

19 September 2019

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Re: Review of the Local Nuisance and Litter Control Act 2016 (LNLC Act)

The Environmental Defenders Office (SA) Inc (“the EDO”) is an independent community legal centre with over twenty five years experience specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education. The EDO appreciates the opportunity to provide a submission. Our key recommendation is that there should continue to be both **objective and subjective elements of nuisance** under the LNLC Act. The approach should be broad enough to deal with the many and varied situations in which nuisance can arise, but also deliver consistency and objectivity in the interests of procedural fairness.

4.1 Local nuisance management and liquor licensing

Question: Should noise and other nuisances, other than those related to entertainment and patrons, that are common to licensed and non-licensed premises be dealt with under the LNLC Act?

The EDO submit that they should be as this prevents a gap between the role of the liquor licensing board and the activities regulated under the LNLC Act and furthermore these activities are not directly linked to the roles and functions of the board. It is preferable to have some overlap rather than have a gap or ineffective provisions.

Question: Should the LNLC Act be amended so that outdoor events can be subject to the local nuisance provisions despite the fact that some or all of the event space also requires a liquor licence?

We make a similar point which is that these activities are not those with which the board is concerned and it appears more logical for the LNLC Act to cover this as it deals generally with these issues (e.g. noise).

4.2 Interaction with other legislation

Question: Is the current suite of exclusions related to other legislation that deals with local nuisances sufficient or are there other Acts that also address local nuisance issues that should be considered for

exclusion under Part 3 of Schedule 1?

Yes.

4.3 Animals living in their 'natural' habitat

Is there a need for a definition of 'natural habitat'?

In general the LNLC Act should be as clear as possible in defining natural habitat but how to phrase this is difficult eg should it include things like mice and rats and would they be excluded given the 'feeding exemption' ?

4.5 Possible new 'things that are local nuisance'

Question: Should light be included as an agent causing local nuisance that can be regulated under the Act and if not, what issues would prevent its inclusion?

"Many environmentalists, naturalists, and medical researchers consider light pollution to be one of the fastest growing and most pervasive forms of environmental pollution. And a growing body of scientific research suggests that light pollution can have lasting adverse effects on both human and wildlife health." - <https://ehp.niehs.nih.gov/doi/full/10.1289/ehp.117-a20>

Given every other sensory nuisance is included it seems prudent to include light considering its ability to interfere with enjoyment to land (particularly at night) but a question is should natural light be included or just artificial? (e.g. glare from a building)?

In Queensland it is regarded as an environmental nuisance under s15 of the Environmental Protection Act - unreasonable interference or likely interference with an environmental value caused by—

(a) aerosols, fumes, light, noise, odour, particles or smoke;

It is also covered by local councils – e.g. Logan city council can order a compliance notice for light pollution (Local Law No. 10 (Public Health) 1999)

In the ACT the Environment Protection Act 1997 provides that a person has a general environmental duty to take all practical and reasonable steps to minimise environmental harm or environmental nuisance caused by their activities. This includes nuisance related to light. However there is no fixed level which constitutes a statutory nuisance; individual circumstances differ and each case has to be judged on its own merits.

In the UK the Environment Protection Act 1990 provides that for artificial light to be regarded as a statutory nuisance it must either unreasonably and substantially interfere with the use or enjoyment of a home or other premises or injure health or be likely to injure health. Council can then serve an abatement notice. The Act does not cover natural light and there are a number of exceptions for

artificial light (e.g. airports, bus stations, street lights). When looking into complaints about potential light nuisances, councils can assess one or more of the following:

- whether it interferes with the use of a property
- whether it may affect health
- how it's likely to affect the average person (unusual sensitivities aren't included)
- how often it happens
- how long it lasts
- when it happens
- whether it's in the town or country

Any exemption for public infrastructure should be limited to activities where nuisance cannot reasonably be avoided or managed. We support provisions which allow for early morning concrete pours during extremely hot weather but there must be limitations such as operating times.

7.1 Allowing councils to clean up and recover costs after if a hazard exists

Question: Should a retrospective costs order be made available to councils where immediate clean-up of litter is required because it is causing a hazard?

The EDP supports this proposal. In NSW there is an Emergency Pollution Clean Up Program, which has an annual budget of \$500,000. The program allows state agencies, emergency services or local councils the ability to apply for funding under the EPCUP if a party cannot be identified to pay for the immediate clean up/ recover costs. However you can also seek to recover costs through a court order **eg** Shire Council v Slade (2015) 214 LGERA 214; [2015] NSWLEC 135 (Kempsey (No 1)) which concerned the Council's clean-up of a polluted yard in the South West Rocks Rubbish Depot Reserve. In this case the Court ordered full recovery of the Council's costs (however they needed supporting evidence detailing the clean up and associated costs) . However, there are still issues with this system and many councils still cannot recover costs even with this power. This may be an issue where companies are liquidated or refuse to pay – see <https://www.smh.com.au/national/nsw/frustrated-councils-unable-to-demand-rubbish-be-removed-20130919-2u2ic.html>.

7.3 Illegal dumping

Question: Are there any suggested changes to the LNL Act that would assist in tackling illegal dumping?

The EDO submits that consideration be given to increasing fines in this area and promoting the use of relevant and evolving technology. The EDO notes that the ACT recently introduced increased fines for driving with uncovered loads – this may be covered in the road rules but it does not seem to be

explicitly mentioned, just that it is 'safely secured' . There is interesting new AI technology being used to combat this, however not so much an issue with the LNLC Act if it already permits surveillance. Other councils have used a strategy of increasing the effort required to illegally dump by making access to hotspots difficult, using structural approaches such as barriers, landscaping and lighting. New Zealand has higher penalties for waste which could cause harm to other people. SA legislation outlines specific items which are considered to be class A or B hazardous material but perhaps this could be extended to include a broader category of items which could cause harm to humans/ the environment? (eg s 15 of Litter Act 1929 (NZ) "and the litter deposited is of such a nature as is likely to endanger any person or to cause physical injury or disease or infection to any person coming into contact with it ")

8.3 Which court is best placed to deal with nuisance, litter and illegal dumping?

Question: What are the views of local government regarding the current jurisdiction that the LNLC Act falls within, and what are the positives and negatives for changing the jurisdiction to the Magistrates Court?

NSW uses a blended model whereby 'higher tier' offences are heard either summarily in the Land and Environment Court or on indictment in the Supreme Court. However other lower offences may be heard in the Land and Environment Court or before a local court. It should be noted that there are maximum penalties which can be imposed by the local court and that some offences are expressly prohibited from being pursued in the local court. Victoria uses the Magistrates Court.

Whilst the SA ERD Court has relevant expertise there are sometimes costs and representation issues affecting access to justice. We submit that perhaps the ERD Court could hear more serious matters and lesser matters could be dealt with by the Magistrates Courts.

8.4 What jurisdiction is best placed to deal with administrative appeals?

Question: Does the specialist nature of the ERD Court provide benefits when hearing appeals against notices that would outweigh any cost benefits associated with moving appeals to SACAT?

Victoria uses VCAT to review decisions which relate to works approvals, licenses, and fees under the Environment Protection Act 1970. New South Wales relies on the Land and Environment Court to deal with appeals.

Although the ERD Court has specialist knowledge as noted there may be access to justice issues. Allowing SACAT reviews initially would allow faster, simpler and cheaper resolution of matters. The ERD Court and/or District Court could review SACAT decisions.

9. Other improvements

A key challenge is accounting for new technologies causing nuisance particularly airborne software such as drones and light weight aircrafts which is relevant when considering future light aircraft. However the LNLC Act does not specifically mention these apparatus and excludes “aircraft”. Federal legislation provides that if under 2kgs and for non commercial use there is no need for a permit. There are currently no internationally-mandated noise aviation standards for drones. However they may be covered by federal aviation noise regulations. Until recently the federal aviation department was of the view that the Air Navigation (Aircraft Noise) Regulations 2018 (the Regulations) did not apply to drones, and that approvals under the Regulations were intended for vintage, adventure, ex-military and other historical aircraft operations for which noise standards do not apply. Following representations from the community and the Australian Capital Territory (ACT) Standing Committee on Economic Development and Tourism, the department has examined carefully the applicability of the Regulations to drone operations. The department is now of the view that a range of commercial and recreational drone operations within Australia require approvals under section 17 of the Regulations. In our submission SA should consider LNLC Act regulations covering drone and light aircraft use to avoid any confusions which are currently presented by the federal legislation. Moreover, it would assist community members to report to local councils rather than a federal department.

6. Improve subjective assessment of nuisance or introduce objective measures of compliance

The LNLC Act contains a subjective assessment under section 50 which allows authorized officers to assess the presence of nuisance with their own senses. There is guidance on this subjective assessment through the Regulations (regulation 4) which outline certain considerations when making a subjective assessment of the presence of nuisance. However, according to the Discussion Paper,¹ the *Environment Protection (Noise) Policy 2007 (Noise Policy)* provides objective guidance on what is considered to meet the general environmental duty (section 25 – reasonable and practicable measures) relating to noise. In essence, this sets noise standards for compliance with the general environmental duty. The LNLC Act has similar provisions to the general environmental duty under section 27 – defence of due diligence. Assessment of noise against the Noise Policy to assist in determining whether the defence of due diligence is likely to be applicable is appropriate in cases where the noise is of a borderline nature. The Discussion Paper² suggests that a similar approach could be incorporated into the LNLC Act or Regulations to provide clarity around the use of such an approach.

The EDO submits that there seems to be both subjective and objective elements to section 50. The current subjective assessment requires assessment using objective criteria. There is also the issue of nuisance laws being scattered in different legislative regimes. Ideally, there should be one approach

¹ Review of the Local Nuisance and Litter Control Act 2016 discussion paper, page 8.

² Review of the Local Nuisance and Litter Control Act 2016 discussion paper, page 8.

within LNLC Act that is broad enough to deal with the many and varied situations in which nuisance can arise, but an approach that also delivers consistency and objectivity so that people accept the fairness of the process. The EDO suggests section 50 should be interpreted, or amended to reflect, a three-step assessment process. The current section 50 reads:

- (1) In proceedings under this Act, where it is alleged that a person caused local nuisance within the meaning of section 17, evidence by an authorised officer that he or she formed the opinion based on his or her own senses that—*
- (a) the agent alleged to have caused the local nuisance when discharged or emitted from a place occupied or a vehicle owned by the person travelled to a place occupied by another person; and*
- (b) the level, nature or extent of the agent within the place occupied by the other person was such as to constitute an unreasonable interference with the person's enjoyment of the place, constitutes proof, in the absence of proof to the contrary, of those matters.*

Section 50(1)(a) determines whether the alleged person caused the nuisance. Section 50(1)(b) appears to have two elements within it: the level of nuisance and whether it was reasonable. It is suggested that sub-section 50(1)(b) either be amended to reflect two separate provisions or be interpreted as two separate sets of criteria.

1. *Factual assessment: assessment of the level of nuisance* (proposed section 50(1)(b))

For consistency and clarity, the EDO submits that there should be standard criteria available in the LNLC Act to assess the level, nature or extent of the nuisance. There are many mechanisms that could be employed to factually assess the nuisance (for example, high-low chart suggested in the Discussion Paper). There could even be specific charts, or the use of technology, to measure specific nuisances like noise or dust.

The third element is particularly necessary when the nuisance is less obvious, and/or to assess if the nuisance is reasonable given the circumstances. The third element will either be obvious where the noise, smell or dust etc is clearly unreasonable, or a more detailed analysis of objective criteria would be employed to assess the reasonableness. Either way, the second element of the factual assessment of the nuisance will inform the second element, however the criteria for reasonableness should be different to reflect the possible competing values and rights of the dispute.

2. *Reasonableness: is the nuisance reasonable in the circumstances?* (proposed section 50(1)(c))

The question becomes harder when there is, perhaps, a valid reason for the nuisance. For example, there is nuisance being caused by an air conditioner that is deemed loud at the high end of any

nuisance chart but it is an extreme heat event where those using the air-conditioner may suffer more than those experiencing the nuisance. The second example is when the nuisance level is borderline and then reasonableness again becomes the relevant question to ask.

In the former example, Victoria uses an objective compliance approach to this issue. Here, they prohibit the use of domestic air conditioners overnight where noise is audible within a habitable room of other residential premises unless there is an extreme weather event. This prohibition, with its exception, is a specific objective approach with a clear set of circumstances triggering the applicability of the prohibition. However, it is impossible to list every specific situation with its exception in the LNLC Act. Therefore, a generalised approach is needed in the LNLC Act for instances of nuisance that cannot yet be conceptualised. As technology develops, and populations grow, it is difficult to predict what may cause a nuisance and the circumstances in which they appear. This three-step approach to assessing a nuisance may help to address novel situations in an objective and consistent way. Notwithstanding the practicalities of allowing authorities to efficiently assess the situation with the subjective element.

Objective criteria should also be employed to determine whether the nuisance is reasonable. This should allow for a balancing process. This is where the guidelines for the current Regulations would be relevant, which state any authorised officers must take into account:³

- (i) the sensitivity of the affected premises;
- (ii) the land use categories of the source premises and the affected premises;
- (iii) whether the local nuisance was avoidable;
- (iv) whether, in the case of local nuisance generated by an activity outside of normal business hours, the activity has been so timed to avoid inconvenience to traffic or pedestrians during normal business hours (for example, in the case of early morning rubbish collection, or late night construction works, in populated or high traffic areas);
- (v) whether all reasonable measures have been taken at the source premises to prevent or minimise the local nuisance;
- (vi) whether, in the case of local nuisance generated by an activity carried out under an authorisation within the meaning of the Development Act 1993, the activity is being carried out in accordance with the authorisation.

The EDO submits that a further criterion could be added to allow for a balanced process of assessing reasonableness including other legitimate competing values and rights of affected and source premises.

Non-legislative approaches

³ *Local Nuisance and Litter Control Regulations 2017*, r 4.

The EDO agrees that there should be updated guidance tools for local councils. In addition, it would be appropriate to include further training of local government staff or the development of a standard operating procedure that could be adopted by councils. These types of non-legislative measures could be important for adequate and consistent application of any changes to the LNLC Act.

Should you have any queries in relation to this submission please email the writer at Melissa.ballantyne@edo.org.au or telephone 8359 2222 Tuesdays and Thursdays.

Yours faithfully

A handwritten signature in cursive script that reads "M Ballantyne". The signature is written in dark ink on a light-colored background.

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