

Review of the *Local Nuisance and Litter Control Act 2016* discussion paper

Issued June 2019

EPA 1115/19: This discussion paper outlines issues being considered in a review of the Local Nuisance and Litter Control Act 2016.

1 Introduction

The *Local Nuisance and Litter Control Act 2016* (LNLC Act) passed Parliament on 18 May 2016 and the Governor in Executive Council gave assent on 26 May 2016. The Act commenced in two parts. The Regulations and all elements of the LNLC Act except for those specific to local nuisance offences commenced on 1 February 2017. The local nuisance offences commenced on 1 July 2017.

The LNLC Act provides the community with a more effective and consistent local service for the management of nuisance complaints and heightened deterrence for littering and illegal dumping.

The LNLC Act provides a modern legislative scheme for litter control in South Australia including tiered offences depending on the type of litter (small versus large quantities, dangerous and hazardous litter); improvements in the use of surveillance for evidence gathering in the case of illegal dumping (linking an offence to the registered owner of a vehicle); allowing non-government organisations to undertake compliance activities (subject to approval); and for public reporting of littering and illegal dumping.

The first anniversary of the full commencement of the LNLC Act was 1 July 2018. This milestone provides a useful prompt to undertake a minor review of the operation of the LNLC Act. Feedback from councils, the community, and other stakeholders indicate that there is potential to fine-tune elements of the legislation. This minor review will consider the functionality of the legislation and the effectiveness of the legislation within the context of whether the scope of the legislation is appropriately addressing nuisance complaints, littering and illegal dumping issues in the community.

This paper discusses issues that have been identified as requiring review. In addition to comment on the issues presented in this paper, the Environment Protection Authority (EPA) welcomes any further feedback from stakeholders on the legislation. All issues raised during consultation will be considered by the EPA and responded to through a report on the consultation. Following the consultation period a report will be submitted to the Minister for Environment and Water, Hon David Speirs MP for his consideration. The EPA will assist the Government with any amendments that they seek to progress.

Comments on the review are due by **Friday, 4 October 2019**.

Comments may be forwarded by mail or email to:

Review of the Local Nuisance and Litter Control Act 2016
Environment Protection Authority
GPO Box 2607
ADELAIDE SA 5001
Email: epainfo@sa.gov.au (mark subject as Review of Local Nuisance and Litter Control Act)

Emailed submissions are preferred.

All submissions received by the EPA during the consultation period will be acknowledged and treated as public documents unless provided in confidence, subject to the requirements of the *Freedom of Information Act 1991*, and may be quoted in reports.

2 Implementation of the Local Nuisance and Litter Control Act 2016

As part of consultation with the Local Government Association (LGA) during development of the LNLC Act, the EPA agreed to provide a range of support services designed to assist local government with the transition to managing local nuisance issues. A service level agreement (SLA) was entered into for the provision of support services for environmental nuisance matters.

Under the terms of the SLA the EPA, since commencement of the LNLC Act, has provided:

- one staff member to manage and coordinate implementation of the LNLC Act in close consultation with the LGA and individual councils
- access to operational staff to directly assist councils in the areas of operational administration, application of compliance standards and dealing with difficult issues
- equipment to assist councils to respond to nuisance issues
- training to council staff
- a suite of fact sheets, guidelines and standard operating procedures for use by councils;

The EPA has attended all regions of the state and provided training to 330 council staff in relation to local nuisance, in addition to 220 council staff trained in litter provisions of the LNLC Act.

Councils continue to be in regular contact with the EPA. The types of issues addressed have ranged from basic training and information around roles and responsibilities and introduction of the LNLC Act, through to more complex issues including field-based assistance and training in use of noise meters.

3 Local nuisance discussion points

The local nuisance provisions of the LNLC Act allow councils to manage various nuisance issues in their community. Nuisances covered by the legislation include environmental nuisances (eg smoke and noise), insanitary conditions and more general amenity nuisances (eg unsightly premises). These nuisances were previously addressed using the *Environment Protection Act 1993* (EP Act), *Local Government Act 1999* or the *South Australian Public Health Act 2011*. Since the commencement of the local nuisance elements of the LNLC Act on 1 July 2017 there have been various minor issues raised with the EPA. These issues are outlined in the sections below and comment is invited as to whether change is required, and if so, what changes would be most suitable.

3.1 What is and is not local nuisance?

The LNLC Act describes the meaning of local nuisance in section 17 with the ability to further refine the definition of what is and is not local nuisance through Schedule 1 of the LNLC Act. The definition was refined following consultation feedback from councils on the draft Bill which had light and heat within the meaning of local nuisance. These were removed to ensure the starting point for regulation of nuisance was manageable by councils and not too broad. Further

consideration of the addition of light and heat at a later date once the Act had been implemented was noted in the consultation report for the draft Bill. As an alternative the Act provides the ability to prescribe specific types of nuisance that might include light or heat in the regulations with the agreement of local government to do so. An example of this is 'vibration', prescribed in Part 2 of Schedule 1.

A number of determinations as to what is not local nuisance are also included in Part 3 of Schedule 1 of the LNLC Act. These listings fall within three categories. The first category of listings is where the issue of nuisance is adequately managed under alternative legislation. This is where an activity is approved under other legislation, the approval or conditions of the approval adequately minimise or prevent nuisance impacts, and those conditions are complied with.

An example of this is a development authorisation with conditions of approval related to time of operation that effectively limits noise to reasonable business hours [covered by Clause 5(d)]. In this circumstance the noise from the day time operation would need to be considered reasonable for the approved activity. This ensures that the development system takes precedence in determining the appropriateness of a land use for a certain location. By comparison, if an approved development had no relevant noise controls in place through condition of approval or had conditions relating to noise control but these conditions were not being complied with, both the Development Act 1993 and LNLC Act could be applied to gain compliance.

The second category of listings is where another Act contains a resolution or complaints process for nuisance issues. An example of this is the *Strata Titles Act 1988* that contains remedies for nuisance within a strata management group. A further example of this type, the *Liquor Licensing Act 1997*, is discussed in detail later in this paper as to whether the provisions of that Act are appropriate to cover all forms of nuisance or are better limited to entertainment type nuisances from established premises.

The third category of listings is where the nuisances are considered a reasonable feature in the community. These include noise from a school or kindergarten, or emergency vehicle sirens.

4 Review of current inclusions and exclusions

4.1 Local nuisance management and liquor licensing

The Liquor Licensing Act 1997 (section 106) provides a complaints process for most forms of nuisances from premises licensed under that Act. So as to avoid conflict between this legislation and the LNLC Act, any form of nuisance that can be dealt with under the Liquor Licensing Act is excluded from being regulated under the LNLC Act through Schedule 1 ('things that are not local nuisance'). As a result, councils have no ability to apply the LNLC Act for most forms of nuisance, and complaints can only be managed by the Office of Liquor and Gambling, under the Liquor Licensing Act.

4.1.1 Bricks and mortar licensed premises

In the context of bricks and mortar licensed premises this means nuisance noise from air conditioners or other plants on the property that would be addressed under the LNLC Act by councils on any other type of commercial premises cannot be addressed. While the process under the Liquor Licensing Act can address nuisances that are not specific to licensed premises the LNLC Act provides a more timely response in these scenarios. Council officers would be more familiar with addressing them than officers from the Office of Liquor and Gambling, who would generally deal with music and patron noise issues.

4.1.2 Outdoor events with a liquor licence

There are also issues with the application of the exclusion to the management of outdoor events. Firstly, the application of the exclusion in circumstances where only part of an event space has a liquor license is problematic. The exclusion only applies to the area that is licensed and therefore the remainder of the event is able to be dealt with under the LNLC Act. This creates problems where council compliance staff are unable to address complaints about nuisances emanating from a licensed area of an event.

A further issue specific to outdoor events is caused because they are inevitably annual or one-off and of a short duration. For outdoor events that are licensed (in part or full), the process under section 106 of the Liquor Licensing Act does not provide for immediate compliance intervention and therefore provides limited deterrence and compliance options in these circumstances. Section 106(3a)(b) provides that no conciliation meeting or other hearing may be held on the complaint until the period of 14 days has elapsed from the day that the licensee is served with a copy of the complaint. This leaves the community with no reasonable avenue to address a nuisance.

Possible solutions

These issues could be easily resolved by amending the exclusion in the LNLC Act to better reflect the specific types of nuisance that are envisaged to be dealt with under the Liquor Licensing Act 1997 being noise associated with the service of alcohol, such as entertainment and patron noise from 'bricks and mortar' licensed premises. This would ensure that common nuisances that are not linked to the service of alcohol and those associated with outdoor events (not associated with bricks and mortar venues) are able to be managed under the LNLC Act.

As an example, a noisy compressor at a hotel is no different to a noisy compressor from a supermarket, has no relationship with the service of alcohol, and should be regulated in the same manner. Events, that will usually have council involvement (eg food inspections, road closures, etc) can also be managed by council in a more responsive manner that meets community expectations if such an amendment were to be made. The Liquor Licensing Act may also benefit from greater clarity as to types of nuisance that its nuisance process is designed to deal with.

Questions:

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?

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?

Would there be benefit in amending the nuisance provisions of the Liquor Licensing Act 1997 to better align with the LNLC Act?

4.2 Interaction with other legislation

The LNLC Act sets out a number of exclusions related to different Acts in Part 3 of Schedule 1 where the issue of nuisance is adequately managed under the alternative legislation or where another Act contains a resolution or complaints process for nuisance issues. Comment is sought as to whether the current suite of exemptions related to legislation is sufficient or whether there are other Acts that also address local nuisance issues and should be considered for exclusion.

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?

4.3 Animals living in their 'natural' habitat

Noise, odour or waste from animals living in their natural habitat are declared as not being local nuisance under Schedule 1, Clause 5 of the LNLC Act with the exception to this being where animals have been actively encouraged, by feeding, to gather in a particular area. The term 'natural' is not defined in the Act and takes its common meaning being (Macquarie Dictionary): '1. existing in or formed by nature; not artificial: a natural bridge'.

A query was made by a local government officer to the EPA as to whether this definition may extend to the naturalised habitat of mice, rats and pigeons in human structures. Based on the definition above such naturalised habitat should not be considered the same as natural habitat (mice, rats and pigeons in human structures can be considered a local

nuisance) however comment is sought on whether any improvement such as a set definition is necessary.

Question: Is there any need to set a definition for natural habitat?

4.4 Noise from sporting activities – motorsports

Noise or other nuisance from sporting or associated activities at sporting venues is declared as ‘not local nuisance’ and therefore excluded from regulation under the LNLC Act, on the basis that sports venues are widespread, provide an important community function, and noise, in particular, is incidental to the playing of sport at the venue.

Motorsports is a form of sport that produces considerably more noise than other sports. Motorsports venues, and the noise generated, are mostly already regulated through other legislation (*Development Act 1993*, EP Act and *South Australian Motorsport Act 1984*).

All new and upgraded motorsports venues require a development approval to operate. Development approvals should include conditions to control noise impacts such as limited hours of operation. If a motorsports venue is proposed within 3 km of residential premises not associated with the premises the development application must be referred to the EPA who has the ability to direct refusal or apply conditions to limit impacts. If a motorsports venue is less than 200 metres from a residential premises not associated with the venue it requires a licence under Schedule 1, Activity 8(5) of the EP Act.

If motorsports venues were removed from the exclusion for sporting venues the majority of venues would still not be regulated under the LNLC Act. This is because the Act does not apply to EPA licensed premises or development authorisation approved activities (as discussed earlier) that have conditions to minimise nuisance from the activity (see section 5 and Part 3 of Schedule 1 of the LNLC Act). This reflects the design of the LNLC Act so as not to apply duplication of regulation on activities that are effectively regulated for nuisance impacts under other legislation.

The only motorsports venues that would be able to be regulated by the LNLC Act in this scenario is where development authorisations are lacking conditions that minimise noise impacts on neighbouring residents and those older venues with existing land use rights that do not have a relevant approvals or conditions of approval. The LNLC Act could be used to apply similar controls as would be applied to a new or upgraded facility through the development system with the use of a nuisance abatement notice. Currently the Environment Protection Act 1993 may still be used to regulate such issues.

Question: Should the exclusion for noise and associated nuisances from sporting or associated activities at sporting venues be amended to remove motorsports venues from the exclusion allowing such activities to be regulated under the LNLC Act only in cases where they are not already regulated under a development approval or EPA licence?

4.5 Possible new ‘things that are local nuisance’

4.5.1 Light as an agent of local nuisance

Light and heat were included in the definition of local nuisance when the Bill for the LNLC Act was first consulted on in 2015 but subsequently removed prior to the Bill being introduced into Parliament due to feedback from councils that the definition in the Bill was too broad. Since the Act has commenced there have been a number of councils who have indicated that being able to deal with light nuisance under the Act would be useful.

Light is, considered a statutory form of nuisance under Queensland and ACT legislation, is also considered a statutory form of nuisance in the United Kingdom. Light nuisance in a domestic setting is generally easy to resolve through better screening and redirection of lighting or use of timers. Light from larger sources (eg sporting fields and commercial premises) may prove more difficult but, as with all other nuisances regulated by the Act, light nuisance would operate within the due diligence defence provisions in section 27 of the Act where reasonability of actions to ameliorate a nuisance is a relevant consideration. For example, it would be unreasonable for a sporting venue to remove its lights but may be reasonable to adjust direction, upgrade to technology with less light spill or apply a curfew on their use.

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?

4.5.2 Noise from vehicles – revving, alarms, off-road motorbikes

The LNLC Act currently excludes noise from vehicles other than vehicles operating within, or entering or leaving, business premises and from waste transport vehicles on roads and road-related areas. This is because it is impractical to apply regulation to general traffic noise, including noisy vehicles on roads, at a specific locality because the vehicles that are causing the noise (and the nuisance) are transiting the location irregularly and cannot, individually, be identified as the source of the nuisance associated with the locality. South Australia Police have powers under the *Australian Road Rules* (rule 291) to deal with individual vehicles that are identified on roads as being unreasonably noisy.

Following the implementation of the legislation it is apparent that there are examples where nuisance is emanating from an identifiable individual vehicle at a specific locality that the exclusion may currently apply to. The examples identified to date are revving of engines on residential premises, running of food refrigeration vehicles on domestic premises overnight, faulty car alarms, and recreational use of off-road motorbikes (not associated with primary production activities).

Question: Should the exclusion relating to noise from vehicles be amended to ensure nuisance from vehicles that is not associated with use on roads is able to be regulated as local nuisance and are there any other examples that should be considered?

4.6 Possible new ‘things that are not local nuisance’

4.6.1 Dust from unsealed roads

Some councils receive complaints regarding dust nuisance generated from unsealed roads. There are tens of thousands of kilometres of unsealed roads throughout South Australia, and it is not practical and would be cost prohibitive to seal all roads and maintain them. Councils are able to assist with nuisance dust where the issue is considerable by erecting signage regarding dust nuisance or reducing speed limits in impacted areas. The LNLC Act attributes responsibility for nuisance by applying to a person carrying on an activity that results in nuisance, or through failure to act. To ensure that councils are not deemed responsible for nuisance dust from unsealed roads through a perverse interpretation of ‘failure to act’ as a result of not sealing a road it is suggested that dust from unsealed roads should be prescribed as ‘not local nuisance’.

Question: Should dust from unsealed roads be considered ‘not local nuisance’ for the purposes of the Act and if not, what circumstances would justify allocation of responsibility to a council?

4.6.2 Noise from public infrastructure – application to vibration and extent of the exclusion

Noise from public infrastructure works is prescribed as ‘not local nuisance’ under Schedule 1 of the LNLC Act. It is prescribed so that infrastructure works which benefit the public are not unduly regulated where the nuisance is unavoidable. While dust can be attenuated, noise is often extremely hard to minimise when working on public infrastructure. Examples include evening or overnight roadworks or water infrastructure maintenance where a certain amount of noise is unavoidable and must be carried out overnight to avoid traffic disruption.

It is evident that public infrastructure earthworks such as the examples given may also result in some level of vibration impact caused by compacting of road base associated with the works. The vibration impact would be minimal in most circumstances and it is proposed to prescribe that vibration from public infrastructure works is not local nuisance. Dilapidation reports (used to assess the state of a building before and after an activity that produces vibration to identify any damage and provide evidence for claiming of damages) may also be available as an alternative to regulation prior to commencement of major public infrastructure projects.

A further issue that has arisen is the extent of the exemption for noise from public infrastructure. While there are roadworks, water pipe repairs and the like that may need to occur late at night and with limited advance notice to fix an issue and avoid disruption to traffic (as discussed earlier). There are other examples of public infrastructure works that may not necessarily need to be conducted at night or in the early morning other than for convenience. One example is concreting works associated with a public hospital redevelopment. Under the terms of the exclusion there are no limits to the nuisance caused to neighbouring properties from this activity whereas the same activity on another site would be regulated by the LNLC Act.

The benefit of applying the Act to such scenarios is that where there is a valid need an exemption (under section 19) can be sought and, as part of that process, neighbours can be informed by the applicant and complaint mechanisms put in place by the applicant such that the council should receive less complaints.

Questions:

Should the exclusion of noise from public infrastructure be extended to also exclude vibration from public infrastructure?

Should the exemption for public infrastructure be limited to activities where nuisance cannot reasonably be avoided or managed?

4.6.3 Early morning concrete pours in hot weather

An occasional source of noise complaints in the community is the early morning commencement of concrete pours associated with construction within residential areas. Early morning pours are done either due to the size of the pour or to accommodate extreme weather conditions that might affect the structural integrity of the concrete. Heat-related issues can be overcome to some extent with curing additives, and sealants applied after the pour. Whilst there are alternative approaches available, this form of nuisance is usually a one-off event, has technical merit and warrants consideration of allowing early starts through some form of exemption where extreme heat is forecast. It would be important to set limits on what constitutes a reasonable early start time and to ensure the forecast temperature is easily verified by compliance staff so that it is not abused by operators over summer months.

Questions:

Should provision be included to allow for early morning concrete pours during extremely hot weather?

If allowance was made, what are relevant considerations regarding applying limitations such as temperature and start time?

5 Waste collection vehicles – application beyond roads and road-related areas [section 5(5)]?

The LNLC Act is designed so that the majority of activities licensed by the EPA are excluded as they are already regulated directly by the EPA under the EP Act. The exceptions to this are activities that are undertaken associated with a vehicle, including: earthworks drainage, dredging and waste transport.

This is for two reasons. Firstly, that litter from such vehicles is better dealt with under the provisions of the LNLC Act and to exclude these vehicles would have made the operation of a public litter reporting program more difficult in that checks would need to be made against a list of licence plates which would need to be kept up to date. The second reason is that the general public should have confidence in reporting nuisances to the appropriate regulator in that neighbours of an EPA licensed site would generally know to make complaints to the EPA whereas a complainant aggrieved by a nuisance from a mobile activity would be unlikely to know that the activity is licensed by the EPA.

The wording of the current exclusion is limited to 'roads and road-related areas', as defined in the *Road Traffic Act 1961*. While the common meaning of these terms might seem to limit the application to public roads and nearby areas, the definitions extend their meaning to include private property areas that are publicly accessible to pedestrians, bicycles and

motor vehicles. The way that the exclusion is written means that, in the case of waste transport vehicles, the LNLC Act generally applies to nuisance generated by them except when operating on private property that is not accessible to the public, as noted above. This creates a regulatory arrangement that is very difficult to communicate and creates unnecessary difficulty when assessing alleged nuisance from waste transport vehicles that are operating on private property.

Question: Should the LNLC Act apply to waste transport vehicles operating on private property as well as when operating on roads and road-related areas?

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

Subjective assessment is provided for in section 50 of the LNLC Act to allow authorised officers to assess the presence of nuisance using their own senses. This may include aural assessment of noise, visual assessment of dust or smoke nuisance, and odour assessments. Regulations (regulation 4) under the Act provide guidance on various considerations when making a subjective assessment of the presence of nuisance. The broader experience of the EPA in assisting councils with the implementation and administration of the Act is that subjective assessment is being used effectively to assess nuisance complaints, will improve with experience, and could be further improved by further training from the EPA in subjective assessment.

Sensory evidence, or subjective assessment, is not new when dealing with nuisances throughout Australia. In South Australia it is already provided for under provisions identical to those in the LNLC Act, under section 139(4) of the EP Act. Tasmania, Queensland and Victoria all allow subjective assessment by councils of nuisance. In Victoria, they prohibit the use of domestic air conditioners overnight where noise is audible within a habitable room of another residential premises. Audibility of noise is a very straightforward use of subjective assessment whereas determining the reasonability of an audible noise is less so.

While there are provisions in the Act that support subjective assessment, there is nothing in the Act, as is also the case with the EP Act that prevents the taking of objective measurements as part of determining whether there is sufficient evidence that an offence may be occurring.

One issue that may arise, in the area of noise nuisance, is where a subjective determination of noise nuisance is made relating to a complaint where the noise is of a nature that is borderline with regard to causing nuisance and a further objective measurement (taken after the subjective determination by the alleged offender or a third party) may appear contradictory. For this reason, all noise complaints of a borderline nature should be assessed with an element of objective measurement to ensure that compliance requirements are reasonable and effective. Subjective assessment is still useful for very obvious offences and for obviously unreasonable complaints.

Under the EP Act, 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 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. However, a similar approach could be incorporated into the LNLC Act or Regulations to provide clarity around the use of such an approach.

Current guidance to local government could be updated to incorporate a process chart that councils can use straightforward noise nuisances (high end, low end, and matters of fact/time related) with subjective assessment alone, and for making a subjective determination (not limited to subjective assessment) of borderline or other complicated noise nuisance issues that incorporates an objective assessment using the Noise Policy or a similar scheme established under the Act to provide certainty in assessments. Such a procedure could also be incorporated into the Regulations to build on the guidance provided by regulation 4.

There are other options that could be considered to improve the application of the subjective assessment approach within the legislation. Non-legislative approaches could include further training of local government staff or the development of a standard operating procedure that could be adopted by councils.

A further legislative option specific to key domestic noise sources such as air conditioners, would be to apply a similar approach as Victoria where audibility of certain noise sources from habitable rooms of a residential premises during night-time hours, except under exceptional circumstances such as extreme weather, is prohibited.

Questions:

Would any of the options discussed improve the assessment of noise nuisance under the LNLC Act?

Are there any other suggestions to improve the assessment of noise nuisance under the LNLC Act?

7 Litter discussion points

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

The LNLC Act does not prevent councils from urgent clean-ups of littered material, however it does not allow for cost recovery in these circumstances. The Act provides that a Litter Abatement Notice may be issued to the person responsible for the litter that requires, among other things, that they clean it up. Such a notice would also include a timeframe for the clean-up to occur. If the notice is not complied with then the council may clean up the material and charge the person responsible for the cost of that clean-up.

This scenario is fair and reasonable in most situations as it provides procedural fairness to the alleged offender. When there is material littered that causes a hazard whether a health or environmental hazard or a physical hazard (eg in the middle of a road) it may be a reasonable community expectation that the material is cleaned up immediately. This may not always be able to be done by the offender as the offender may not even be known to authorities early on.

The Act does provide for the court to order costs be paid by the convicted party for such matters (section 45) but only where there is a conviction. The civil penalty provisions of the Act (section 34) do not provide a specific remedy in this regard as the maximum civil penalty is the maximum penalty for the offence plus any illegally obtained economic benefit. It could be argued that part of the penalty applied could be used to offset the cost of clean up or alternatively, that the clean-up cost was an avoided cost of economic benefit to the alleged offender and recoverable. An option to explore could be a retrospective order of costs for such a scenario where an offender is identified but a conviction, for whatever reason, is not pursued. This could possibly be achieved through an extension to section 48 where councils may currently recoup technical and administrative costs.

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?

7.2 Bill posting – car parks and expiations

Under the LNLC Act a person must not post a bill on property without the consent of the owner or occupier of the property. This covers posting of bills on buildings, cars and other property but it is unclear as to whether, where bill posting is occurring on vehicles within a carpark, whether the carpark constitutes 'on property' or whether it only applies to the cars. This is important as a car park owner may be aggrieved by the posting of bills on their land but may not have recourse to deal with it themselves. The ability to address the bill posting would rest with the owner of a car in the carpark. This may need improvement as it is the owner of the carpark that will be responsible for removing the resulting litter and, where offensive material is being distributed, may suffer reputational damage.

The Act currently only provides for a court imposed penalty for persons that authorise bill posting. Court proceedings are a considerable cost to councils and alleged offenders and an expiation will provide deterrence from reoffending in many instances. An expiation amount for section 23(2) would overcome this issue.

Question:

Should car park owners be able to commence proceedings for distribution of bills on their premises?

Should there also be an expiation for the offence of authorising bill posting?

7.3 Illegal dumping

Illegal dumping is a considerable issue in the community and the LNLC Act introduced a number of tools to assist councils with compliance and cost recovery. Such initiatives include the following:

- Vehicle owner responsibility provisions that allow for surveillance of illegal dumping hotspots and for reports of vehicles being used for illegal dumping to be better followed up for possible prosecution.
- Higher penalties and expiations for acts of illegal dumping.
- Specific penalties for asbestos dumping.
- Ability to order clean-ups where the offender is known.
- Ability to undertake the clean-up and charge the offender where the offender does not comply with a litter abatement notice.

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

7.4 Trolleys

Trolleys that are dumped outside of shopping centres constitute littering under the LNLC Act. The offence applies to the person doing the littering, not the owner of the trolley. Council officers are rarely present to witness the act of littering and there is little in the Act to resolve the problem effectively. The act of littering does not extinguish ownership rights for these articles.

There are a number of approaches that could be considered further to assist councils with the management of trolleys in their area. Many of these were raised at a 'Shopping Trolley Summit' hosted by the City of Marion in July 2018. Extension of the litter abatement notice provisions such that they can be issued to the owners of trolleys requiring collection or preventative measures to be implemented is one way that this might be achieved.

The ACT has a scheme in place to better manage trolleys dumped in the community. It should be noted however that the ACT government provides all local government services as there are no councils in the ACT. In any other State or Territory the programs established for trolleys in the ACT would be administered by local government.

The ACT scheme is summarised below:

- the creation of offences against the improper use of shopping trolleys including removal of trolleys from shopping centres
- a retailer must place signage warning people against taking shopping trolleys outside a shopping centre precinct;
- requirement upon a retailer that they keep trolleys on their premises with an exemption from this requirement if a trolley containment system is in place (eg deposit or wheel locks)
- the provision of identification on shopping trolleys to assist their collection if abandoned
- a proactive trolley collection scheme that allows the government to respond to a trolley problem in a specific area.

Some councils across Australia have introduced local bylaws to manage the issue. For example, Alice Springs Town Council's bylaws allow council officers to fine people caught abandoning trolleys, impound trolleys collected from council land, charge the owner of the trolleys a release fee, require the owner to collect the trolleys, and to dispose of the trolleys if not collected. In the context of this review, such provisions could be written into the LNLC Act as general provisions that councils could utilise at their discretion. Alternatively it could be left to councils to create their own bylaws in this area.

One issue that needs consideration when applying stricter controls on the use of trolleys outside of shopping centres is the potential for social disadvantage for those without a car or the means to buy their own personal trolley to transport shopping to their home. This issue was highlighted in a report by the ACT Human Rights Commissioner in response to the ACT trolley controls¹. A further issue is whether such changes might promote additional car use, however this impact would be minimal.

Questions:

Are general litter provisions sufficient to manage abandoned trolleys and if not, what would be the preferred approach for local government and why?

Have councils considered use of existing bylaw making provisions in the *Local Government Act 1999* to regulate the abandonment of trolleys on council roads?

How do you suggest the issue of social disadvantage and trolley use is addressed?

8 General discussion points

8.1 Abatement notices – linkage to land

One of the main tools for addressing nuisance from fixed machines such as air conditioners and pool pumps is a nuisance abatement notice. Nuisance from a fixed machine requires ongoing management to avoid further nuisance so controls such as limiting hours of operation or requiring the maintenance of an acoustic barrier may be appropriate elements of a notice. It has been identified by local government that change of ownership of a property with a problematic fixed machine that has controls applied within a notice is not able to be transferred to the new owner of the property and a new regulatory process would need to be undertaken to apply the controls to the new owners. It has been proposed that the LNLC Act be amended to allow councils to register nuisance abatement notices against land where the source of the nuisance at a property requires ongoing regulation.

Question: Should the LNLC Act be amended to allow councils to register a notice on land when it is considered that the source of a nuisance on a property requires ongoing regulation?

8.2 Improving cost recovery

Cost recovery is an important element of any regulatory function performed by government. The LNLC Act contains a number of cost recovery provisions, generally linked to contraventions of the legislation that are directed at recovering costs from offenders. Where such measures are not being utilised or are not completely effective the residual cost is, by default, recovered through general rates as a service provided for the benefit of the broader community. Advice is sought from stakeholders regarding other potential mechanisms that could be considered to further enhance cost recovery provisions of the Act aimed at the offender.

Question: What other mechanisms for cost recovery should be considered for the LNLC Act?

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

The Environment, Resources and Development (ERD) Court specialises in environment protection and has a greater, and likely more consistent, knowledge of matters such as nuisance, litter and illegal dumping. The ERD Court acts as the Magistrates Court in its criminal jurisdiction, and there is therefore no substantive difference in procedure between the

¹ <http://www.hrc.act.gov.au/res/Response%20to%20CM%20Shopping%20Trolleys.pdf>

ERD Court and the Magistrates Court. The only minor difference in practice is that the ERD Court tends to have more pre-trial listings (ie a pre-trial conference followed by a directions hearing).

At present, in the ERD Court, the matters are heard in a central location. In the Magistrates Court, the matters can be heard either in Adelaide or in a regional court. While there is no requirement that a matter must be heard in a location where the offence took place, considerations of the balance of convenience (including, most relevantly the location most convenient to the defendant) would come in to play. As a result, matters could end up being listed in Port Augusta, Ceduna, Mount Gambier or elsewhere. While this would make use of the legislation by the EPA potentially more costly, it would provide greater access to regional councils to pursue prosecutions.

The Magistrates Court also has the facilities to arrange payment options for fines so offenders can go from the court to the cashier to finalise penalty payments. All metropolitan Magistrates Courts have staff to help direct a person to the court, a duty solicitor and assistance for disability or language issues.

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?

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

The LNLC Act currently provides that appeals against litter and nuisance abatement notices are to be made to the ERD Court. At the time that the Act was drafted, the South Australian Civil and Administrative Tribunal (SACAT²) was still in the process of being fully established and bringing relevant existing legislation under its jurisdiction. SACAT is considered a lower formality and lower-cost jurisdiction for administrative appeals. As a result of the complexity and volume of work being done to implement SACAT at the time it was not considered appropriate to add the Act to the SACAT jurisdiction. Instead it was determined that appeals under the Act should be dealt with by the ERD Court.

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?

8.5 Exemptions from the LNLC Act for causing local nuisance

Persons creating nuisance may apply for an exemption from the LNLC Act (section 18). The process requires the applicant to submit a site nuisance management plan to the satisfaction of the council that details the sources of the nuisance, the steps being taken to minimise the nuisance and details of a person that can receive complaints regarding the nuisance, among other things. There are some necessary activities in the community that will cause local nuisance which is largely unavoidable and the exemption provision is in place to accommodate these activities.

The provisions in the Act allow for an exemption to last for a maximum of three months. If an activity that causes local nuisance extends beyond this period then a further exemption would need to be applied for, using the same process. The time limit for exemptions is in place to ensure that activities causing nuisance are completed in a timely manner and that activities do not drag on to the detriment of neighbours simply because no time limit is established. One activity that has the potential to cause nuisance over an extended period is large-scale construction which will often last several months and in some cases more than a year. In these circumstances the proponent will need to apply for an exemption every three months. A shorter process for extension or special categories of exemption that facilitate longer-term projects could be considered to reduce the administrative burden on councils and on proponents.

² SACAT is a state tribunal that helps South Australians resolve issues within specific areas of law, either through agreement at a conference, conciliation or mediation, or through a decision of the tribunal at hearing. SACAT also conducts reviews of government decisions.

Question: Are there any opportunities for improvement to the exemption process which reflects a balance between excessive exposure for neighbours, and the reality of some activities that cause local nuisance lasting longer than three months?

9 Other improvements

The issues identified above have been derived from feedback from stakeholders, mostly councils, during the first 18 months of the full operation of the legislation. This is not to say that there are not other issues that stakeholders would like considered as part of the review of the LNLC Act.

Question: Are there any legislative, non-legislative or administrative suggestions that you would like to have considered as part of the review of the LNLC Act?

Further information

Legislation

[Online legislation](#) is freely available. Copies of legislation are available for purchase from:

Service SA Government Legislation Outlet
Adelaide Service SA Centre
108 North Terrace
Adelaide SA 5000

Telephone: 13 23 24
Facsimile: (08) 8204 1909
Website: <https://service.sa.gov.au/12-legislation>
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General information

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