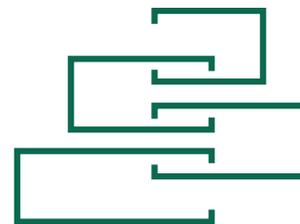


# Homeless Persons' Legal Service

Legal help for the homeless and those at risk of homelessness  
A joint initiative of the Public Interest Law Clearing House Inc  
and the Public Interest Advocacy Centre Ltd

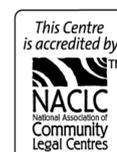


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## **SUBMISSION IN RESPONSE TO OMBUDSMAN NSW ISSUES PAPER: *SUMMARY OFFENCES ACT 1988* SECTION 9: CONTINUATION OF INTOXICATED AND DISORDERLY BEHAVIOUR FOLLOWING MOVE ON DIRECTION**

14 February 2013

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# Introduction

## Homeless Persons' Legal Service

The Homeless Persons' Legal Service (HPLS) is a joint initiative of the Public Interest Advocacy Centre (PIAC) and the Public Interest Law Clearing House (PILCH) NSW. HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area. These agencies provide direct services, such as food and accommodation, to people in housing crisis. The clinics are co-ordinated by HPLS and staffed by lawyers acting pro bono from PILCH members.

Since 2004, HPLS has provided free legal advice and representation to almost 7,000 people who are homeless or at risk of homelessness. During 2010-2012, HPLS helped 1,770 clients with a range of civil and criminal law matters. Since 2008, the HPLS Solicitor Advocate has provided legal representation for people who are homeless and charged with minor criminal offences. The role was established to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge of how to navigate the legal system; the need for longer appointment times to obtain instructions; and, the need for greater capacity to address multiple and complex interrelated legal and non-legal problems. Since commencing in 2008, the HPLS Solicitor Advocate has provided court representation to 362 individual clients. The overwhelming majority of these clients are referred from the nine HPLS clinics located in the inner Sydney metropolitan area (relevant clients accessing the Parramatta clinic are referred to Legal Aid NSW).

From January 2010 to December 2012, the HPLS Solicitor Advocate provided court representation to 241 individual clients facing criminal charges. Of these:

- 48 per cent disclosed they had a mental illness
- 63 per cent disclosed they had drug or alcohol dependency;
- 72 per cent had either a mental illness or drug/alcohol dependency; and
- 41 per cent had both a mental illness and a drug/alcohol dependency.<sup>1</sup>

## Homelessness and human rights

HPLS strongly endorses the principle that addressing homelessness must take place within a human rights framework. The comments provided in this submission reflect this principle.

The right to adequate housing is recognised in Article 25 of the Universal Declaration of Human Rights and the binding right is set out in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>2</sup> Article 11(1) of ICESCR recognises:

... the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

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<sup>1</sup> Further information about PIAC, PILCH NSW and HPLS is provided at Appendix A.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

The UN Committee on Economic, Social and Cultural Rights has extensively defined the nature of the right to adequate housing. The Committee established that the right to adequate housing involves more than just having shelter but that it is the 'right to live somewhere in security, peace and dignity'.<sup>3</sup> The Committee also established seven indicia of adequacy, including security of tenure and that housing is affordable and accessible.<sup>4</sup> As a State Party to the ICESCR, Australia is required by Article 11(1) to take appropriate steps to ensure the realisation of the right to adequate housing.

HPLS recognises the right of homeless people to enjoy public spaces without arbitrary interference, disturbance, harassment or discriminatory treatment. The following articles of the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> are directly relevant to the right of homeless people to have quiet enjoyment of public space:

- Article 12 - Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- Article 17 - No one shall be subjected to arbitrary or unlawful interference with his privacy...
- Article 21 - The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.
- Article 22 –
  1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
  2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

HPLS also recognises the fundamental right of people to 'take part in the conduct of public affairs', as enshrined in Article 25 of the ICCPR.<sup>6</sup> For this reason, in 2009 HPLS established its homeless consumer advisory committee, StreetCare. StreetCare enables HPLS to obtain direct input from homeless people into its policy advocacy. HPLS believes that the active involvement of those who are or have been homeless leads to the development of more effective public policy in response to issues facing homeless people, as well as assisting in the empowerment of participants.

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<sup>3</sup> General comment No. 4, The right to Adequate Housing (Art. 11(1)), UNCESCR, General Comment No 4, 6th sess, [7], UN Doc E/1992/23 (1991).

<sup>4</sup> Ibid [8].

<sup>5</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993). The full text of the ICCPR is available at: <<http://www2.ohchr.org/english/law/ccpr.htm>>.

<sup>6</sup> Ibid.

StreetCare is made up of nine people who have recent experience of homelessness. The members reflect the diversity of homelessness in New South Wales, and include men, women, transgender people, young people, and representatives from inner Sydney, the outer suburbs and rural and regional areas. StreetCare also provides a mechanism for HPLS to engage actively with other people who are homeless or at risk of homelessness, to facilitate their input into public policy and law reform initiatives.

Since 2011, members of StreetCare have provided comments to HPLS regarding the need for respectful and appropriate communication and interaction by NSW Police towards homeless people, such that homeless people are not discriminated against on the basis of their homelessness status. Members of StreetCare have been actively involved in providing advice and recommendations to the NSW Government on the development and implementation of the revised Protocol for Homeless People in Public Places, which has been endorsed by 12 NSW government departments and statutory agencies, including NSW Police.

### **Amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Summary Offences Act 1988***

On 7 June 2011, the NSW Parliament passed legislation to enhance police powers relating to intoxicated people, allowing police to move on an individual who is intoxicated in a public place (*Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011*). This Act removed a previous legislative requirement that such a 'move-on' direction could only be given to a group of three or more intoxicated individuals.

On 30 September 2011, the NSW Parliament passed the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (Amendment Act), which amended the *Law Enforcement (Powers and Responsibilities) Amendment Act 2002* (LEPRA). This amendment further expanded the police 'move-on' power, to enable police to give a direction to an intoxicated person to leave a public place on the ground that their behaviour is disorderly. In addition, the Amendment Act created a new offence, under section 9 of the *Summary Offences Act 1988*, 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.

At the time the legislation was passed, HPLS expressed concern about the potential effect the legislation may have on people experiencing primary homelessness (i.e. people sleeping rough on the streets, in parks, sheds, humpies, in cars, railway carriages, derelict buildings). In summary, these concerns were:

- The amendment to LEPRA was unnecessary as police already had sufficient move-on powers under existing legislation (i.e. section 197 of LEPRA).
- The amendment would have a disproportionate effect on people experiencing primary homelessness: the omission of the requirement for an intoxicated person to be in a group of three or more intoxicated people effectively widened the class of persons to whom such a police direction could be given. A homeless person who is intoxicated is less likely to be in a group of three or more persons, and more likely to be on his/her own.

- The amendment could expose homeless people who are intoxicated to unnecessary policing interaction, with the risk that such contact could escalate into criminal charges under the amended *Summary Offences Act*.

## **Other relevant recent developments regarding homeless people in public space**

### **The Crimes Amendment (Consorting and Organised Crime) Act 2012**

In April 2012, the NSW Parliament passed the *Crimes Amendment (Consorting and Organised Crime) Act 2012* ('Anti-consorting legislation'), which created an offence for a person to 'habitually consort' with at least two convicted offenders on at least two occasions after the person has received a warning from the police to the effect that the person is known to be consorting with two or more convicted offenders.

PIAC and HPLS have expressed concerns that the Anti-consorting legislation would be used against people who were not intended to be covered by this legislation. In particular, there is a concern that the legislation may be used to provide "warnings" to homeless people who gather together in public places, to effectively force them to move on from their position and to cease gathering together. Given the evidence of a significant relationship between homelessness, previous criminal offending and experience of imprisonment,<sup>7</sup> it is likely that a high proportion of homeless people would come within the definition of a 'convicted offender' under the Anti-consorting legislation. This creates a potential for the legislation to be used to target groups of homeless people gathering together in public places.

HPLS notes that under the legislation, the NSW Ombudsman is to prepare a report on the operation of the Anti-consorting legislation after the legislation has been in operation for two years.

### **The revised Protocol for Homeless People in Public Places**

In October 2012, the NSW Government released the revised Protocol for Homeless People in Public Places ('the Protocol'). The Protocol has been endorsed by 12 NSW Government Departments and statutory agencies that have an operational presence in public places, or provide a service to assist homeless people. These include NSW Police, RailCorp, the State Transit Authority of NSW and the Sydney Harbour Foreshore Authority.

The Protocol aims to ensure that homeless people are treated respectfully and appropriately and are not discriminated against on the basis of their homeless status. It also aims to assist homeless people to receive needed or requested services.

According to the Protocol, a homeless person is not to be approached unless:

- they request assistance;
- they appear to be distressed or in need of assistance;

<sup>7</sup> See Willis, Matthew and Makkai, Toni (2008), 'Ex-Prisoners and Homelessness: Some Key Issues', *PARITY*, Volume 21, Issue 9, October 2008, 6-7; Willis, Matthew (2004), Ex-Prisoners, SAAP, Housing and Homelessness in Australia, Final Report to the National SAAP Coordination and Development Committee, Australian Institute of Criminology, May 2004, 25; Baldry, Eileen, McDonnell, Desmond, Maplestone, Peter and Peeters, Manu (2003), Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?, Australian Housing and Urban Research Institute, AHURI Final Report No. 46, August 2003, 4.

- an official seeks to engage with the person for the purpose of information exchange or provision of a service;
- their behaviour threatens their safety or the safety and security of people around them;
- their behaviour is likely to result in damage to property or have a negative impact on natural and cultural conservation of environment, including cultural heritage, water pollution and fire risks;
- they are sheltering in circumstances that place their or others' health and safety at risk;
- they are a child who appears to be under the age of 18;
- they are a young person who appears to be 16 or 17 years old who may be at risk of significant harm; or
- they are a child or young person who is in the care of the Director-General of the Department of Family and Community Services or the parental responsibility of the Minister for Family and Community Services.

The Protocol is based on the principles that homeless people have the same entitlement as any member of the public to –

- be in public places, at the same time respecting the right of local communities to live in a safe and peaceful environment;
- participate in public activities or events; and
- carry with them and store their own belongings.

The Protocol was originally introduced in 2000, to provide a framework for relations between officials, including police, and homeless people in public places, as Sydney prepared to host the 2000 Olympics. The original protocol was not reviewed until 2012. The revised protocol is to be reviewed every two years.

It is important to note that the Protocol is not binding and has no legal force. While the Protocol may assist in improving relations between police and homeless people, it is still subject to individual police discretion.

From late 2011, members of StreetCare, were actively involved in reviewing the original Protocol, and providing advice as to the contents of the revised Protocol, and the appropriate strategies for implementation of the protocol, including recommendations for training of officials and police. In 2012, HPLS together with members of StreetCare, produced a series of six short videos in which individual members of StreetCare were interviewed about their experiences of homelessness. The video project, entitled "In their Words", has been made available for agencies and government departments who have interaction with, or provide services to, homeless people, for use in training and skills development.<sup>8</sup>

In December 2012, HPLS was advised by the Sydney Local Area Command ('LAC') of NSW Police that the "In their Words" videos would be used in training police officers in 16 Local Area Commands in Sydney and Harbour area, for implementation of the revised Protocol. HPLS understands that NSW Police is considering using the videos for training police across NSW in relation to implementation of the Protocol.

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<sup>8</sup> The "In their Words" videos can be accessed via the PIAC web site:  
<<http://www.piac.asn.au/news/2012/11/streetcare-videos-voices-street>>.

## Impact of legislation on homeless people

As indicated above, at the time the legislation was passed, HPLS expressed concern that the amendments may have a disproportionate effect on homeless people. The evidence available to HPLS regarding the impact of the amendments should be considered in a geographically specific context.

### Inner Sydney region

On the basis of case-work data from HPLS, and specifically from the HPLS Solicitor Advocate, there has been no significant impact of the amendments on HPLS clients in the inner Sydney region. Statistics from the HPLS Solicitor Advocate indicate that there has been no statistically significant increase in offences stemming from a failure to follow a police direction to 'move on'. In addition, there has been no discernible increase in reports from clients attending HPLS clinics in the inner Sydney region, or through the HPLS Solicitor Advocate, of police directions to homeless people to move on.

This is consistent with reports from members of StreetCare, who have indicated that in their perception, the uniformed police of inner Sydney LACs are more skilled and experienced in appropriately communicating to and interacting with homeless people. In particular, members of StreetCare have expressed the view that uniformed police in inner Sydney had a much greater awareness of the aims and expectations of the original Protocol, and that this appears to have produced a less aggressive and confrontational approach to policing homelessness in the inner city, compared to other areas of metropolitan Sydney or rural NSW.<sup>9</sup>

HPLS has welcomed the expressed intention of senior police in the Sydney and Harbour LACs to conduct further training to facilitate the implementation of the revised Protocol. In particular, HPLS is pleased that they intend to incorporate the voices of people who have experienced homelessness into the training through the use of the "In their Words" videos.

### Parramatta region

The HPLS Solicitor Advocate does not generally represent clients from the Western Sydney region. However, two members of the HPLS consumer advisory council, StreetCare, are from Parramatta, and have close links with other homeless people from the Parramatta and Greater Western Sydney Region. They have reported anecdotally that since mid-2012, there has been a significant increase in police activity in relation to homeless people, specifically in the Parramatta mall and retail precinct. StreetCare members have stated that they have received reports from homeless people being requested to move on from public areas in and close to the Parramatta mall, and being directed not to associate with other homeless people with whom they consort in that region. It is unclear whether these requests and directions are being made under the amended LEPR, the Anti-consorting legislation, or under other legislative provisions such as section 197 of LEPR. HPLS and PIAC are considering undertaking further direct consultations, with the assistance of StreetCare, with homeless people in the Parramatta region to obtain more specific details of the nature of this apparent increased policing activity towards homeless people in that area.

The reports of more intensive and confrontational policing in Western Sydney are consistent with earlier comments and reports from StreetCare members that outside of the inner

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<sup>9</sup> AJ, 'The NSW Police Protocol: A Streety's Perspective', *PARITY*, Volume 25, Issue 2, May 2012, 36-37.

Sydney region, awareness of the original Protocol for Homeless People in Public Places amongst NSW Police is haphazard at best, and in some areas, non-existent. This was a recurring theme in consultations undertaken by StreetCare in Western Sydney and Newcastle in 2010, on behalf of Housing NSW. Several of those consulted during these forums spoke of the difficulties they had with NSW Police members, sharing experiences of being harassed by police while they were trying to sleep in local parks or other public spaces:

*“Every few weeks I get moved on by the cops from where I am sleeping. I am in a private spot and not hurting anyone. There should be a law that stops them moving you on if you are causing no harm.”*

- Participant, StreetCare Consumer Forum, The Hunter, 2010

*“It is not safe on the streets but as if the cops care. Would they do anything if I told them I had been attacked? I don’t think so!”*

- Participant, StreetCare Consumer Forum, The Hunter, 2010

*“I am sick of it. Why aren’t I just allowed to find a space to sleep?”*

- Participant, StreetCare Consumer Forum, The Hunter, 2010

*“Three of us were sleeping in a park for about four months. One night we were suddenly woken by police, had our possessions confiscated and told to move on from the area. We had no previous interactions with police. They threatened to charge us if we did not move on, even though we had done nothing to disturb the local community.”*

- Participant, StreetCare Consumer Forum, Western Sydney, 2010

The reports received by HPLS from Western Sydney and Parramatta are in marked contrast to the reports and observations from HPLS clinics in inner Sydney. This reinforces the importance of considering the impact of the legislation on homeless people in each Local Area Command of NSW Police, as there may be considerable variation in the approach to policing homelessness in each region.

Given the differences observed between Inner Sydney and Parramatta, HPLS maintains its original concerns about the legislation in relation to its potential disproportionate impact on homeless people. The actual impact may depend upon each LAC’s approach to implementing the Protocol, and the commitment to ensure that each member of the NSW Police is adequately trained in the aims, expectations and principles of the Protocol, and the implications it has for appropriate and respectful policing of homeless people in public places.

## **Conclusion**

HPLS welcomes the opportunity to respond to the NSW Ombudsman’s review of recent changes to police move on powers in relation to intoxicated persons. The review is particularly timely as it coincides with the recent release of the revised Protocol, to which NSW Police is a signatory.

HPLS remains concerned that the amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Summary Offences Act 1988* have the potential to have a

disproportionate impact on homeless people, particularly those in primary homelessness who spend much of their time living and sleeping in public places. While such an impact may be ameliorated to some extent by positive policing practices towards homeless people, as recommended by the Protocol, the extent to which that occurs will be determined by the commitment to implement the Protocol and train NSW police members across the state in a consistent and comprehensive manner. This will require a commitment from each Local Area Command to ensure all police are appropriately trained in implementing the Protocol.

HPLS is concerned about reports from its consumer advisory committee, StreetCare, regarding the recent history of inconsistent policing practices towards homelessness across Sydney, and in rural and regional NSW, and the apparent ignorance of the original Protocol amongst some police outside of inner Sydney. Accordingly, HPLS strongly recommends that a comprehensive, statewide strategy for police training and implementation of the revised Protocol, which includes examples of the lived experiences of homeless people (through incorporation of material such as StreetCare's "In their Words" video project), be initiated. This will ensure that there is a consistent approach to policing in relation to homeless people across NSW, which accords with the aims and principles of the Protocol. HPLS submits that such an approach may reduce the incidence of inappropriate policing practices and usage of additional move on powers towards homeless people.

## APPENDIX A

### **The Public Interest Advocacy Centre**

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC receives funding from Industry & Investment NSW for its work on energy and water, and from Allens Arthur Robinson for the Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

### **The Public Interest Law Clearing House**

The Public Interest Law Clearing House (PILCH) NSW was established in 1992 by the Law Society of New South Wales, the Public Interest Advocacy Centre and the private legal profession to respond to the growing incidence of unmet legal needs within the community. Underlying the establishment of PILCH is the commitment from lawyers that the provision of legal services on a pro bono publico ('for the public good') basis is intrinsic to legal professional responsibility. The aims of PILCH are:

- to identify matters of public interest that warrant legal assistance pro bono publico;
- to identify the legal needs of non-profit organisations;
- to match disadvantaged and under-represented individuals, groups and non-profit organisations with a need for otherwise unavailable legal assistance with PILCH member firms and barristers;
- to utilise the diverse skills and resources of lawyers in a broad range of public interest matters;
- to expand the participation of private practitioners in the law reform process;
- to seek the integration of pro bono work with legal practice;
- to encourage co-operation between private practitioners and public interest lawyers:  
and
- to establish/coordinate public interest projects which seek systemic reform.

PILCH provides services to community organisations and individuals for free. It is a membership based organisation with members including small, medium and large private law firms, corporate law departments, individual barristers, barristers' chambers, law schools, accounting firms, Legal Aid NSW, the Law Society of NSW, the NSW Bar Association, and PIAC.

### **Homeless Persons Legal Service**

HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area. The clinics are hosted by the following welfare agencies:

- Edward Eagar Lodge (Wesley Mission);
- Matthew Talbot Hostel (St Vincent de Paul Society);
- Newtown Mission in Partnership with Newtown Neighbourhood Centre;
- Norman Andrews House (Uniting Care);
- Parramatta Mission (Uniting Church);
- Streetlevel Mission (Salvation Army);
- The Station, Vincentian House (St Vincent de Paul Society);
- Vincentian Village (St Vincent de Paul Society);
- Wayside Chapel (Uniting Church); and
- Women's and Girls' Emergency Centre.