendment Act) amended the LEPRA to allow police to give a direction to an intoxicated person to leave a public place on the grounds that their behaviour is disorderly.

In addition, the Amendment Act created a new offence, under section 9 of the *Summary Offences Act 1988* (SO Act), for the continuation of intoxicated and disorderly behaviour within six hours of a move on direction by police, in the same or another public place.

1.2 Our role and the purpose of this paper

Section 36 of the SO Act requires the Ombudsman to prepare a report on both the operation of the new s.9 and the issue of penalty notices in respect of offences against s.9. Following the completion of the review, the Ombudsman is required to provide a report to the Attorney General and the Commissioner for Police. The Attorney General will then provide a copy to both Houses of Parliament, and the report will be made public.

As part of this review we are examining whether the laws are being implemented appropriately and effectively by police and whether any difficulties have arisen in the implementation of the powers. In addition we are considering the impact of the use of the powers on the community.

The first phase of our review has involved monitoring documented uses of the new laws, and talking to both senior police commanders and operational police in relation to their experiences in implementing the new laws. During the second phase we will also consult with a range of community and non government organisations, and the public generally, to obtain views and comments about the impact and potential impacts of the legislation.

This paper provides some background to the new laws, outlines key provisions of the relevant legislation, identifies issues for discussion, and invites submissions from all interested parties.

Personal experiences can often supplement hard data by presenting qualitative information and context to the subject under review. We are therefore keen to hear about individual people's experiences with police issuing move on directions for intoxicated and disorderly behaviour.

1.3 Invitations for submissions or information

Submissions or correspondence in relation to this review should be **sent by 15 February 2013** to:

Summary Offences Act Review
NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

By fax: (02) 9283 2911

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

To assist with preparing submissions, this Issues Paper, together with a document containing questions for consideration (in MS Word), is available on our website.

Chapter 2. Objectives of the legislation

In dealing with people who are intoxicated and disorderly in public, police now have a wider range of tools at their discretion, including the ability to give move on directions to a person who is intoxicated and disorderly and to take action if a person fails to comply, or continues such behaviour within a six hour period in any public place.

2.1 NSW Government policy objectives

In introducing the new legislation, the NSW Government stated that the main aims were to reduce alcohol related violence and antisocial behaviour, and its impact on health, welfare and police resources. A specific objective of the new legislation was to better manage alcohol related violence in entertainment districts and around violence 'hot spots'.

These objectives are laid out in the NSW Government's policy document *Making Our Streets Safe Again*.¹ This policy was developed in response to concerns over NSW Bureau of Crime Statistics and Research data which showed a steady increase in alcohol related offences.² The policy action plan lists three main strategies:

- strengthening move on powers
- introducing a new offence of 'drunk and disorderly'
- piloting three 'sobering up' centres in NSW.

2.1.1 Extension of move on powers to individuals

The first of these strategies was implemented on 7 June 2011, by the *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011*. Prior to this amendment, police could direct intoxicated people to move on and not return for a specified period if they were in a group of three or more. The focus was on dispersal of the group, and was therefore not applied to individuals. The amendment removed the requirement that the intoxicated person be in a group.

2.1.2 Intoxicated and disorderly behaviour offence

The second strategy was implemented on 30 September 2011 by the Amendment Act, which is the subject of this review. Prior to the Amendment Act, police could direct an intoxicated individual to move on and not return, if s/he believed the behaviour was a risk to public safety. The Amendment Act firstly extends this power, enabling the officer to issue a direction if s/he considers the person's behaviour is 'disorderly'.

Secondly, it creates an offence under s.9 of the SO Act, should a person be found to be intoxicated and disorderly in a public place within a six hour period after being issued with a move on direction. The point of this amendment was to ensure that intoxicated people who are moved on do not simply continue their intoxicated and disorderly behaviour somewhere else.

2.1.3 Safeguards

To supplement the safeguards contained in the LEPPA in relation to move on directions generally, the government introduced new safeguards specific to the new offence, including:

- The direction given by a police officer must be reasonable in the context of the particular circumstances for the purpose of preventing the continuance of the intoxicated and disorderly behaviour in a public place.
- As well as the standard warning in relation to not complying, the police officer must also provide a warning about the potential for committing an offence under s.9 of the SO Act.
- There must be no reasonable excuse for the behaviour.

The Amendment Act also requires that the NSW Ombudsman conduct the review which is the subject of this paper, and provide a report to Parliament after 12 months. The review is examining whether the powers are being used appropriately and consistently with the government's commitment to address problem social drinking, and whether there has been any adverse impact on the community or on vulnerable groups.

1 NSW Liberals & Nationals, Policies, Return Quality Services, *Making Our Streets Safe Again, Sobering Up Centres* (<http://www.nswnationals.org.au/policies/return-quality-services>)

2 Bureau of Crime Statistics and Research (2010), *Alcohol related crime for each NSW Local Government Area*, NSW Government: <http://www.bocsar.nsw.gov.au/lawlink/bocsar>; cited in *Making Our Streets Safe Again* (ibid)

2.2 Parliamentary debate

The Hon. Michael Gallacher MP, Minister for Police and Emergency Services, stated during the second reading speech: 'Police are sick of repeatedly dealing with drunks on city streets. Giving a person one opportunity to behave should be enough'.³ The intended outcome of the new offence is that once intoxicated and disorderly people are moved away from high risk areas, they stay away – at least until they are no longer intoxicated and disorderly – thus increasing the efficiency and effectiveness of police efforts.

The aim of the Amendment Act was clearly to address alcohol related violence in entertainment districts. At the readings of the Bill into Parliament, The Hon. Greg Smith MP, Attorney General, stated:

*This Bill represents the implementation of the second stage of the Making Our Streets Safe Again policy. It provides that intoxicated individuals who engage in disorderly conduct in any public place after being given a move on direction will be committing an offence. We have said that people are entitled to enjoy a night out without fear of having their evening ruined by drunken and violent hooligans... This policy is not about targeting the homeless, the mentally ill, the Aboriginal community or the disadvantaged in our society. It is to manage the excessive intoxicated behaviour seen in entertainment districts on weekends.*⁴

On the impact of alcohol related violence on state services, he stated:

People are entitled to have fun, but not to the detriment of other people's night out. Those people are the reason that police need additional enforcement tools in the form of the new intoxicated and disorderly conduct offence. This State bears the cost of that type of behaviour every day through a burden on the health system. Every weekend emergency departments across New South Wales see the impact of intoxicated and disorderly behaviour, and the cost of dealing with the resultant injuries represents a burden to the State for which taxpayers should not have to pay.

During parliamentary debate, concerns were raised about the potential impact on vulnerable and marginalised groups such as Aboriginal communities, the homeless, young people and people with mental health problems. It was pointed out by The Hon. Nathan Rees MP, that Aboriginal people continue to be disproportionately represented in the criminal justice system, that move on powers disproportionately affect Indigenous people, and that broad ranging powers have been misused by police.⁵

Mr Jamie Parker MP reminded Parliament that 'the Royal Commission into Aboriginal Deaths in Custody recommended the abolition of the offence of drunk and disorderly because it disproportionately impacted on Aboriginal citizens'.⁶

Mr Parker also cited the Ombudsman's review of criminal infringement notices,⁷ pointing out that it highlighted the risks:

... that recipients might not court-elect or request an internal review, despite having strong grounds to do so, and risks that recipients may simply ignore the penalty notice system and become entrenched in the fines enforcement system.

In quoting the Ombudsman's review, Mr Parker stated that these risks were particularly acute for Aboriginal people, as nine out of ten Aboriginal people issued with a criminal infringement notice failed to pay in the allowed time. He also referred to a report by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, which indicated that:

*...the broad-ranging move on powers have been misused by police and that young Indigenous offenders are less likely than their non-Indigenous counterparts to receive a police caution and are more likely to be referred to the court.*⁸

In the same speech, Mr Parker argued that fines were ineffectual, as many are not paid, and that strategies such as enforcing conditions on trading hours and the responsible service of alcohol has reduced violent crime in NSW. He also pointed out that the LEPPA already contains provisions that allow police to adequately deal with people who do not obey a move on direction⁹ (see s.199 LEPPA).

3 The Hon. Michael Gallacher MLC, NSWPD, Legislative Council, 4 August 2011, p.3590

4 The Hon. Greg Smith MP, NSWPD, Legislative Assembly, 22 June 2011, p.3135

5 The Hon. Nathan Rees MP, NSWPD, Legislative Assembly 4 August 2011, p.3641 where he read a letter from the NSW Aboriginal Land Council into Hansard

6 Mr Jamie Parker MP, NSWPD, Legislative Assembly 4 August 2011, p.3660

7 NSW Ombudsman (2005) *Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002*, cited in Hansard, Legislative Assembly, 4 August 2011, p.3660

8 Cited in Hansard, NSWPD Legislative Assembly, 4 August 2011, p.3661

9 Mr Jamie Parker MP, NSWPD Legislative Assembly 4 August 2011, p.3660

In response to these concerns, The Hon. Greg Smith MP pointed out that the legislation added an additional ground on which police could use the move on powers, thereby enhancing the powers, but with appropriate safeguards. In relation to vulnerable groups, he stated:

The Government has repeatedly stated that this new policy is not aimed at disadvantaged groups...including the Aboriginal community. The Government has also emphasised that the intention behind the offence is that it will be directed at antisocial behaviour at night-times in entertainment hubs.¹⁰

The Ombudsman's review is considering and will report on the issues raised during parliamentary debate.

¹⁰ The Hon. Greg Smith MP, NSWPD, Legislative Assembly 4 August 2011, p.3662

Chapter 3. Legislative framework

3.1 Move on Powers

This chapter describes the legislative changes introduced by the Amendment Act to both the LEPRA and the SO Act. A copy of the Amendment Act is at Appendix 1.

3.1.1 Directions generally relating to public places

In New South Wales current move on powers are contained within Part 14 of the LEPRA. The police are (and were previously) able to move on *any* person for a range of reasons to prevent crime and maintain public order and safety. These are listed in s.197 of the LEPRA. In summary, a police officer may direct a person to move on to prevent them from obstructing, harassing or intimidating others or to prevent the supply or purchase of prohibited drugs (see Appendix 2).

3.1.2 Move on directions to intoxicated people in public places

Move on directions in relation to intoxicated people are treated separately and are contained in s.198 of the LEPRA. In June 2011 the LEPRA was amended to authorise a police officer to direct an intoxicated person to move on from a public place and not return for a specified period if they posed a threat to another person or property or otherwise posed a risk to public safety. Prior to this such a direction could only be given to an intoxicated person who was in a group of three or more intoxicated people.

3.1.3 Addition of 'disorderly behaviour' as a reason for moving intoxicated people on

The Amendment Act extended the circumstances in which police could issue a move on direction to include 'intoxicated and disorderly' behaviour, amending s.198 of the LEPRA to include the power to direct an intoxicated person to move on if they are disorderly (per s.198(1)(b), see Appendix 2).

3.1.4 Failure to comply with direction

Failure to comply with any of the above, without reasonable excuse, is an offence under s.199(1) of the LEPRA. This offence carries a maximum of two penalty points. Police may issue a penalty notice of \$220. A court may also impose a fine of the same amount. Section 199(2) indicates that a person is not guilty of an offence under this section unless it is established that the person persisted, after the direction concerned was given, to engage in the relevant conduct or any other relevant conduct.

3.1.5 Failure to provide identification

There are a number of situations where police may require people to provide details and/or proof of their identity – for example when driving a vehicle, leaving the country, or being charged with a criminal offence. One of these is outlined in Part 3 of the LEPRA – Powers to require identity to be disclosed (see Appendix 3). It is an offence to fail to disclose identity (s.12) or to give false or misleading information about identity (s.13).

Prior to the Amendment Act, if a person complied with a move on direction, police could not require them to provide their identity. If an officer takes proceedings under s.9 of the SO Act, he/she must prove that a move on direction was given within six hours before the person was again found to be intoxicated and disorderly in a public place (s.9(3)), for which identity details are required.

On 30 September 2011 (the same date as the introduction of the Amendment Act) the following clause was inserted into the LEPRA:

LEPRA s.11(2): A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if the officer proposes to give a direction to the person in accordance with Part 14 for the person to leave a place.

This means police can now request identity details in relation to all move on directions, and non-compliance can attract a penalty under s.12 of the LEPRA.

3.2 New Offence: Continuation of intoxicated and disorderly behaviour

The Amendment Act also amended the SO Act. Section 9 introduced a new offence, 'Continuation of intoxicated and disorderly behaviour following move on direction'. This means a person who has been given a move on direction for intoxicated and disorderly behaviour, and within six hours is found in a public place (not necessarily the same one) in an intoxicated and disorderly state is guilty of an offence.

3.3 Safeguards for move on powers

Safeguards in relation to the use of police move on powers are contained in s.201 of the LEPR, which is reproduced at Appendix 4. In summary, where a police officer issues a move on direction they must identify themselves as a police officer, give a warning that the person must comply with the direction and if they fail to comply, give a further warning that such failure is an offence.

A further warning was added as a safeguard to the introduction of the s.9 of the SO Act offence. Where the move on direction is given because of intoxicated and disorderly behaviour, the person must be warned that if found intoxicated and disorderly in that or *any* public place within six hours, they can be committing an offence. Additional safeguards in relation to s.9 of the SO Act are that the move on direction must be reasonable in the circumstances, and the conduct must occur without reasonable excuse.

3.4 Penalties in relation to s.9 of the SO Act

Chapter 7, Part 3 of the *Criminal Procedure Act 1986* permits police officers to issue penalty notices for prescribed offences. The *Criminal Procedure Regulation 2010*, Schedule 3, identifies the prescribed criminal offences for which police are permitted to serve a penalty notice (referred to by police as a Criminal Infringement Notice (CIN)¹¹ or an 'on-the-spot fine'), on a person whom they reasonably believe has committed the prescribed offence. That Schedule now includes the offence under s.9 of the SO Act, with a penalty of \$200. Paying the fine means the person does not have to attend court. Should a person elect to take the matter to court, and is found guilty of the offence, the court can impose a penalty of up to six penalty points (\$660).

Penalty Notices are dealt with under s.19 of the *Fines Act 1996*, which details the penalty notice procedure (see Appendix 5), and grants police a discretion to issue a penalty notice or give a caution.

3.5 Safeguards in relation to CINS

Certain safeguards apply in relation to the issuing of a CIN. For example the person can elect to have the matter heard before a court, and a CIN cannot be issued to a person under the age of 18 years.¹²

In order to issue a CIN, the police officer must confirm the identity of the person. In some cases, for example where the person has no proof of identity, the police may wish to take fingerprints. They can do this at the point of issuing the CIN by means of portable equipment ('Field ID kits'). Any fingerprints taken in relation to the issue of a CIN must be destroyed:

- on payment of the penalty under the penalty notice, or
- if the offence is dealt with by a court and the court dismisses the charge in relation to the penalty notice or arrives at a finding of not guilty for the charge, or
- if the penalty notice is withdrawn.

Once a CIN penalty is paid, no further proceedings can be taken against the person and it is not recorded as a criminal conviction.

11 Criminal Infringement Notice (CIN) is a term used by police to refer to penalty notices issued under Part 3 of the *Criminal Procedure Act 1986*

12 Criminal Procedure Act s.335

3.6 Detention of an intoxicated person

Section 206(1) of the LEPRA outlines the circumstances in which police may detain an intoxicated person found in a public place, including if they are behaving in a disorderly manner, or are in need of protection. The purpose of this provision is to allow police to detain an intoxicated person out of a duty of care. Police are *not* to detain intoxicated people under this section for the purposes of charging them with an offence under any law, including an offence under s.9 of the SO Act. Police must release the intoxicated person once a responsible person is found to care for them (see Appendix 6).

3.7 Jurisdictional comparison

Police in all Australian jurisdictions have powers to move people on, however there is variation in the scope of powers, the penalties, and conditions which must be met. All jurisdictions have a list of conditions for use of the powers which generally include responding to or preventing offences; risks of injury or damage to people or property; and obstructions and breaches of the peace. Some jurisdictions make it an offence to return to the place where the direction was given, or a specified place, and the timeframes vary quite markedly. NSW is now unique in Australia in that no other jurisdiction requires people who are moved on to remain out of *any* public place for a specified time. Another unique feature in NSW is the explicit distinction between general move on directions and those involving intoxication.

In Queensland the relevant legislation is ss.46-48 of the *Police Powers and Responsibilities Act 2000*. This provides Queensland police with a wide scope of behaviours for moving people on, including disorderly behaviour that is not tied to intoxication. Further, a person's presence is sufficient, and police need only to 'reasonably suspect' that the presence or behaviour is impacting on people or businesses. The direction remains in force for up to 24 hours, a substantially longer timeframe than NSW, however the direction only applies to a specific location.

In South Australia the relevant legislation is s.18 of the *Summary Offences Act 1953*, which specifies a number of grounds under which police may order people to move on or disperse. The list does not specify intoxication and/or disorderly behaviour, but instead focuses on the officer's reasonable belief that an offence has been (or will be) committed, or that there is a risk to people in the area. Under South Australian legislation the person need only leave the specified area.

In Victoria the relevant legislation is s.6 of the *Summary Offences Act 1966*. The conditions, scope and timeframe for directions are broader than NSW, and are not tied to intoxication. Like Queensland, a direction can prevent a person from returning to the public place for up to 24 hours, however the place must be specified.

In Tasmania the relevant legislation is s.15B of the *Police Offences Act 1935*. If a person is moved on under this legislation, they may not return for a specified period of *at least* four hours. Again, the direction applies to that specific place.

In the Northern Territory the relevant legislation is s.47 of the *Summary Offences Act*. Use of that legislation begins with requiring the person to justify 'loitering' in the place. If the officer believes an offence has been (or may be) committed the direction can apply for up to 72 hours.

In the Australian Capital Territory the relevant legislation is s.4 of the *Crime Prevention Powers Act 1998*. This legislation is broadly comparable with NSW, applying for up to six hours, but again, applies only to a specific public place.

In Western Australia the relevant legislation is s.27 of the *Criminal Investigation Act 2006*. The timeframe can be up to 24 hours, and can apply to 'a reasonable distance from the place'. An important safeguard provided for in this legislation is that a person is not in breach of the direction if they are taking reasonable steps to comply with it.

Chapter 4. Key Issues and Questions

4.1 Interpretation of ‘disorderly’ behaviour when giving a move on direction

The new provisions in s.198(1)(b) of the LEPRA expand existing police powers to include giving move on directions to intoxicated people whose behaviour is disorderly. The new provision does not define ‘disorderly’ although ‘intoxicated’ is defined under s.9(6) of the SO Act (see Appendix 1).

In the second reading speech, The Hon. Michael Gallacher¹³ states:

There is no definition of “disorderly” in the bill. The intention of the Government is to impose sanctions against behaviour that contravenes community standards to the extent that it warrants the intervention of the criminal law.

Disorderly behaviour can vary according to time, place and the context in which it is conducted. Behaviour that may not disturb or annoy others in one instance could amount to a criminal offence in another. For example, an intoxicated individual who is yelling loudly and persistently to the extent that it annoys others, and who does not cease his or her behaviour when asked to move on by police, could be committing an offence of intoxicated and disorderly conduct. It will be for police to determine the appropriate response according to the context in which the behaviour occurs.

In *Making the Streets Safe Again*¹⁴ there is a suggestion that the term ‘disorderly’ is generally understood: ‘The meaning of ‘drunk and disorderly’ is pretty clear. You’re drunk, your behaviour is offensive, threatening or just plain obnoxious’.

The amendments to s.198 of the LEPRA appear to provide police with an alternative ground to give a move on direction to an intoxicated person. That is, police can give a move on direction if an intoxicated person:

- (a) *is likely to cause injury to any other person or persons, damage property or otherwise give rise to public safety,*
or
- (b) *is disorderly.*

Although the section frames ‘disorderly’ as alternate or additional to the conduct described in s.198(1)(a), it is arguable that ‘disorderly’ behaviour could be interpreted as including the conduct described in s.198(1)(a) and that in practice police do not regard the provisions as mutually exclusive.

Importantly, ‘disorderly’ behaviour is distinguished from behaviour under s.198(1)(a) and from the move on powers under s.197 of the LEPRA insofar as it is not qualified by a requirement that the behaviour is likely to have an adverse impact on a member of the public.

It is also relevant to note that s.4 of the SO Act provides an offence of ‘offensive conduct’ and s.4A of the SO Act provides an offence of ‘offensive language’. It is an element of both these offences that the conduct occurs near, or within view or hearing from, a public place or a school.

We are seeking public comment on the broad definition of disorderly behaviour, including the absence of a requirement that the behaviour may impact on a member of the public.

Questions for consideration: Interpretation of Disorderly

1. What are your views about the discretion provided to police to determine whether behaviour is disorderly?
2. Which matters should police take into consideration in determining whether behaviour is disorderly?
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?

¹³ The Hon. Michael Gallacher MLC, NSWPD, Legislative Council, 4 August 2011, p.3588

¹⁴ NSW Liberals & Nationals, Policies, Return Quality Services, *Making Our Streets Safe Again, Sobering Up Centres* (<http://www.nswnationals.org.au/policies/return-quality-services>)

4.2 Safeguards relating to move on powers

4.2.1 Information and Warnings

The amended powers to move on intoxicated people under s.198 of the LEPRA are subject to safeguards contained in s.201 of the LEPRA (see Appendix 4). The powers are summarised in Chapter 3 of this paper, and include that police must warn the person that it is an offence not to comply with the direction.

The amendments introduced at s.9 of the SO Act included the addition of a further warning to be given by police following a move on direction for intoxicated and disorderly behaviour. Additionally it is an offence to be intoxicated and disorderly in that or any other public place at any time within six hours after the direction is given (s.201(2D) LEPRA).

As it is an offence to fail to comply with a s.198 move on direction under both s.199(1) of the LEPRA and under s.9 of the SO Act, police must give a warning under both s.201(2C) and s.201(2D) of the LEPRA.

We are interested to obtain views and comments on whether these safeguards are clear, adequate, or should be simplified.

In assessing the adequacy of these provisions it may be relevant to consider that the person receiving the information is apparently intoxicated and may have reduced capacity to understand the warnings given by police.

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

4.2.2 Move on directions must be reasonable in the circumstances

A police officer may give a direction to an intoxicated person who is in a public place to leave that place and not return for a specified period of not more than six hours.

Section 198(2) of the LEPRA provides a safeguard relating to move on directions given by police to intoxicated people:

- (2) *A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:*
- (a) *preventing injury or damage or reducing or eliminating a risk to public safety, or*
 - (b) *preventing the continuance of disorderly behaviour in a public place.*

We are interested to receive views and comments of people in a range of communities and organisations about the matters that police should consider in deciding whether a move on direction to a person for being intoxicated and disorderly is reasonable in the circumstances.

Given the objectives of the legislation to reduce the incidence of alcohol related crime in entertainment precincts, we are also interested to identify any impediments to the use of the move on power by police. For example, it may be unreasonable for police to give move on directions in circumstances where the person is unable to comply with the direction because there is no public transport to leave the area.

Questions for consideration: 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?
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?
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.

4.3 Interpretation of s.9 of the SO Act

4.3.1 Police discretion to proceed under s.199(1) of the LEPRA or s.9 of the SO Act

There are two offences that a person may commit following a direction by police, under s.198(1)(b) of the LEPRA, to leave a public place because they are intoxicated and disorderly.

Under s.199(1) of the LEPRA a person must not, without reasonable excuse, refuse or fail to comply with a direction given under s.198(1)(b). The offence carries a maximum of two penalty units (\$220).

Under s.9 of the SO Act a person is guilty of an offence if at any time within six hours after the move on direction is given, the person is intoxicated and disorderly in the same or another public place. The offence carries a maximum of six penalty units (\$660). Police may issue a penalty notice for \$200, however courts can impose a higher or lesser penalty.

Section 9(4) of the SO Act states:

- (4) *A person cannot be proceeded against or convicted for both an offence against this section and an offence against section 199 of the Law Enforcement (Powers and Responsibilities) Act 2002 (Failure to comply with direction) in relation to the same conduct.*

In the second reading speech the Minister for Police and Emergency Services said the following about the new s.9 offence:

An example is police identifying an intoxicated person who is behaving in a disorderly manner at Circular Quay. The person is given an intoxicated and disorderly move on direction. The person might comply with the direction and walk to Town Hall. However, if the person is still intoxicated and disorderly or resumes such behaviour in that new place within six hours he or she will be liable to prosecution. Similarly, if a person is given a move on direction for a period of an hour and returns to the same spot and is again intoxicated and disorderly two hours later that person will be guilty of an offence. Police are sick of repeatedly dealing with drunks on city streets. Giving a person one opportunity to behave should be enough.

Currently, if an intoxicated person does not comply with the move on direction he or she can be charged with failing to comply with the direction under section 199 of the Law Enforcement (Powers and Responsibilities) Act 2002. A person can still be charged with failing to comply. However, new section 9 (4) provides that a person cannot be proceeded against or convicted for both an offence under the new section 9 that will be inserted into the Summary Offences Act and under section 199 of the Law Enforcement (Powers and Responsibilities) Act 2002, in relation to the same conduct. This allows police to make decisions in the field about how to respond appropriately when confronted with that behaviour.

The scenario of an intoxicated person at Circular Quay outlined by the Minister describes a continuation of intoxicated and disorderly behaviour following compliance with a move on direction under s.198(1)(b) of the LEPRA.

The construction of the provisions allowing a police officer to take action under s.9 of the SO Act or under s.199(1) of the LEPRA raises a question about whether in practice the scheme is sufficiently focused on repeated intoxicated and disorderly behaviour or in practice duplicates the existing powers of police.

The following scenarios are examples where a person may be liable for prosecution under either s.199(1)(b) of the LEPRA or s.9 of the SO Act.

Scenario 1: Refusal of a move on direction for intoxicated and disorderly behaviour

Police identify an intoxicated person who is behaving in a disorderly manner at Circular Quay. The person is given a move on direction to leave Circular Quay for a period of two hours. The person refuses to comply and continues to be intoxicated and disorderly.

Scenario 2: Failure to comply with a move on direction for intoxicated and disorderly behaviour

Police identify an intoxicated person who is behaving in a disorderly manner at Circular Quay. The person is given a move on direction to leave Circular Quay for a period of two hours. The person leaves but after one hour returns to the same spot and continues to be intoxicated and disorderly.

In both these scenarios police have the power under s.199(1) of the LEPRA to take action on the person's failure to comply with the move on direction. However our preliminary analysis of data provided by the NSW Police Force (NSWPF) suggests that criminal infringement notices issued under s.9 of the SO Act commonly relate to incidents where police could have alternatively issued a penalty notice under s.199(1).

The offence under s.9 of the SO Act carries a higher number of penalty points than the offence under s.198(1), suggesting that a continuation of intoxicated and disorderly behaviour following a direction under s.198(1) of the LEPRA is more serious than a refusal or failure to comply with that direction. However, the fine for a penalty notice under s.9 of the SO Act is fixed at \$200, which is lower than a penalty notice issued under s.199(1), being \$220.

On that basis, one impact of the scheme appears to be that some people are now receiving a lesser penalty for failing to comply with a move on direction under s.198 of the LEPRA.

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

4.3.2 Interpretation of the elements of the offence under s.9 of the SO Act

Section 9 of the SO Act provides that:

- (1) *A person who:*
 - (a) *is given a move on direction for being intoxicated and disorderly in a public place, and*
 - (b) *at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place,**is guilty of an offence.*
- (2) *For the purposes of this section, a move on direction is a direction given to a person by a police officer, under section 198 of the Law Enforcement (Powers and Responsibilities) Act 2002, to leave a public place and not return for a specified period.*

Section 9 appears to be open to two interpretations in respect of the requirement that a person must have been given a move on direction:

1. A person must have been given a move on direction in accordance with s.198(1)(a) of the LEPRA or s.198(1)(b);
2. A person must have been given a move on direction under s.198(1)(b) only.

The NSWPF have advised that in practice they interpret s.9(1) of the SO Act as requiring a move on direction under either s.198(1)(a) or (b) and that officers are not required to record whether a move on direction is given under s.198(1)(a) or under s.198(1)(b).

We are interested in receiving comment as to whether there may be any difficulties with this particular implementation of s.9 and if so, how these could be remedied.

Questions for consideration: 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?

4.3.3 There must be no reasonable excuse for the conduct

The SO Act provides a defence to a prosecution if the defendant satisfies the court that s/he had a reasonable excuse for conducting themselves in the manner alleged.¹⁵ For example, some medical conditions and/or prescription medications, or certain disabilities, may cause an individual to appear intoxicated. Police have discretion not to issue a CIN if they believe the person has a reasonable excuse for appearing to be intoxicated and disorderly. We are interested in obtaining comments and feedback about how or when police should exercise discretion to take no action because a person has a reasonable excuse for their conduct.

¹⁵ Summary Offences Act s.9(5)

Questions for consideration: ‘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?
14. Should the NSW Police Force develop guidelines to assist police in respect of this issue?

4.4 Impact on Aboriginal and other vulnerable people

During debate about this legislation, The Hon. Greg Aplin (MP for Albury NSW) made the point that, for vulnerable groups in society, public space is often their only space:

I would not want to see this new power...used unfairly to target particular people or groups in our society who are already downtrodden, doing it tough or marginalised. These people might have few alternative places to gather in their local and familiar surroundings.¹⁶

In Chapter 2 of this paper we outlined the Minister’s views in the second reading speech that the government’s policy underpinning the provisions relating to intoxicated and disorderly behaviour is aimed at addressing alcohol related violence and antisocial behaviour, and is not aimed at targeting Aboriginal communities or other vulnerable groups such as the homeless, people with mental health issues and the disadvantaged.

However the legislation does not prevent police from using these powers in relation to such vulnerable people. Given that vulnerable people are frequently found by police in public places, an important aspect of our review is to monitor whether vulnerable people, including Aboriginal communities, are impacted by the new laws, and whether police practices are consistent with the policy intention that vulnerable groups not become unfairly targeted by the new powers.

4.4.1 Aboriginal communities

The NSW Law Society raised several concerns with the legislation prior to enactment¹⁷. Pointing out the potential for arbitrary use and abuse of these powers by police, the Law Society raised the likelihood of increased tension between police and Aboriginal communities, and the downstream consequences of potential over-policing, including escalation of offences. It points out that 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. The offence of drunk and disorderly was removed from the statute books many years ago, and the Law Society argues it should not be reintroduced.

Early indications during our review are that Aboriginal people are over-represented in legal actions taken by police for prosecutions of this offence. While the Indigenous population rate for NSW is around 2.5 percent, NSWPF data indicates around a third of people subject to this legislation between October 2011 and May 2012 were Indigenous¹⁸. This is not unusual within the criminal justice system in NSW, however given that the speeches in Parliament stated explicitly that the new legislation was not aimed at vulnerable groups, and highlighted the Aboriginal community as one such group, the early indications are of concern.

During the review we aim to closely scrutinise the reasons for any over-representation of Aboriginal people in terms of the use of the powers. A key question we are carefully considering is whether in relation to Aboriginal people, police are using the powers in a way which is consistent with the aims of the new powers. That is, to manage excessive intoxicated and disorderly behaviour in entertainment districts on weekends.

We are also interested in learning about local initiatives to address alcohol related issues as we are aware that these may have a positive impact. For example, in 2008 the Bourke community formed the Bourke Alcohol Working Group (BAWG) and following community consultation developed a five year Bourke Alcohol Action Plan to improve community safety, health and well being. The plan was recently evaluated by the George Institute and found that:

Overall the majority of impacts of the Bourke Alcohol Action Plan have been positive for the Bourke community, including in the streets and in the home.¹⁹

¹⁶ Mr Greg Aplin MP, NSWPD, Legislative Assembly, 4 August 2011, p.3656

¹⁷ Law Society of NSW (July 2011), submission to NSW Attorney General and Minister for Justice.

¹⁸ Data source: NSW Computerised Operational Policing System

¹⁹ T Senserrick, M Lyford, R Hinchcliff, S Boufous, K Clapham, S Torr and R Ivers (2012), *Evaluation of the Bourke Alcohol Action Plan: final report*. The George Institute for Global Health, University of Sydney.

The findings included a decrease in reports of crime in the 18 months following the introduction of the plan including:

- 32% drop in intoxicated people
- 22% drop in assaults
- 25% drop in domestic related assaults
- 18% drop in sexual assaults
- 34% drop in malicious damage

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

4.4.2 Vulnerable people

In their submission, the NSW Law Society also raised concerns about the impact of the legislation on vulnerable groups:

Proposed section 9(1)(b) of the Summary Offences Act 1988 provides 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.

The last words of proposed section 9(1)(b) provide that the further behaviour can happen in “the same or another public place”. The Committee 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.

We are interested in receiving feedback and views about the impact or potential impact of the laws on vulnerable people including the homeless, people suffering from mental illness and young people.

Questions for consideration: Impact on Vulnerable Groups

18. What is your view about the potential impact on vulnerable groups of the introduction of this legislation?
19. Should the legislation be amended to include further safeguards to protect vulnerable people? If so, how?
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.

4.5 Custody issues

4.5.1 Police discretion to detain intoxicated people

Police have retained the power to detain an intoxicated person²⁰ under s.206 of the LEPRA (see Appendix 6) if they are disorderly or behaving in a manner likely to cause injury or damage, or if they are in need of protection. The purpose of this provision is to protect the intoxicated person and other people from injury and property from damage (s.206(5) LEPRA). However, they are not able to detain an intoxicated person under s.206 because of behaviour which constitutes an offence under any law. At the same time as the SO Act was amended, s.206 (2A) of the LEPRA was introduced, which states:

However, a police officer may detain an intoxicated person under this section even if behaviour constitutes an offence under s.9 of the Summary Offences Act 1988 if the detention is not for the purpose of taking proceedings for the offence.

Given that the conditions under which a person can be detained under s.206 of the LEPRA are almost identical to those which may be an offence under s.9 of the SO Act, police now have the discretion to detain the person under s.206, or to take proceedings under s.9. This presents officers with a choice between fundamentally different approaches for the same set of circumstances. However there are no guidelines as to when they should select one approach over another.

Questions for consideration: 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?

4.5.2 Possible impact on custody numbers

One of the concerns raised in Parliament around the new legislation was that it may increase custody numbers, particularly with respect to Indigenous people, as expressed by The Hon. Nathan Rees MP:

*As recently as 1991 the Commonwealth Royal Commission into Aboriginal Deaths in custody recommended that public intoxication not be regarded as a criminalised offence because of the huge impact such an offence has on the detention rates of Aboriginal people and, consequently, the deaths of Aboriginal people in custody.*²¹

With respect to s.206 of the LEPRA, police are advised in training material²² that wherever possible the person is to be released into the care of a responsible person, and detention should be a last resort. They are advised not to take an intoxicated person to a police station *unless*:

- it is necessary to do so temporarily for the purpose of finding a responsible person
- a responsible person cannot be found to take care of the intoxicated person
- the intoxicated person is behaving or likely to behave so violently that a responsible person would not be capable of taking care of and controlling the intoxicated person.

However, it may not be possible to find a responsible person. While the definition of 'a responsible person' includes an organisation which provides drug and alcohol services, the NSWPF advises that there are no standard procedures in place for officers to contact welfare organisations²³. If a person is seriously intoxicated to the point where there are health concerns, the practice is to call an ambulance in line with duty of care obligations, and in that situation, other agencies would be reluctant to accept them for the same reason.

So in practice, where police are unable to find a family member or friend willing and able to take responsibility, and the case is not serious enough to call an ambulance, the intoxicated person may be detained, under s.206 of the LEPRA, or arrested under s.99(3)(b) of the LEPRA to prevent a repetition or continuation of the offence. This could clearly have an impact on custody numbers.

20 LEPRA Part 16, 'intoxicated person' is defined in s.205 as a person 'who appears to be seriously affected by alcohol or another drug or a combination of drugs'. 'Seriously affected' has not been defined. Safeguards in relation to the detention of an intoxicated person in an authorised place of detention are set out in s.207 of LEPRA

21 The Hon. Nathan Rees MP, NSWPD, Legislative Assembly, 4 August 2011, p.3641.

22 SMIT Training SC003 Intoxicated person

23 Advice provided in Focus Groups run by reviewers, and email correspondence to NSW Ombudsman

The NSW Government is considering conducting pilots of 'sobering up' centres²⁴, where an intoxicated person could be taken for monitoring, instead of being detained in custody. While this strategy would pose challenges for service providers, it may reduce the demand on emergency and/or custodial services by providing an alternative for people who are seriously intoxicated, but do not require immediate medical treatment.

Questions for consideration: 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?
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)
24. In your view, what obstacles may there be to setting up effective 'sobering up' centres?
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?

24 NSW Liberals & Nationals, Policies, Return Quality Services, *Making Our Streets Safe Again, Sobering Up Centres* (<http://www.nswnationals.org.au/policies/return-quality-services>)

Chapter 5. Penalties

5.1 Penalty Notices

Section 36 of the SO Act requires the Ombudsman to prepare a report on (a) the operation of s.9, and (b) the issue of penalty notices in respect of offences against s.9. This part of the paper looks at CINs applied in respect of the new s.9 offence, and issues to be considered as part of our review.

Chapter 7, Part 3 of the *Criminal Procedure Act 1986* permits police officers to issue CINs for prescribed offences. The Criminal Procedure Regulation 2010 identifies the prescribed criminal offences for which police are permitted to serve a CIN on a person whom they reasonably believe has committed the prescribed offence. The new offence at s.9 of the SO Act (Continuation of intoxicated and disorderly behaviour following move on direction), has been added to Schedule 3 of that regulation to provide for the issuing of a CIN with a penalty of \$200.

The Ombudsman has previously conducted two reviews concerning CINs²⁵, commonly known as 'on-the-spot fines'. The first describes in detail how and why CINs were introduced, and problems identified during their initial 12 month trial. The primary reason for the CINs scheme was to reduce the red tape for police officers dealing with minor criminal offences. Instead of commencing a court process, such as charging a person, then attending at court as a prosecution witness, the police officer could issue a CIN. The recipient of the CIN could then elect to challenge the CIN at court, or pay the fine. The review concluded that CINs were largely successful in providing police with an easy, additional way to deal with minor offences, although it also identified problems with issuing CINs to Aboriginal people.

The second review covered the impact CINs have on Aboriginal communities – the concern being an escalation of practical problems triggered by the lack of capacity to pay fines. That report concluded that the increased use of on-the-spot fines as a way of diverting minor offenders from the courts presented particular risks, especially in relation to Aboriginal people and others who are over-represented in the criminal justice system.

Both reports found that in many cases where a CIN had been issued, it remained unpaid for some months, or in many cases, years after the offence.

5.2 How CINS work

A police officer may issue a CIN to an adult for a prescribed criminal offence, which if paid by the offender, avoids further legal action. A summary of how the CIN procedure works is set out in s.19 of the Fines Act (see Appendix 5).

A CIN consists of:

- a description of the offence and the particulars of the alleged offender
- the nominated monetary penalty
- instructions on how to pay the fine, and
- an option to elect to take the matter to court.

If a CIN is issued the person may pay the fine to the State Debt Recovery Office. The CIN has payment details, and court election details should they choose to have the matter heard at court.

If a person elects to take the matter to court, the fact that a CIN was issued is retained indefinitely, and any fingerprints taken are retained by police until the court outcome.

Someone who cannot pay the fine may have access, through Legal Aid, to the Work Development Order scheme. This is a program whereby people with outstanding fines, who realistically cannot pay, can perform voluntary work, study or training to reduce their fines. However it is a voluntary process which could take time, and may not be suitable for many offenders.

The standard outcome for the s.9 offence is a CIN. However the issuing of a CIN is not mandatory and police retain discretion to deal with this offence in accordance with the LEPR powers, so they can alternatively issue a warning, a caution, a CAN, or arrest the person.

²⁵ *On the Spot Justice: The trial of Criminal Infringement Notices by NSW Police*, April 2005, and *Report on review of the impact of Criminal Infringement Notices on Aboriginal Communities*, August 2009, NSW Ombudsman

5.3 Why is a CIN the preferred way of dealing with a s.9 offence?

Unlike ordinary infringement notices, CINs have standard safeguards built in including that the offence is not recorded on a person's criminal history, any fingerprints taken are destroyed, and a CIN may not be issued to a person under the age of 18 years.

5.3.1 No criminal conviction recorded

Payment of a CIN does not result in the recording of a criminal conviction. A CIN therefore enables offenders to deal with the offence quickly and easily, without becoming involved in the criminal justice system.

5.3.2 No fingerprints retained

Police can only issue CINs to an adult whose identity has been confirmed. To confirm the identity of an adult being issued a CIN, s.138A of the LEPRA gives police the power to take finger-prints or palm-prints. Safeguards in relation to the exercise of these powers are contained in s.139 of the LEPRA. If fingerprints were taken at the time the CIN was issued, and the fine is paid, the fingerprints will be destroyed. (Although a record of the fact that a CIN has been issued will be held by the NSWPF.)

5.3.3 Young people protected

A CIN may not be issued to a person under the age of 18 years. If a CIN is mistakenly issued to a young person, it must be withdrawn.

5.4 Implications of penalty for vulnerable people

Fine default is a particular risk in relation to vulnerable groups who may not have the capacity, for one reason or another, to pay a fine. This is particularly an issue for Aboriginal communities, as outlined by the NSW Ombudsman's review of the impact of CINs on Aboriginal communities²⁶. Vulnerable people may also neglect to engage in any formal processes available to address the outstanding fines. With people potentially receiving more fines, possibly for larger amounts, a failure to pay fines may increasingly be an entry point into the criminal justice system for some. Also, the non-payment issues could potentially bring more people before courts for move on offences, leading to an escalation of penalties.

5.4.1 Internal Review Process

Part 3, Division 2A of the Fines Act outlines the internal review process that government agencies must follow in relation to applications for a review of a penalty notice. The decision to issue a penalty notice is required to be considered by the issuing agency upon application by the recipient, and the penalty notice either confirmed or withdrawn. Section 24(2) provides:

- (2) *A reviewing agency must withdraw a penalty notice if it finds any of the following grounds to be made out:*
- (a) *the penalty notice was issued contrary to law,*
 - (b) *the issue of the penalty notice involved a mistake of identity,*
 - (c) *the penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence,*
 - (d) *the person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless:*
 - (i) *to understand that the person's conduct constituted an offence, or*
 - (ii) *to control such conduct,*
 - (e) *an official caution should have been given instead of a penalty notice, having regard to the relevant guidelines under section 19A,*
 - (f) *any other ground prescribed by the regulations.*

In August 2009 the Ombudsman published his report *Review of the impact of Criminal Infringement Notices on Aboriginal communities*. The report included information about an audit conducted into the NSWPF internal review procedures in respect of CINs. It reported that the NSWPF advised that it would seek an exemption from Part 3, Division 2A of the Fines Act. The Ombudsman reported:

²⁶ *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, NSW Ombudsman

We are concerned that a decision to exempt CIN offences from the new review processes will lead to inconsistent outcomes for persons that seek a review of a penalty notice on the basis of special circumstances such as an intellectual disability, mental illness, cognitive impairment or homelessness.

If there are compelling reasons why the NSW Police Force wishes its review processes to remain separate from the scheme being implemented by other agencies, we are of the view that current police procedures should be reviewed and updated to ensure that they are consistent with the internal review procedures outlined in the Fines Further Amendment Act 2008.

In the Ombudsman's recent annual report he advised:

As we reported last year, the Attorney General gave 'in principle' support to 22 of our 25 review recommendations about criminal infringement notices (CINs) and convened a working party to review their implementation. Although we are happy to report that the NSWPF has now implemented a majority of our review recommendations as part of the working party process, one recommendation that continues to be disputed relates to whether the police should be exempted from the internal review provisions in Part 3, Division 2A of the Fines Act 1996. Under these provisions, all agencies that issue penalty notices must have systems and procedures in place to allow recipients of penalty notices to seek internal reviews. The rationale behind these provisions is to divert vulnerable groups out of the fine and penalty notice system and make the fines system fairer.

The NSWPF has advised that they are currently not complying with the provisions of the Fines Act and are seeking an exemption from the Ministry for Police and Emergency Services. We remain concerned about the NSWPF's ongoing failure to comply with the legislation and the inadequacy of their internal review procedures for penalty notices.

It would appear that the proposal by the NSWPF to seek exemption from the operation of Part 3, Division 2A of the Fines Act has the potential to weaken the safeguards available to vulnerable people who are issued a CIN for an offence under s.9 of the SO Act.

Question for consideration: 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?

Chapter 6. Questions for consideration

Interpretation of Disorderly

1. What are your views about the discretion provided to police to determine whether behaviour is disorderly?
2. Which matters should police take into consideration in determining whether behaviour is disorderly?
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?

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

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?
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?
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.

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?
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?
11. When should police use their discretion not to take proceedings? (ie, to 'walk away').

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?

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

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

Impact on Vulnerable Groups

18. What is your view about the potential impact on vulnerable groups of the introduction of this legislation?
19. Should the legislation be amended to include further safeguards to protect vulnerable people? If so, how?
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.

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?

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

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?

Chapter 7. Invitation to make a submission

If you have an opinion – positive or negative – on any aspect of the new legislation, the Ombudsman would be pleased to receive your submission. This could include your views on the creation of the new offence, the legal procedures, the impact on people affected by the powers, and/or on the community at large. If you know of an example where a person has been charged with failing to comply with a move on direction for intoxicated and disorderly behaviour (s.199 of the LEPRA), or for continuing to be intoxicated and disorderly in a public place (s.9 of the SO Act), please outline the circumstances, as objectively as possible, and any views you have in relation to incident.

To assist with preparing submissions, this Issues Paper, together with a document containing questions for consideration (in MS Word), is available on our website

Submissions or correspondence in relation to this review should be **sent by 15 February 2013** to:

Summary Offences Amendment Review
NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

By fax: 029283 2911

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

Appendix 1

Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011 No 28

Schedule 1 Amendment of *Summary Offences Act 1988 No 25*

[1] Section 3 Definitions

Insert after section 3 (3):

- (4) Notes included in this Act do not form part of this Act.

[2] Section 9

Insert after section 8A:

9 Continuation of intoxicated and disorderly behaviour following move on direction

- (1) A person who:
- (a) is given a move on direction for being intoxicated and disorderly in a public place, and
 - (b) at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place,
- is guilty of an offence.
- Maximum penalty: 6 penalty units.
- (2) For the purposes of this section, a move on direction is a direction given to a person by a police officer, under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, to leave a public place and not return for a specified period.

Note. The maximum period for which a person can be directed not to return to a public place is 6 hours.

It is a requirement under section 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* that the police officer warn a person given a move on direction for being intoxicated and disorderly in a public place that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the move on direction is given.

- (3) In proceedings for an offence against this section, it is necessary to prove that a move on direction was given within 6 hours before the person was found to be intoxicated and disorderly in a public place, but it is not necessary to prove that the person contravened the move on direction by being so intoxicated and disorderly in the public place at the time concerned.
- (4) A person cannot be proceeded against or convicted for both an offence against this section and an offence against section 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (Failure to comply with direction) in relation to the same conduct.
- (5) It is sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.
- (6) For the purposes of this section, a person is **intoxicated** if:
- (a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and
 - (b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.

[3] Section 36

Insert after section 35:

36 Report by Ombudsman on section 9

- (1) As soon as practicable after the end of the period of 12 months from the commencement of section 9 (as inserted by the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*), the Ombudsman must prepare a report on:
 - (a) the operation of section 9, and
 - (b) the issue of penalty notices in respect of offences against section 9.
- (2) For that purpose, the Commissioner of Police is to ensure that the Ombudsman is provided with information about:
 - (a) any prosecutions brought under section 9, and
 - (b) the issue of penalty notices in respect of offences against section 9.
- (3) The Ombudsman may at any time require the Commissioner of Police, or any public authority, to provide any information or further information the Ombudsman requires for the purposes of preparing the report under this section.
- (4) The Ombudsman must furnish a copy of the report to the Attorney General and to the Commissioner of Police.
- (5) The Attorney General is to lay (or cause to be laid) a copy of the report before both Houses of Parliament as soon as practicable after the Attorney General receives the report.
- (6) If a House of Parliament is not sitting when the Attorney General seeks to lay a report before it, the Attorney General may present copies of the report to the Clerk of the House concerned.
- (7) The report:
 - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and
 - (d) is to be recorded:
 - (i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and
 - (ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly, on the first sitting day of the House after receipt of the report by the Clerk.

[4] Schedule 2 Savings and transitional provisions

Insert at the end of clause 1 (1):

Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011

Schedule 2 Amendments to other legislation

2.1 Criminal Procedure Regulation 2010

Schedule 3 Penalty notice offences

Insert in appropriate order in Columns 1 and 2 of Schedule 3, under the matter relating to the *Summary Offences Act 1988*:

section 9 \$200

2.2 Law Enforcement (*Powers and Responsibilities*) Act 2002 No 103

[1] Section 198 Move on directions to intoxicated persons in public places

Omit section 198 (1) (a) and (b). Insert instead:

- (a) is likely to cause injury to any other person or persons, damage to property or otherwise give rise to a risk to public safety, or
- (b) is disorderly.

[2] Section 198 (2)

Omit the subsection. Insert instead:

- (2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:
 - (a) preventing injury or damage or reducing or eliminating a risk to public safety, or
 - (b) preventing the continuance of disorderly behaviour in a public place.

[3] Section 201 Supplying police officer's details and giving warnings

Insert after section 201 (2C):

- (2D) In addition, if a police officer exercises a power that involves the making of a direction under section 198 on the grounds that a person is intoxicated and disorderly in a public place, the police officer must provide the person the subject of the direction with a warning that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given.

Note. See section 9 of the *Summary Offences Act 1988*.

[4] Section 206 Detention of intoxicated persons

Insert after section 206 (2):

- (2A) However, a police officer may detain an intoxicated person under this section even if behaviour constitutes an offence under section 9 of the *Summary Offences Act 1988* if the detention is not for the purpose of taking proceedings for the offence.

Note. Section 9 of the *Summary Offences Act 1988* makes it an offence for a person who is the subject of a move on direction to be intoxicated and disorderly in a public place. Part 8 of this Act would apply to a person who is arrested for such an offence and detained for the purpose of taking proceedings for the offence.

Appendix 2

Law Enforcement Powers and Responsibilities Act 2002

Part 14 Powers to give directions

Note. Safeguards relating to the exercise of the power to give a direction are set out in Part 15.

s.197 Directions generally relating to public places

- (1) A police officer may give a direction to a person in a public place if the police officer believes on reasonable grounds that the person's behaviour or presence in the place (referred to in this Part as relevant conduct):
 - (a) is obstructing another person or persons or traffic, or
 - (b) constitutes harassment or intimidation of another person or persons, or
 - (c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness, or
 - (d) is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or
 - (e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.
- (2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:
 - (a) reducing or eliminating the obstruction, harassment, intimidation or fear, or
 - (b) stopping the supply, or soliciting to supply, of the prohibited drug, or
 - (c) stopping the obtaining, procuring or purchasing of the prohibited drug.
- (3) The other person or persons referred to in subsection (1) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in.
- (4) For the purposes of subsection (1)(c), no person of reasonable firmness need actually be, or be likely to be, present at the scene.

s.198 Move on directions to intoxicated persons in public places

- (1) A police officer may give a direction to an intoxicated person who is in a public place to leave the place and not return for a specified period if the police officer believes on reasonable grounds that the person's behaviour in the place as a result of the intoxication (referred to in this Part as relevant conduct):
 - (a) is likely to cause injury to any other person or persons, damage to property or otherwise give rise to a risk to public safety, or
 - (b) is disorderly.
- (2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:
 - (a) preventing injury or damage or reducing or eliminating a risk to public safety, or
 - (b) preventing the continuance of disorderly behaviour in a public place.
- (3) The period during which a person may be directed not to return to a public place is not to exceed 6 hours after the direction was given.
- (4) The other person or persons referred to in subsection (1) (a) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in.
- (5) For the purposes of this section, a person is intoxicated if:
 - (a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and

- (b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.

198A Giving of directions to groups of persons

- (1) A police officer may give a direction under this Part to persons comprising a group.
- (2) In any such case, the police officer is not required to repeat the direction, or to repeat the information and warning referred to in section 201, to each person in the group.
- (3) However, just because the police officer is not required to repeat any such direction, information or warning does not in itself give rise to any presumption that each person in the group has received the direction, information or warning.

s.199 Failure to comply with direction

- (1) A person must not, without reasonable excuse, refuse or fail to comply with a direction given in accordance with this Part.

Maximum penalty: 2 penalty units.

- (2) A person is not guilty of an offence under this section unless it is established that the person persisted, after the direction concerned was given, to engage in the relevant conduct or any other relevant conduct.

s.200 Limitation on exercise of police powers

This Part does not authorise a police officer to give directions in relation to:

- (a) an industrial dispute, or
- (b) an apparently genuine demonstration or protest, or
- (c) a procession, or
- (d) an organised assembly.

Appendix 3

Law Enforcement (Powers and Responsibilities) Act 2002 – PART 3

Division 1 - General powers to require identity to be disclosed

11 Identity may be required to be disclosed

- (1) A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if the officer suspects on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place where the alleged indictable offence occurred, whether before, when, or soon after it occurred.
- (2) A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if the officer proposes to give a direction to the person in accordance with Part 14 for the person to leave a place.

Note. Section 201 sets out safeguards relating to requests made under this section.

12 Failure of person to disclose identity on request

A person who is requested by a police officer in accordance with sections 11 and 201 to disclose his or her identity must not, without reasonable excuse, fail or refuse to comply with the request.

Maximum penalty: 2 penalty units.

13 False or misleading information about identity

A person must not, without reasonable excuse, in response to a request made by a police officer in accordance with this Division:

- (a) give a name that is false in a material particular, or
- (b) give an address other than the person's full and correct address.

Maximum penalty: 2 penalty units.

Appendix 4

Law Enforcement (Powers and Responsibilities) Act 2002

Part 15 Safeguards relating to powers LEPR

201 Supplying police officer's details and giving warnings

- (1) A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following:
 - (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
 - (b) the name of the police officer and his or her place of duty,
 - (c) the reason for the exercise of the power.
- (2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):
 - (a) if it is practicable to do so, before or at the time of exercising the power, or
 - (b) if it is not practicable to do so before or at that time, as soon as is reasonably practicable after exercising the power.
- (2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).
- (2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:
 - (a) if it is practicable to do so, before or at the time of exercising the power, or
 - (b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.
- (2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:
 - (a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and
 - (b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.
- (2D) In addition, if a police officer exercises a power that involves the making of a direction under section 198 on the grounds that a person is intoxicated and disorderly in a public place, the police officer must provide the person the subject of the direction with a warning that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given.

Note. See section 9 of the *Summary Offences Act 1988*.
- (3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):
 - (a) a power to search or arrest a person,
 - (b) a power to search a vehicle, vessel or aircraft,
 - (c) a power to enter premises (not being a public place),
 - (d) a power to search premises (not being a public place),
 - (e) a power to seize any property,

-
- (f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,
 - (g) a power to request a person to disclose his or her identity or the identity of another person (including a power to require the removal of a face covering for identification purposes),
 - (h) a power to establish a crime scene at premises (not being a public place),
 - (i) a power to give a direction to a person,
 - (j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,
 - (k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object.
- (3AA) Despite subsection (3), this section does not apply to the exercise of a power to enter premises or to search premises or a vehicle, vessel or aircraft that is conferred by a covert search warrant.
- (3A) If a police officer is exercising more than one power to which this section applies on a single occasion, and in relation to the same person, the police officer is required to comply with subsection (1) (a) and (b) in relation to that person only once on that occasion.
- (4) If 2 or more police officers are exercising a power to which this section applies, only one officer present is required to comply with this section.
- (5) However, if a person asks another police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.
- (6) This section does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.
- Note.** See section 5 (1), which provides that this Act does not limit the functions of a police officer under an Act or regulation specified in Schedule 1.

Appendix 5

Fines Act 1996 No 99

Part 3 Division 1 Section 19

19 Summary of penalty notice procedure

- (1) The following is a summary of the penalty notice procedure under this Part:
- (a) **Breach of statutory provision**
A person is alleged to have committed an offence under a statutory provision for which a penalty notice may be issued (see Division 2 and Schedule 1).
 - (a1) **Determine whether to give official caution rather than penalty notice**
The appropriate officer determines whether to issue a penalty notice or whether an official caution would be more appropriate (see Division 1A).
 - (b) **Issue of penalty notice**
If it is determined that it is not appropriate to give an official caution, a penalty notice is issued under the relevant statutory provision. The notice requires payment of a specified monetary penalty, unless the person alleged to have committed the offence elects to have the matter dealt with by a court (see Division 2 and Schedule 1).
 - (b1) **Internal review**
A reviewing agency may conduct a review of the decision to issue the penalty notice. If a review is conducted, the agency may withdraw the penalty notice or confirm the decision and issue a penalty reminder notice (see Division 2A).
 - (c) **Penalty reminder notice**
If the penalty is not paid, a penalty reminder notice is issued. The person who is alleged to have committed the offence may elect to have the matter dealt with by a court (see Division 3).
 - (d) **Enforcement order**
If payment of the specified monetary penalty is not made and the person does not elect to have the matter dealt with by a court, a penalty notice enforcement order may be made against the person (see Division 4). If the person does not pay the amount (including enforcement costs) within 28 days, enforcement action authorised by this Act may be taken in the same way as action may be taken for the enforcement of a fine imposed on a person after a court hearing for the offence (see Part 4).
 - (e) **Withdrawal of enforcement order**
A penalty notice enforcement order may be withdrawn if an error has been made (see Division 4).
 - (f) **Annulment of enforcement order**
A penalty notice enforcement order may, on application, be annulled by the State Debt Recovery Office or, if the Office refuses the application, by the Local Court. If the order is annulled, the alleged offence is to be heard and determined by the Local Court (see Division 5).
- (2) This section does not affect the provisions of this Part that it summarises.

Appendix 6

Law Enforcement (Powers and Responsibilities) Act 2002

Part 16 Powers relating to detention of intoxicated persons

s. 206 Detention of intoxicated persons

- (1) A police officer may detain an intoxicated person found in a public place who is:
 - (a) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or
 - (b) in need of physical protection because the person is intoxicated.
- (2) A police officer is not to detain a person under this section because of behaviour that constitutes an offence under any law.
- (2A) However, a police officer may detain an intoxicated person under this section even if behaviour constitutes an offence under section 9 of the *Summary Offences Act 1988* if the detention is not for the purpose of taking proceedings for the offence.

Note. Section 9 of the *Summary Offences Act 1988* makes it an offence for a person who is the subject of a move on direction to be intoxicated and disorderly in a public place. Part 8 of this Act would apply to a person who is arrested for such an offence and detained for the purpose of taking proceedings for the offence.

- (3) An intoxicated person detained by a police officer under this Part is to be taken to, and released into the care of, a responsible person willing immediately to undertake the care of the intoxicated person.
- (4) An intoxicated person detained by a police officer under this Part may be taken to and detained in an authorised place of detention if:
 - (a) it is necessary to do so temporarily for the purpose of finding a responsible person willing to undertake the care of the intoxicated person, or
 - (b) a responsible person cannot be found to take care of the intoxicated person or the intoxicated person is not willing to be released into the care of a responsible person and it is impracticable to take the intoxicated person home, or
 - (c) the intoxicated person is behaving or is likely to behave so violently that a responsible person would not be capable of taking care of and controlling the intoxicated person.
- (5) An intoxicated person detained under this Part may be detained under such reasonable restraint as is necessary to protect the intoxicated person and other persons from injury and property from damage.
- (6) This section does not authorise a responsible person into whose care an intoxicated person is released to detain the intoxicated person.

Part 16 definitions

authorised place of detention means:

- (a) a police station, or
- (b) a detention centre within the meaning of the *Children (Detention Centres) Act 1987* approved for the time being by the Minister for the purposes of this Part as an authorised place of detention.

intoxicated person means a person who appears to be seriously affected by alcohol or another drug or a combination of drugs.

public place includes a school.

responsible person includes any person who is capable of taking care of an intoxicated person including:

- (a) a friend or family member, or
- (b) an official or member of staff of a government or non-government organisation or facility providing welfare or alcohol or other drug rehabilitation services.

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000

Toll free (outside Sydney Metro Area, NSW only): 1800 451 524

Tel. typewriter (TTY): 02 9264 8050

Facsimile: 02 9283 2911

Email: nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au