Ombudsman
New South Wales

Policing intoxicated and disorderly conduct:

Review of section 9 of the *Summary Offences Act 1988*

August 2014

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ISBN 978-1-925061-36-9

Foreword

Police officers in NSW need a broad range of powers to assist them in performing their work. These include powers to assist in policing and responding effectively to serious threats of drunken violence.

In 2011, a new summary offence was introduced to provide police with an additional tool to manage incidents of intoxicated, anti-social and violent behaviour in entertainment districts. The amendment enabled police to issue an on-the-spot fine or charge a person for continuing to be intoxicated and disorderly after having been given an opportunity to comply with a formal move on direction by police. Parliament required my office to review and report on how this power is used. This report outlines the findings and recommendations resulting from this review.

A central finding is that officers use the new offence interchangeably with an existing offence of failing to comply with a police direction. This was confirmed by the NSW Police Force. I believe it is important that police receive clear guidance and direction around which offence to apply, particularly as the on-the-spot fine for the new 'intoxicated and disorderly behaviour' offence has recently increased from $200 to $1,100, while the fine for the existing 'fail to comply with direction' offence has remained at $220.

The new powers also impact on vulnerable groups who are already over-represented in the criminal justice system. During the first 12 months of the new intoxicated and disorderly offence, 40% (196) of all fines and charges for this offence were issued to marginalised groups – mainly Aboriginal people and/or people who are experiencing, or who have a recent history of, mental illness. The Parliamentary and public debate at the time the offence was introduced discussed ways to mitigate these impacts. My office has stressed time and again across a number of reviews the impact of fines on vulnerable people. There is a very real risk these fines will have flow-on effects for those fined, their families and broader communities, and I believe this is an area that will need to continue to be monitored carefully.

The recommendations in this report aim to ensure the legislation and policy relating to the application and use of these provisions are clear, and that the powers are used effectively and in a way that is consistent with government policy. This assists officers to know when it is appropriate to use them, and helps the community to better understand the actions of police.

It is also important to ensure that these provisions are used to target disorderly conduct by intoxicated people in certain entertainment districts, as was intended by the Parliament when it was introduced. I believe that the recommendations in this report will help to achieve this, and look forward to working with the NSW Police Force to ensure they are implemented.

Bruce Barbour

Ombudsman

Acknowledgements

We would like to thank the NSW Police Force, the State Debt Recovery Office (Office of State Revenue), the Department of Police and Justice, the NSW Bureau of Crime Statistics and Research and the Queensland Crime and Misconduct Commission for providing information and assistance for this review. Particular thanks to all of the NSW police officers and other employees who participated in interviews and provided us with their views during Local Area Command visits.

We would also like to thank all of the organisations and individuals who provided information during interviews and responded to our issues paper. We appreciate your comments and your willingness to share your experiences with us. Only with the valuable information that you provided were we able to comprehensively assess the effects of these new provisions.

Contents

Acronyms and Glossary

CAN	Court Attendance Notice
CBD	Central business district
CIN	Criminal Infringement Notice
COPS	Computerised Operational Policing System. The NSW Police Force's centralised system for recording crime information and intelligence.
LAC	Local Area Command
LEPRA	*Law Enforcement (Powers and Responsibilities) Act 2002*
MP	Member of Parliament
NSWPD	New South Wales Parliamentary Debates
NSW Police Force	New South Wales Police Force, previously referred to as 'NSW Police' and the 'NSW Police Service'.
PODS	Police Oversight Data Store. The Police Integrity Commission's database of records extracted from COPS.
SDRO	State Debt Recovery Office
SOPs	Standard Operating Procedures

Terms used in this report

Aboriginal	In this report, the term 'Aboriginal' refers to Aboriginal and Torres Strait Islander.
amendment Act	*Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*.
review period	refers to the first full year immediately following commencement of the new provisions, 1 October 2011 to 30 September 2012.
section 9	offence of 'continuation of intoxicated and disorderly behaviour following a move on direction' under section 9, *Summary Offences Act 1988*.
section 199	offence of 'failure to comply with direction' under section 199, *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). Although section 199 can be imposed in relation to any direction under Part 14 of LEPRA, the data reported in this report relates only to failure to comply with a direction under section 198 of LEPRA.
section 198 direction	a move on direction to an intoxicated person in a public place under section 198 of LEPRA.

Executive summary

When amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and the *Summary Offences Act 1988* were introduced in mid-2011, Parliament was told that the intention was to:

- broaden police powers under section 198 of LEPRA to issue legally enforceable move on directions to 'drunken and violent hooligans', particularly in busy entertainment districts and on weekends, and
- create a new offence of 'continue intoxicated and disorderly behaviour' under section 9 of the Summary Offences Act, with harsh penalties for any 'intoxicated and disorderly persons' who ignore a section 198 direction and – at any time or any public place within six hours of the initial direction being given – 'create a disturbance' by engaging in 'disorderly' behaviour.[1]

The broader move on powers and new section 9 offence were introduced in response to heightened community concerns about the impact of alcohol-related violence in busy entertainment precincts, and calls to provide police with 'additional enforcement tools' to curb the behaviour of 'individuals who are determined to drink to excess or party hard on their drug of choice and then choose not to obey reasonable directions given by police to go home before trouble starts'.[2]

The amending Act also required the Ombudsman to scrutinise police uses of the new provisions for the first 12 months, and to prepare a report on: (a) the operation of section 9 (see chapters 4 to 7 of this report), and (b) the issue of penalty notices for those offences (see chapters 8 to 10).[3] As the then Attorney General explained, the Ombudsman's review would:

> … ensure that the powers are being used appropriately and consistently with the Government's commitment to address problem social drinking, and not [directed at] the homeless and disadvantaged in our society.[4]

This report sets out the findings from our review and recommends measures designed to ensure that these broader powers and harsher penalties are used fairly, appropriately and in ways that are consistent with government policy.

The operation of section 9

Section 9 of the Summary Offences Act, entitled 'continuation of intoxicated and disorderly behaviour following move on direction', makes it an offence for any person who has been given a move on direction under section 198 of LEPRA to be 'intoxicated and disorderly in the same or another public place' within six hours of the direction being given. NSW Police Force data shows that 110,949 formal directions were issued to people in NSW during the review period (October 2011 to September 2012). Almost a third of these recorded uses – 33,580 directions – were made using the specific power in section 198 of LEPRA to issue directions to intoxicated people.

There are high levels of compliance with directions issued by police, including section 198 directions. Of the 33,580 section 198 directions during the review period, police issued just 1,768 fines or charges (5.3%) under section 199 of LEPRA for failure or refusal to comply with a section 198 direction, and 484 fines or charges (1.4%) under section 9 of the Summary Offences Act for intoxicated and disorderly behaviour following a section 198 direction.

When the new section 9 provision commenced in October 2011, there was a sharp fall in police uses of section 199 to deal with people who did not comply with a section 198 direction. In the 12 months to September 2012, there were 1,768 section 199 fines and charges issued in these circumstances – 24% fewer than the 2,332 fines and charges issued for the same offence in the previous 12 months. A significant factor in the shift away from using section 199 was the ability of police to use section 9 instead.

Our review considered how operational police interpreted the new power to issue section 198 directions to deal with 'disorderly' behaviour. However, it is unclear what impact this broader authority to issue a section 198 direction might or might not have had. At our request, the NSW Police Force initially made changes to its COPS system to enable officers to record reasons for issuing a section 198 direction, including the option of noting when a direction was issued on grounds that the intoxicated person's behaviour was 'disorderly' (under section 198(1)(b)). However, further changes made to COPS in April 2012 to meet the needs of the Commuter Crime Unit meant that when officers create

1 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
2 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
3 *Summary Offences Act 1988*, s. 36(1)(a)-(b).
4 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3137.

records of section 198 directions, they can no longer specify the legal basis for the direction. Although a recent bulletin published in the NSW Police Force's *WebCOPS eGuide* indicates that this deficiency in the COPS system has since been rectified, the repair occurred too late to be of use for our review.

Instead, we had to rely on manual checks of the reasons noted in officers' narrative descriptions of incidents to try to identify their reasons for issuing section 198 directions. This showed that the grounds for using the power were often unclear. Section 198 authorises police to issue directions for the purpose of preventing injury or damage, or to eliminate risks to public safety, or – since the 2011 legislative amendments – to prevent a continuance of disorderly behaviour. In many cases the reasons noted by police did not clearly relate to any of these factors.

For instance, it was common for section 198 directions to be issued in response to conduct that was intimidating, quarrelsome or likely to cause fear. While these reasons would provide a sound basis for issuing a direction using the broad section 197 power, using them as the basis for issuing a section 198 direction means that the conduct must be 'disorderly' or pose a risk to public safety. This was not always the case. As section 9 requires police to have first issued a valid move on direction, we recommend consolidating and simplifying the requirements at section 197 and section 198 to make it abundantly clear that police may issue reasonable directions to intoxicated people in a broad range of circumstances, not just those grounds currently in section 198. The NSW Police Force has rejected this proposal.

An important justification for creating the section 9 offence was that it would give police officers clear authority to act on 'continuing disorderly conduct' that occurs some time after the section 198 direction was issued and in another public place. Our review therefore included an analysis of 447 police records relating to alleged section 9 offences to determine how many occurred in circumstances where it was clear that police could not have used the existing section 199 offence provision. We identified only two such cases. Overwhelmingly, fines and charges for section 9 offences were issued in situations where section 199 could just as readily have been used.

Another justification for creating a separate offence aimed at 'intoxicated and disorderly' conduct was to strengthen the focus of policing operations on more serious incidents of violence and public disorder. The issues considered by our review therefore included questions about where and when section 9 was used, the range of disorderly conduct being targeted by police, and whether the provision helped police deal with more serious incidents. We found there was no consistency in how the offence provisions are used. The evidence indicates that police use section 9 to penalise an array of offending behaviours, ranging from mere failure to comply with a police direction – that is, conduct previously dealt with as a section 199 offence – through to much more serious alcohol-related violence.

In response to concerns raised in the consultation draft of this report about the substantial overlap between the section 9 and section 199 offence provisions and our discussion of measures needed to focus the uses of section 9 on more serious incidents of drunken violence, the NSW Police Force confirmed that its operational officers use these offences 'interchangeably' and indicated its strong support for them continuing to do so. As a consequence, the police submission rejected five of the six recommendations relating to measures aimed at addressing this issue. We believe the police arguments in favour of maintaining the status quo fail to address some crucial issues.

Although the provisions were intentionally drafted in a way to maximise individual police discretion in determining where and when a section 9 fine may be imposed, Parliament was told that there would be 'comprehensive' procedures to advise officers on circumstances warranting use of the new offence.[5] Procedures that directly address these issues are yet to be developed and the NSW Police Force now argues that such guidance is unnecessary.

During the review period, the interchangeable use of these offences had little practical impact, as the fines issued for each offence were similar. However, Parliament recently signalled a clear intention to take a strong stand against certain forms of alcohol-related offending by approving substantial increases to the penalties for section 9 and certain other offences.[6] Since March 2014, a member of the public who fails to comply with a section 198 move on direction may be fined either $1,100 or $220, depending on whether the officer issuing the on-the-spot fine decides to use section 9 of the Summary Offences Act or section 199 of LEPRA. The difference is even greater for court-imposed fines: up to $1,650 for a section 9 offence and up to $220 for section 199. This means that police discretion on which offence provision to use can have important consequences.

Without some legislative and/or police policy guidance on when the section 9 offence and its substantially higher penalties should be imposed, the continued inconsistent application of this provision is likely to be regarded as arbitrary and unfair. Over time, this can undermine community trust in police and confidence in the law. In our view,

5 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3137; see also The Hon. Greg Smith MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, pp. 3662-3663.

6 *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, Schedules 5.1 and 5.2.

there is an urgent need for Parliament and/or the NSW Police Force to stipulate when non-compliance with a section 198 direction should attract the higher penalty.

Another concern is the impact these provisions have on Aboriginal and Torres Strait Islander people, young people and/or people who are experiencing, or who have a recent history of, mental illness, homelessness or cognitive impairment. Despite assurances to Parliament that police policies and procedures would minimise the use of the provisions on disadvantaged and marginalised groups, our analysis of police data shows that 40% (196) of all fines and charges for section 9 offences during the review period were issued to people with one or more of these characteristics.

Aboriginal people were particularly affected. Of the 484 section 9 fines or charges issued during the review period, 31% (150) were issued to Aboriginal people, even though they comprise just 2.5% of the NSW population. Many of these Aboriginal people also had mental health concerns, and/or were homeless or had recently experienced homelessness. It is clear that the current arrangements disproportionately affect disadvantaged groups who are already over-represented in the criminal justice system.

It is clearly in the public interest for police to have adequate powers to reduce the incidence and impact of alcohol-related crime occurring in public spaces and for these powers to operate effectively. While we support broader police submissions that Parliament should avoid imposing complex or overly prescriptive conditions on powers such as these, we do not accept that it is preferable to provide no legislative or policy advice to operational police officers on their use of discretion. The amendments we propose are designed to enhance the ability and effectiveness of police in managing and reducing drunken violence in busy entertainment districts, without impacting disproportionately on vulnerable groups within the community.

Other recommendations relating to the operation of section 9

Our review of issues related to the operation of section 9 also considered the police practice of initiating a section 9 legal action against a person who has been detained for their own care and protection. Police are generally prohibited from detaining a person for their own protection under section 206 of LEPRA, and then initiating proceedings against them for an offence.[7] However, a police officer may use this detention power even if behaviour constitutes a section 9 offence if the detention is not for the purpose of taking proceedings for the offence.[8]

As almost half (47%) of all people who were fined or charged for a section 9 offence during the review period had also been detained for their own protection, we proposed measures aimed at clarifying when a person who is in protective detention should also be the subject of a section 9 legal action. In supporting this recommendation, the NSW Police Force said that, ideally, no legal action should be initiated in these circumstances. It indicated that any decision to issue a fine or charge a person in protective detention should depend on the detainee's behaviour *after* being taken into protective custody. We support this approach.

We also considered the statutory requirements for police to warn people about the legal consequences of failing or refusing to comply with the section 198 move on direction before issuing a fine or charge for a section 9 offence, and proposed measures aimed at addressing some of the practical challenges associated with conveying meaningful information to intoxicated people. In May 2014, while the Department of Justice and the NSW Police Force were considering the consultation draft of this report, Parliament made substantial amendments to these statutory safeguards, including consolidating and simplifying the warnings that police must give.[9] These and other changes may go some way to reducing the complexity associated with the statutory safeguards in LEPRA. Nonetheless, to be effective in helping intoxicated people (and others) to better understand the legal consequences of any failure or refusal to comply, the NSW Police Force will still need to reinforce these provisions with a range of training and communication strategies.

Among the other issues related to the operation of section 9 are concerns about critical gaps in a large proportion of the COPS event records we examined as part of this review. Many lacked basic details about the alleged section 9 offences, undermining the ability of supervisors to check that there were sufficient grounds for initiating proceedings in the first place. The NSW Police Force supported our recommendation that training and policy advice for officers should emphasise that COPS records of a section 9 offence must contain a sufficient description of a person's particular behaviour, in order to allow a supervisor to verify that all elements of the offence have been met.

7 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 206(2).
8 LEPRA, s. 206(2A).
9 *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*.

The issue of penalty notices for section 9 offences

Parliament also required us to examine and report on the issuing of criminal infringement notices (CINs) for section 9 offences. The CINs scheme authorises police in NSW to issue on-the-spot fines to adults who have committed certain minor criminal offences, including section 9 offences. CINs give police an additional, intermediate option between cautioning offenders on the one hand, and arresting and charging on the other. Our review found that 39% (150) of all section 9 CINs during the review period were issued to recipients who had one or more vulnerable characteristics. The overwhelming majority (88%) of these marginalised CIN recipients failed to pay within the time allowed and were subsequently referred for enforcement action.

Despite the high numbers of vulnerable people subject to sanctions for fine debts, there was evidence that recent reforms to the fines enforcement system were having a positive impact. Of the 130 vulnerable people subject to enforcement action after failing to pay their section 9 CIN, about a third had entered into agreements to repay the debt over time – some using conventional time-to-pay arrangements whereby regular instalments are deducted from the person's bank account, but most using 'Centrepay time-to-pay' agreements whereby instalments are deducted directly from the person's Centrelink welfare benefit. The expanded availability of these options has significantly reduced the incidence of fine default and given some of the SDRO's poorest and most disadvantaged clients a practical way to start repaying accumulated fine debts. We also found that some recipients of section 9 CINs were benefiting from 'work and development orders', another recent reform that allows particularly poor and/or vulnerable people to repay their accumulated fine debts by undertaking community work or agreed activities to address the underlying issue that led to their offending behaviour.

The impact of CINs on disadvantaged and marginalised groups in the community has been the subject of detailed review and recommendations in two previous Ombudsman reports. Among the recommendations in those reports were measures designed to strengthen police processes for diverting vulnerable people at three critical points: when a police officer is deciding whether or not to issue a CIN; when a senior officer conducts an internal review at the request of a CIN recipient; and the option police have at any time to conduct an 'own motion' review to determine whether or not to exercise their discretion to withdraw a CIN.

A significant development is the NSW Police Force's recent introduction of new procedures, the *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, that provide its officers with comprehensive advice about their legislative obligations when conducting internal reviews of CINs and other fines issued by police. These guidelines implement recommendations made in our 2009 report, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, that the NSW Police Force aligns its limited processes for reviewing CINs with broader Fines Act requirements. These provide clear rules on when the issuing agency must withdraw a penalty notice, and when a penalty notice may be withdrawn on discretionary grounds. The NSW Police Force supported our recommendation that it make these guidelines publicly available and has since published them on its website.

As the NSW Police Force has updated its processes for reviewing and enforcing CINs to comply with Fines Act requirements, we assessed whether the advice provided to officers about their initial decision to issue a section 9 CIN rather than caution an offender was consistent with the new Internal Review Guidelines. We concluded that there is a need for frontline officers to be provided with much clearer guidance on the appropriate exercise of their discretion, particularly in relation to people who have an intellectual disability, a mental illness, a cognitive impairment or who are homeless, and when those factors affect their ability to understand or control that conduct.

While we acknowledge that the NSW Police Force has consistently advocated that its officers should not be bound by formal cautioning requirements, we believe it is inefficient and unfair for officers to continue to issue CINs that – when applying the standards set out in its Internal Review Guidelines – should subsequently be withdrawn. Until the police procedures for issuing CINs include advice to officers about the grounds for withdrawing CINs and other penalty notices following internal review, it is unlikely this information will be factored into officers' initial decisions on whether to issue the CIN. Consistent with the statutory obligations that apply to other agencies that issue penalty notices, we recommend changes designed to strengthen police decision-making in this regard.

We found that requests for internal review are rare. During the review period only three people – including one who had a vulnerable characteristic – requested an internal review. Among the barriers to requesting internal reviews are the requirements that police impose on people who request an internal review on the grounds of behaviour related to their intellectual disability, mental illness, cognitive impairment or homelessness. At present, the Internal Review Guidelines require them to provide an expert report or other documentation that demonstrates a causal nexus between their vulnerable characteristic and the lack of understanding or control over their conduct. We recommend

that the NSW Police Force relax these requirements to enable its officers to apply commonsense when reviewing such applications, but also that it retain its broad discretion in determining which penalty notices 'must' subsequently be withdrawn.

As the NSW Police Force has only just introduced Internal Review Guidelines that allow people with an intellectual disability, a mental illness, a cognitive impairment or who are homeless to seek a review of their penalty notice on these grounds, it is too soon to know how many fine recipients might use these grounds to request internal reviews. However, in the case of CINs, the scheme was established to provide an alternative to charging offenders and bringing them before the courts for certain minor offences. Even if a small proportion of CIN recipients request internal reviews on grounds specified in the Fines Act, it should still be cheaper, fairer and more efficient for the NSW Police Force to make provision for such reviews rather than require those CIN recipients to elect to have the matter heard at court.

Among the other issues considered in this report are the need to provide police reviewers with practical advice on the factors they should consider when exercising their broad, general discretion to withdraw a penalty notice on practical or compassionate grounds, and the scope to use supervisory checks or periodic audits of COPS records to gauge whether officers are exercising appropriate discretion when issuing CINs or cautioning offenders for minor offences. We recommend that the NSW Police Force consider these issues as part of its scheduled review of the Internal Review Guidelines in 2015, and that this scheduled review take into account data such as the number of review requests received and decisions made under the guidelines.

In rejecting these and other recommendations in this part of our report, the NSW Police Force's response noted that 'there is no evidence to suggest that this legislation has adversely impacted on vulnerable groups'. This is at odds with the available evidence. It should be noted that 40% (196) of all fines and charges for section 9 offences during the review period involved people with one or more vulnerable characteristics – mostly Aboriginal people and people with a recent history of mental illness. Almost nine out of every 10 CINs issued to a vulnerable person resulted in that person being subject to enforcement action by the SDRO, and three out of every four court attendance notices issued to a vulnerable person resulted in the person being convicted. Although our recommendations will not resolve these issues, it is essential that the NSW Police Force have systems in place to ensure that appropriate standards are being applied.

Overall, we found that the new provisions did not provide police with a significant additional tool to manage or reduce alcohol-related crime during the review period. By far the majority of the incidents resulting in legal action under section 9 could have been dealt with by police using the existing 'failure to comply with direction' offence provision at section 199 of LEPRA.

In light of the sizeable differences in monetary penalties that now apply and the disproportionate numbers of vulnerable people affected, it is important that police uses of the section 9 offence be directed at more serious incidents. For this reason we have recommended that section 9 be amended so that it relates more squarely to serious instances of intoxicated and disorderly conduct, including violent or threatening conduct not already covered by section 199 LEPRA.

The intent of our recommendations is to provide police with a simpler scheme that provides clarity about the options for responding to intoxicated and disorderly conduct, and includes penalties that reflect the seriousness of the offending behaviour. While our recommendations are unlikely to remedy the significant over-representation of disadvantaged and marginalised groups being subject to legal actions for section 9 offences, it is important that police decisions be fair, consistent and supported by transparent policies and processes.

Summary of recommendations

1. **The Attorney General clarify the grounds for issuing reasonable directions to intoxicated groups or individuals by:**
   a. **repealing section 198 of LEPRA, and**
   b. **expanding the 'relevant conduct' requirements in section 197 of LEPRA to incorporate elements of the intoxicated move on power currently at section 198(1)(a) and conduct that 'is otherwise disorderly'.**
2. **The Attorney General review the offences pursuant to section 199 of LEPRA and section 9 of the Summary Offences Act in order to clarify the types of 'disorderly' conduct that might warrant use of the section 9 offence and its higher penalties.**
3. **The Attorney General review the offences pursuant to section 199 of LEPRA and section 9 of the Summary Offences Act in order to address the overlap between the two offence provisions and consider amending section 9 of the Summary Offences Act to clarify that the purpose of the provision is to enable police to impose a sanction for continued intoxicated and disorderly behaviour, and not simply for failure or refusal to comply with a reasonable direction.**
4. **In reviewing section 9 of the Summary Offences Act, the Attorney General should consider supplementing it with a provision that explains the purpose of this offence and outlines principles regarding its use – including situations that would *not* normally be regarded as disorderly behaviour in the absence of other conduct.**
5. **NSW Police Force establish training and guidelines that provide frontline police officers with practical advice on when the offence provisions under section 199 of LEPRA and section 9 of the Summary Offences Act (and related penalties) should apply in circumstances where both may be applicable.**
6. **NSW Police Force training and policy advice for officers dealing with an intoxicated person in public should emphasise that section 9 should not be used in circumstances where a person is merely intoxicated or drinking in a public place.**
7. **NSW Police Force training and policy advice should either:**
   a. **make it clear that police officers are not to use the protective detention powers at Part 16 of LEPRA to detain an intoxicated person who is or will be the subject of legal proceedings for a section 9 offence, or**
   b. **if section 9 proceedings are allowed to be brought against people in protective detention, provide clear advice to frontline officers regarding the exceptional circumstances that may warrant the use of the section 9 offence provision in these situations.**
8. **NSW Police Force training and policy advice for officers dealing with an intoxicated person in public should include practical guidance on the kind of language and other communication tools to use when communicating statutory warnings to intoxicated people.**
9. **NSW Police Force and the Government should include in any future community awareness campaigns about responsible drinking, information about the offence of continuing to be intoxicated and disorderly in any public place at any time within six hours after being given a direction to leave and not return.**
10. **NSW Police Force training and policy advice for officers emphasise that COPS records of a section 9 offence must contain a sufficient description of the person's actual behaviour, that allows a supervisor to verify that all elements of the offence have been met.**

11. That the NSW Police Force:

a. update the cautioning advice in its *Criminal Infringement Notices Policy and Standard Operating Procedures* to include specific guidance about the grounds on which a CIN may be withdrawn in accordance with the NSW Police Force's *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, and

b. consider developing its own general cautioning guidelines for other penalty notice offences that are consistent with its own Internal Review Guidelines.

12. NSW Police Force amend its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* to provide that a penalty notice must be withdrawn if the person to whom it was issued has an intellectual disability, a mental illness, a cognitive impairment or is homeless, and it appears that this was a contributing factor to the commission of an offence or reduced the person's responsibility for the offending behaviour.

13. NSW Police Force amend its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* to provide that, in circumstances where the reviewing officer forms the view that a caution should have been given instead of a penalty notice, the penalty notice be withdrawn.

14. NSW Police Force amend its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* to include specific guidance to reviewing officers about the circumstances that might warrant the exercise of the general discretion under section 24E(3) of the *Fines Act 1996*.

15. NSW Police Force should ensure that:

a. it reviews its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* as scheduled in 2015

b. this review consider the numbers of review requests received for each penalty notice type, the number of penalty notices subsequently withdrawn and the basis of those decisions, and

c. information about the review of the Internal Review Guidelines, including data summarising the outcomes of review requests, be provided to the Ombudsman.

16. The Commissioner of Fines Administration should, upon request from the NSW Police Force, assist police with advice and information relevant to its review of the *Internal Review Guidelines for Penalty Notices under the Fines Act 1996.*

17. NSW Police Force should include in its existing quality control measures an examination of the appropriate implementation of any cautioning guidelines that officers are required to follow.

Part A – Preliminary

This Part sets out background and contextual information and comprises:

- **Chapter 1. Introduction**
- **Chapter 2. Method**
- **Chapter 3. Legislative framework for policing alcohol-related violence in public.**

Chapter 1. Introduction

In mid-2011, Parliament amended the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and the *Summary Offences Act 1988* to provide NSW police officers with additional powers to deal with incidents of 'excessive intoxicated behaviour seen in entertainment districts on weekends'.[10]

In broad terms, the changes to LEPRA strengthened the authority of police officers to direct intoxicated and 'disorderly' individuals to leave a public place and not return for a specified period. The amendments to the Summary Offences Act included the insertion of a new section 9 into the Act, making it an offence for a person to continue their intoxicated and disorderly behaviour in 'the same or another public place' after being given such a direction.

These new provisions were part of broader government measures intended to help tackle alcohol-related violence in public places. The focus of this reform agenda was a three-part *Making Our Streets Safe Again* plan that sought to:

- strengthen 'move on' powers
- introduce a new offence of 'drunk and disorderly,' and
- pilot three 'sobering up centres' in NSW.[11]

The changes to the 'intoxicated move on' provisions in section 198 of LEPRA occurred in two steps. Firstly, with the passing of the *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011* (the initial amendment) in June 2011, Parliament amended section 198 to enable police to direct an intoxicated individual to move on from a public place.[12] Previously, such a direction could only be given if the intoxicated person was in a group of three or more, as section 198 was principally aimed at giving police clear authority to issue directions to volatile groups of drunken people, particularly where there was a risk to public safety.[13]

Weeks later, with the passing of the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (the amendment Act), Parliament further broadened the grounds for issuing a move on direction to an intoxicated person under LEPRA and created a new summary offence for anyone remaining in a public place after such a direction is given.[14] In explaining the proposed amendments to Parliament, the then Attorney General said the new powers and summary offence for continued intoxicated and disorderly behaviour in public would provide police with additional options for targeting the conduct of 'individuals who are determined to drink to excess or party hard on their drug of choice and then choose not to obey reasonable directions given by police to go home before trouble starts'.[15]

As part of its *Making Our Streets Safe Again* strategy to reduce alcohol-related violence, the NSW Government began a trial of three sobering up centres in the Sydney CBD, Coogee and Wollongong on 1 July 2013. Although the trial was scheduled to end on 1 July 2014, the trial period has been extended until 1 July 2016 in relation to the Sydney CBD centre.[16]

1.1. The changes introduced by the 2011 amendments

The initial amendment to LEPRA[17] in June 2011 removed the words 'in a group of 3 or more intoxicated persons' from the intoxicated move on provision. Previously, section 198 of LEPRA provided:

> (1) A police officer may give a direction to an intoxicated person who is **in a group of 3 or more intoxicated persons** in a public place to leave the place and not return for a specified period if the police officer believes on reasonable grounds that the person's behaviour in the place as a result of the intoxication … [emphasis added]

The effect of removing these words was to broaden the circumstances police could issue such a direction, enabling a direction to be issued even if just 'one or two people meet the behaviour test' for police to move them on.[18] This amendment took effect on 7 June 2011.

10 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
11 NSW Liberals and Nationals, *Making Our Streets Safe Again: Sobering Up Centres*, viewed 15 April 2014, https://www.nswnationals.org.au/images/stories/pdf/7%20making%20our%20streets%20safe%20again.pdf.
12 *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011*, s. 3.
13 The Hon. John Hatzistergos MLC, NSWPD, (Hansard), Legislative Council, 28 November 2007, p. 4506.
14 *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*, Schedules 1[2], 2.2[1].
15 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
16 The Regulation extending the trial was tabled in Parliament on 17 June 2014. See *Intoxicated Persons (Sobering Up Centres Trial) Act 2013*; *Intoxicated Persons (Sobering Up Centres Trial) Amendment (Extension) Regulation 2014*.
17 *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011*, s. 3.
18 The Hon. Matthew Mason-Cox MLC, NSWPD, (Hansard), Legislative Council, 25 May 2011, p. 958.

Soon after that change, there were further amendments to LEPRA to provide:[19]

- a police officer may direct an intoxicated person to move on for up to six hours if the officer has reasonable grounds to believe that the person's behaviour 'is disorderly' – section 198(1)(b)
- the direction 'must be reasonable in the circumstances for the purpose of … preventing the continuance of disorderly behaviour in a public place' – section 198(2)(b)
- an intoxicated person who is given such a direction under section 198 must be warned 'that it is an offence to be intoxicated and disorderly in that or any other public place … within 6 hours after the direction is given' – section 201(2D)[20]
- police may detain an intoxicated and disorderly person for his or her care and protection (even if the person has committed a section 9 offence) – section 206(2A).

Previously, a police officer could direct an intoxicated person to leave a public place and not return for up to six hours, but only if the officer reasonably believed that – as a result of the intoxication – the person's behaviour was likely to cause injury to others or damage to property, or the behaviour otherwise gave rise to a risk to public safety. The further changes to LEPRA provided additional grounds for police to direct a person to leave a public place to deal with disorderly behaviour. 'Disorderly' is not defined in the Act.

Also, prior to the changes, a police officer could not use the power to detain an intoxicated person under section 206 if the person had committed an offence. The changes allowed police to retain the power to detain, as long as the detention was not for the purpose of taking proceedings for the section 9 offence.

Previously, it was an offence under section 199 of LEPRA to refuse or fail to comply with a direction. Significantly, the amending legislation inserted a new section 9 into the Summary Offences Act, creating a new offence of 'Continuation of intoxicated and disorderly behaviour following move on direction'. Under section 9(1), it is an offence for a person who has been given a 'move on direction' under section 198 of LEPRA to remain in that or another public place for up to six hours after being given such an order. In this report, we refer to this as a 'section 9 offence'.

The maximum penalty for a section 9 offence during the review period was six penalty units – that is, $660.[21] The amendment Act also added section 9 to the list of prescribed penalty notice offences in the Criminal Procedure Regulation 2010, giving police officers the option of issuing a $200 on-the-spot fine to any person whom they reasonably believe has committed a section 9 offence.[22] These further amendments commenced on 30 September 2011.

The cumulative effect of these changes[23] was to authorise police officers to issue legally enforceable move on directions to any person who is intoxicated and disorderly in a public place. A person is 'intoxicated' if his or her speech, balance, coordination or behaviour is noticeably affected, and it is reasonable in the circumstances to believe that this is due to alcohol or any drug. A direction can be issued if the person is alone or part of a group. If the person is found in any public place within the next six hours, and continues to be intoxicated and disorderly, he or she is guilty of an offence.

Anyone found to have breached section 9 of the Summary Offences Act may be issued with an on-the-spot fine or charged and brought before the courts. As was the case prior to the changes, an officer continues to have the option of detaining the intoxicated person for his or her own care and protection in appropriate circumstances.

The then Attorney General emphasised that the purpose of the reforms was to strengthen the powers of police to deal with drunken, unruly behaviour in busy precincts:

> This policy is not about targeting the homeless, the mentally ill, the Aboriginal community or the disadvantaged in our society. It is to manage the excessive intoxicated behaviour seen in entertainment districts on weekends.[24]

19 *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*, Schedule 2.2[1]-[4].

20 Since May 2014, this provision is now contained in section 198(6) of the *Law Enforcement (Powers and Responsibilities) Act 2002*. See *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1] and 2[12].

21 *Summary Offences Act 1988*, s. 9(1). In early 2014, Parliament increased the maximum penalty to 15 penalty units ($1,650); see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, Schedule 5.1.

22 Criminal Procedure Regulation 2010, Schedule 3. In early 2014, Parliament increased the on-the-spot fine to $1,100; see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, Schedule 5.2.

23 As made by the *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011* and the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*.

24 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3135.

He said that broadening the move on powers and expanding the options for dealing with non-compliance should enable police to adopt 'a measured but escalating response to intoxicated and disorderly conduct'.[25]

1.2. Our role and this report

The amendment Act[26] included a provision at section 36(1) of the Summary Offences Act requiring the Ombudsman to scrutinise police use of the new provisions for the first 12 months and to prepare a report on:

(a) the operation of section 9, and

(b) the issue of penalty notices in respect of offences against section 9.[27]

The then Attorney General said the purpose of requiring the Ombudsman to review these provisions was to:

> … ensure that the powers are being used appropriately and consistently with the Government's commitment to address problem social drinking and not the homeless and disadvantaged in our society.[28]

As the section 9 provisions commenced on 30 September 2011, our analysis focused on data gathered in the 12 months to 30 September 2012. In this report, we refer to this as the 'review period'.

25 Ibid.
26 *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*, Schedule 1[3].
27 *Summary Offences Act 1988*, s. 36(1)(a)-(b).
28 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3137.

Chapter 2. Method

We used a range of research and investigative methods to inform our review.

2.1. NSW Police Force

Our analysis of NSW Police Force data and information included detailed examination of:

- 484 records on the NSW Police Force's Computerised Operational Policing System (COPS)[29] as at January 2013 relating to all instances in which people were identified by police as having committed a section 9 offence during the review period (dataset 1)
- an earlier (as at November 2012) analysis of 447 records on COPS and held in the Police Integrity Commission's Police Oversight Data Store (PODS)[30] relating to all people identified as having committed a section 9 offence during the review period (dataset 2)[31]
- trend data about the use of existing move on powers[32] and custody records relating to the detention of intoxicated people during the three years prior to the review period[33]
- relevant NSW Police Force policies and guidelines, including Standard Operating Procedures (SOPs), internal memoranda and training materials
- feedback provided by frontline police officers in seven focus group discussions in metropolitan and regional commands
- interviews of local area commanders, crime managers, licensing sergeants and a number of other officers who had planned operations or who had direct experience in using the new provisions
- a direct observation of a frontline policing operation (Operation Rushmore) targeting alcohol-related violence and anti-social behaviour in the Sydney CBD on 28 September 2012.

2.2. State Debt Recovery Office

The State Debt Recovery Office (SDRO)[34] provided information about 395 penalty notices issued for section 9 offences during the review period (dataset 3), including information about whether or not they had been paid, as at 30 November 2012 (eight weeks after the review period).[35] Where possible, information about fine recipients was cross-referenced with information provided by the NSW Police Force. From the 395 penalty notices in dataset 3, we were able to ascertain information about 323 of the 484 records in dataset 1.

The SDRO also provided information about unpaid fines and any subsequent enforcement action taken to recover unpaid fines, as at 2 September 2013. This information related to 130 of the 150 records relating to fine recipients whom we identified as 'vulnerable' from our examination of police records.[36]

2.3. Court records

Of the 484 records in dataset 1 relating to people fined or charged for a section 9 offence, we identified 99 cases where the COPS records showed the person had been charged for an alleged section 9 offence during the review period, instead of being issued a penalty notice. The Department of Justice[37] provided information relating to 108

29 Relevant event records were identified from data provided by NSW Police Force in January 2013, by law part code and CAN law part code 75587 ('Continue intoxicated etc behaviour after move on direction').

30 This is a database containing data derived from COPS.

31 There were 432 matching records between datasets 1 and 2. Relevant event records were identified from data, provided by NSW Police Force in November 2012, by law part code and CAN law part code 75587 ('Continue intoxicated etc behaviour after move on direction'), in addition to records that had no law part code but showed 'refuse direction continue intoxicated and disorderly' under 'incident further classification' and the 'InvStatus' was 'legal process' or 'CAN' (Ref: 2012/108984).

32 EDW data provided by the NSW Police Force on 25 February 2013.

33 Custody data provided by NSW Police Force on 15 October 2012.

34 Now the Commissioner of Fines Administration; see *Fines Amendment Act 2013*.

35 Provided by State Debt Recovery Office (SDRO) on 14 January 2013.

36 We only sought information from the SDRO about those 133 records relating to people whom we identified as vulnerable who had not paid the section 9 fine and for whom we had a record of their infringement number. SDRO provided information for 130 of these cases.

37 This was formerly named the Department of Police and Justice (see Administrative Arrangements (Administrative Changes – Miscellaneous Agencies) Order 2014); and, at the time the information was provided, it was named the Department of Attorney General and Justice (see Administrative Arrangements (Administrative Changes – Ministers and Public Service Agencies) Order 2014).

cases where their records showed a person had been charged with a section 9 offence (dataset 4). This included the transcripts of 58 cases heard before the Local Court. From the 108 cases in dataset 4, we were able to ascertain information about 93 of the 484 records in dataset 1. We examined this information, as well as records in PODS, to determine any other charges that were laid in addition to the charge for the section 9 offence, the pleas entered for the section 9 charge, whether or not the defendant was convicted of the section 9 offence, and any court-imposed penalty. In this way we were able to obtain information about all 99 cases.

2.4. Bureau of Crime Statistics and Research

The NSW Bureau of Crime Statistics and Research provided valuable trend data, including recorded incidents of alcohol-related assaults (excluding domestic violence), assault police, offensive language and offensive conduct in NSW for the period 2005-2012.[38]

2.5. Community consultations

Our community consultations included meetings and discussions with peak bodies, such as the Youth Justice Coalition, and information sought from 10 local councils about their strategies for reducing alcohol-related violence and anti-social behaviour.

We also sought feedback from legal services, community groups and Liquor Accord members in regional locations where police records indicated that the provisions were actively being used, particularly the Tweed-Byron and Richmond Local Area Commands in the Northern Rivers region of NSW.

2.6. Submissions

In December 2012 we published an issues paper[39] and invited submissions. The 24 written responses we received included submissions from legal centres, local councils, the Australian Hotels Association and members of the public.

2.7. Literature review

We reviewed literature and media reports about the new provisions, including research and literature from Australia and elsewhere about the use of move on powers and strategies to reduce alcohol-related violence in public places.

2.8. Complaints about police involving section 9 offences

One of our functions is to oversee the handling of complaints about police officers by the NSW Police Force. We were not notified of any complaints about a police officer's decision to penalise someone for committing a section 9 offence, or their conduct during such an interaction, during the review period.

2.9. Our analysis

The COPS records provided by the NSW Police Force showed that a total of 110,949 move on directions had been issued to people across NSW during the 12-month review period, including 33,580 directions given to intoxicated people under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).[40]

Information from police identified 484 records (1.4% of 33,580) where legal action had been taken for an alleged section 9 summary offence of 'continuation of intoxicated and disorderly behaviour following move on direction'.[41] These 484 records related to 471 separate individuals, as 11 people had legal action taken against them for section 9 offences twice during the review period, and one person was fined three times.

38 Provided by NSW Bureau of Crime Statistics and Research on 29 April 2013 (BOCSAR ref: kg13-11258).

39 NSW Ombudsman, *Issues Paper – Summary Offences Act 1988 Section 9: Continuation of intoxicated and disorderly behaviour following move on direction*, December 2012.

40 Information about the 110,949 move on directions was provided by NSW Police Force on 7 January 2013. Information about the 33,580 section 198 directions was provided by NSW Police Force on 25 February 2013.

41 On closer examination, we found five young people who were neither fined nor charged, but were dealt with informally or under the *Young Offenders Act 1997*. However, we decided they should nonetheless remain in dataset 1.

Additionally, in the same period there were 1,768 incidents (5.3% of 33,580) relating to people who had legal action taken under section 199 of LEPRA for failing or refusing to comply with a section 198 direction.[42]

As shown in Table 1, our quantitative analysis focused on the characteristics of those who were fined or charged for a section 9 offence, police accounts of the circumstances in which the relevant conduct occurred, and the outcomes of the penalties given.

Table 1. Information related to section 9 offences from each dataset, 1 October 2011 to 30 September 2012

Dataset no.	Source	No. of records	Information ascertained
1.	NSW Police Force	484 (as at Jan 2013)	Location (Local Area Command and Region) Person's age Gender Aboriginal status (ever-identified)* Date and time of alleged offence Action taken (penalty notice, court attendance notice, caution or warning)
2.	NSW Police Force & Police Integrity Commission	447 (as at Nov 2012)	Information noted by police either at the time of the alleged offence or in the three years prior to the review period about whether the person was homeless, had mental health issues, had a cognitive impairment, was Aboriginal, or aged under 18 years. Information noted in the event narrative about whether the circumstances leading to the issuing of a section 9 penalty were consistent with the elements of the offence, and whether officers followed legal and procedural requirements when exercising the relevant powers. Whether the police record indicated that the alleged offender had been detained under section 206 of LEPRA. Whether the defendant was convicted.
3.	State Debt Recovery Office	395	Payment of the penalty notice Challenge of the penalty notice Enforcement action taken to recover unpaid fines
4.	Department of Justice	108	Plea Legal representation Defences raised during court proceedings Fine imposed or other order made

* 'Aboriginal status (ever-identified)' refers to people who have ever identified as Aboriginal or Torres Strait Islander in this or a previous interaction with police, as distinct from those who were identified as Aboriginal on this particular occasion.

In order to establish whether the circumstances leading to the issuing of a section 9 penalty were consistent with the requirements to prove the offence had been committed, and the procedural requirements officers must follow when exercising the relevant powers, we conducted a qualitative examination of records relating to 447 records relating to people whom we identified in November 2012 as having been fined or charged for a section 9 offence (dataset 2).[43]

42 Provided by NSW Police Force on 3 June 2013.

43 Because sometimes only one COPS Event record is created in circumstances involving more than one person, the number of COPS Event records was 405.

Our examination enabled us to assess a number of research questions, including:

- whether the initial move on direction was given to a person who was intoxicated and behaving in a disorderly way
- whether the police officer gave the required warnings and justification for exercising their powers
- whether the continuing behaviour took place within six hours of the initial move on direction.

Our review was required to consider the impact of the new provisions on potentially vulnerable people. A person's age and whether or not they were an Aboriginal or Torres Strait Islander person were provided in dataset 1. We identified whether the person was experiencing homelessness, had a mental health issue, or had some form of intellectual disability or cognitive impairment, from our examination of dataset 2.[44] We considered that a person had a mental health issue if the police records indicated that the person had been scheduled under the *Mental Health Act 2007*, had expressed suicidal thoughts, or attempted suicide in the three years prior to the review period.[45]

2.10. Limitations

In April 2012, the NSW Police Force changed the way police officers record move on directions in COPS, simplifying the number of 'further classifications' for recording all move on directions,[46] while expanding the list of 'associated reasons' from nine reasons to 12. At our request, the NSW Police Force had started to implement changes to its COPS system to enable officers to record reasons for issuing a section 198 direction, including the option of noting when a direction was issued on grounds that the intoxicated person's behaviour was 'disorderly' (under section 198(1)(b)). However, the April 2012 COPS update included changes to meet the needs of the Commuter Crime Unit. These effectively removed the ability of officers to specify their legal basis for issuing such directions, because the number of 'associated reasons' linked to police uses of the section 198 powers was actually reduced. Of the 12 listed reasons, only one related to section 198 of LEPRA (previously there were two), six related to other LEPRA move on powers and the remaining five related to move on powers linked to breaches of rail safety regulations.[47]

Without a way for police to note whether the direction was issued because the person was likely to cause injury, damage property or pose a risk to public safety (under section 198(1)(a)), or was issued because the person was 'disorderly' (under section 198(1)(b)), the April 2012 changes to COPS made it harder – not easier – to accurately determine the legal basis of section 198 'move on' directions being issued to intoxicated people. Although a recent bulletin published in the NSW Police Force's *WebCOPS eGuide* indicates that this deficiency in the COPS system has since been rectified,[48] the repair occurred too late to be of use for our review.

Instead, we had to rely on manual checks of the reasons noted in officers' narrative descriptions of incidents to try to identify their reasons for issuing section 198 directions. This showed that the grounds for using the power were often unclear. Section 198 authorises police to issue directions for the purpose of preventing injury or damage, or to eliminate risks to public safety, or – since the 2011 legislative amendments – to prevent a continuance of disorderly behaviour. In many cases the reasons noted by police did not clearly relate to any of these factors.

Additionally, it is likely that there were breaches of section 9 among the 1,768 incidents relating to people who were penalised for a section 199 offence (for failing or refusing to comply with a section 198 direction). Similarly, it is likely that the 33,580 'move on directions' issued by police officers to intoxicated people under section 198 during the review period included a number of instances where officers detected suspected breaches of section 9, but exercised appropriate discretion to take no further action. While decisions such as these are important, the way this information was recorded and subsequently provided made detailed analysis of these issues difficult.

We also identified a number of inaccurate and incomplete records, and some inconsistencies in police recording practices. For example, in some COPS records the offence selected from the available options in the data section differed from the offence described in the event narrative. While such recording issues are to be expected, these errors and omissions – combined with the difficulties noted above with respect to accurately capturing the legal basis for police decision-making – posed a limitation to our research.

44 For the purposes of our analysis, we have adopted the working definition of 'cognitive impairment' used in NSW Attorney General, *Internal Review Guidelines under the Fines Act 1996*, 31 March 2010, p. 10.

45 Our methodology involved looking through information about each person held in the Police Integrity Commission Police Oversight Data Store (PODS) for any reference to a mental illness, mental health issue, suicide, psychosis, bipolar disorder, brain injury, or a person being scheduled under the *Mental Health Act 2007*.

46 The changes required police to classify the move on direction as: A. 'Comply direction'; B. 'Refuse direction'; or C. 'Refuse direction – Continue Intox & Disorder', NSWPF, *COPS Tips & Tricks* Issue 157, April 2012.

47 NSWPF, *COPS Tips & Tricks* Issue 157, April 2012.

48 NSW Police Force, *WebCOPS eGuide*, 'Powers – Move on / refuse direction – Continue intoxicated and disorderly', 24 June 2014.

2.11. Consultation on final report

Draft copies of this report were provided to the Commissioner of Police, the Department of Justice, and the Commissioner of Fines Administration in May 2014. This was to give these parties an opportunity to provide feedback on the material presented, to comment on the accuracy of the descriptions of police processes and practices, and to provide their views about the draft recommendations. We received responses from the NSW Police Force on 6 June 2014, from the Commissioner of Fines Administration on 12 June 2014, and from the Department of Justice on 25 June 2014.

Among the concerns raised by police were claims of 'discrepancies' in the statistical data presented in the report. Following further consultation with specialist staff from the NSW Police Force's Performance Improvement and Planning Command on 26 June 2014, these concerns were resolved.

The police response also expressed concerns about other issues in the consultation draft of this report, including a number of the draft recommendations. These concerns, together with the advice provided by the Commissioner of Fines Administration and from the Department of Justice, are noted in the relevant sections of this report and were carefully considered when finalising the recommendations. Where appropriate, recommendations were revised to address the issues raised.

Chapter 3. Legislative framework for policing alcohol-related violence in public

3.1. Parliamentary consideration of the amendments

In giving police officers greater flexibility to determine when to issue a direction under section 198 of *Law Enforcement (Powers and Responsibilities) Act 2002* (a section 198 direction) and creating a new summary offence to penalise failure or refusal to comply with such a direction, Parliament emphasised that the new powers would be focused on curbing intoxicated, anti-social and violent behaviour in entertainment districts and not directed at the homeless and disadvantaged.[49]

The then Attorney General said that the people who would be most affected by the broader powers and harsher penalties would be those 'individuals who are determined to drink to excess or party hard on their drug of choice' and who then disregard reasonable police directions for them to 'go home before trouble starts'.[50]

> We have said that people are entitled to enjoy a night out without fear of having their evening ruined by drunken and violent hooligans… It is clear that more needs to be done to make the streets of New South Wales safe again.[51]

One Member of Parliament (MP) argued the new powers were needed because:

> The police must find it frustrating to have to move on intoxicated and disorderly persons, only to have them reappear at a nearby venue and create a disturbance. The confrontation between the police and the persons concerned then starts again with the persons being moved on for a second time ... By our enacting this legislation, police will be able to direct disorderly persons to move on. If these persons are intoxicated and disorderly in a public place at any time within six hours after the move-on direction is given, they will be committing an offence.[52]

Another said the amendments were intended to help to prevent tensions from escalating:

> [T]his is preventative medicine. This legislation introduces preventative measures to stop people creating problems that may escalate.[53]

On the impact of alcohol-related violence, the then Attorney General said:

> People are entitled to have fun, but not to the detriment of other people's night out. Those people are the reason that police need additional enforcement tools in the form of the new intoxicated and disorderly conduct offence. This State bears the cost of that type of behaviour every day through a burden on the health system. Every weekend emergency departments across New South Wales see the impact of intoxicated and disorderly behaviour, and the cost of dealing with the resultant injuries represents a burden to the State for which taxpayers should not have to pay.[54]

During the Parliamentary debate, concerns were raised about the potential impact of the new provisions on vulnerable and marginalised groups who are already over-represented in the criminal justice system, particularly Aboriginal or Torres Strait Islander people and/or people who are homeless, young or who have a mental illness.[55] A number of MPs argued that re-introducing a 'drunk and disorderly' offence contravened recommendations of the Royal Commission into Aboriginal Deaths in Custody, noting that criminalising this behaviour in the past had failed to deter this behaviour but instead tended to escalate the number of marginalised people entering the criminal justice system, especially Aboriginal people.[56]

49 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
50 Ibid.
51 Ibid.
52 Melanie Gibbons MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3655.
53 David Elliot MP, NSWPD, (Hansard), Legislative Assembly, 3 August 2011, p. 3565.
54 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
55 The Hon. Nathan Rees MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, pp. 3641-3642, where he read a letter from the NSW Aboriginal Land Council into Hansard.
56 The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3591-3592; David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3609-3610; The Hon. Amanda Fazio MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3615-3616; Ryan Park MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3650; The Hon. Luke Foley MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3608.

Others argued that existing provisions in *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), particularly the section 199 offence to 'fail to comply with a direction', were adequate to deal with people, including intoxicated people, who do not obey move on directions.[57]

Although the changes did not include additional protections for homeless people and other vulnerable groups, the then Attorney General emphasised that the intention was to target 'excessive intoxicated behaviour' and not 'the disadvantaged in our society'.[58] In response to concerns expressed by the Legislation Review Committee about the lack of a definition for 'disorderly' in the Act,[59] and expressed in Parliament about the possible misuse of the powers,[60] the then Attorney General said that the police would develop comprehensive Standard Operating Procedures (SOPs) to guide officers on their use of the intoxicated move on powers and the section 9 offence.[61]

3.2. The provisions we reviewed

As previously noted, Parliament required us to review the police use of the new provisions and to report on the initial 12 months of 'the operation of section 9' of the *Summary Offences Act 1988*, and 'the issue of penalty notices in respect of offences against section 9'.[62]

Section 9 of the Summary Offences Act makes it an offence for any person who has been 'given a move on direction for being intoxicated and disorderly in a public place' under section 198 of LEPRA, to be 'intoxicated and disorderly in the same or another public place' within six hours of having been given a move on direction. During the review period, the maximum penalty for breaching section 9 was six penalty units or $660.[63]

Section 9 is set out in full in Appendix A.

3.3. Provisions directly related to the operation of section 9

To support the introduction of the offence, Parliament also amended:[64]

- sections 198(1), 198(2), 201 and 206 of LEPRA to broaden the grounds for issuing a move on direction to an 'intoxicated and disorderly' individual and to deal with non-compliance
- the Criminal Procedure Regulation 2010 to add section 9 offences to the list of Criminal Infringement Notice offences, giving police officers the option of issuing a $200 penalty notice to anyone they reasonably believe has committed a section 9 offence.[65]

A police officer may use section 198 of LEPRA to direct an intoxicated person to move on if the officer believes on reasonable grounds that the person's behaviour, as a result of the intoxication, 'is disorderly'.[66] Previously, such directions could be given only if the officer believed that the behaviour was likely to cause injury to a person, damage to property or otherwise be a 'risk to public safety'.[67] Section 198 is set out in full in Appendix B.

Any direction given must be reasonable in the circumstances for the purpose of either 'preventing injury or damage or reducing or eliminating a risk to public safety', or 'preventing the continuance of disorderly behaviour in a public place'.[68]

57 The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3606; David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3611.

58 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3135.

59 Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 1/55*, Sydney, 8 August 2011, p. 121.

60 The Hon. Nathan Rees MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3643; Jamie Parker MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3661.

61 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3137; see also The Hon. Greg Smith MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, pp. 3662-3663.

62 *Summary Offences Act 1988*, s. 36(1)(a)-(b).

63 *Summary Offences Act 1988*, s. 9(1). In early 2014, Parliament increased the maximum penalty to 15 penalty units ($1,650); see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, Schedule 5.1.

64 *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*, Schedule 2.

65 Criminal Procedure Regulation 2010, Schedule 3. In early 2014, Parliament increased the on-the-spot fine for this offence to $1,100; see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, Schedule 5.2.

66 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 198(1)(b).

67 These grounds remain. See LEPRA, s. 198(1)(a).

68 LEPRA, s. 198(2).

Police who give a move on direction on the basis that a person is intoxicated and disorderly must also warn that it is an offence to be intoxicated and disorderly in that or any other public place at any time within six hours of the direction being given.[69] This is in addition to the general safeguards at section 201 of LEPRA[70] that officers must provide:

- evidence that they are a police officer (unless they are in uniform)
- their name and place of duty, and
- the reason for the direction.

During the review period, officers were required to give the following additional warnings if a person did not immediately comply with the direction:

- that the person is required by law to comply with the direction[71]
- if the person still did not comply, that failure to comply is an offence.[72]

In May 2014, an Act was passed that replaced Part 15 of LEPRA.[73] One effect was that police are no longer required to give the second warning (under the previous section 201(2C)(b)) in cases where a person still does not comply.

Section 206 of LEPRA (set out in full at Appendix C) provides that police may detain an intoxicated person[74] who is found in a public place and is:

- behaving in a disorderly manner or in a manner likely to cause injury to themselves or others, or damage to property, or
- in need of physical protection due to their intoxication.[75]

The provision allows police to detain an intoxicated person who has not committed an offence, and to place the person into the care of a responsible person – such as a friend, family member or welfare service provider.[76] LEPRA generally prohibits police from using section 206 in relation to a person who is suspected of having committed an offence.[77] The power was intended to be used as an alternative to taking legal action. However, the amendment Act[78] inserted a new subsection in section 206 that provides an exception to this general rule:

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

3.4. Other options for policing alcohol-related incidents in public places

The broader 'intoxicated move on' powers and additional summary offence penalties for failure or refusal to comply with a formal direction by police, are among a number of public order provisions available to police officers faced with the challenge of reducing the risks of alcohol-related violence in public places.

Instead of using the section 198 powers, police officers who are dealing with an intoxicated individual might – depending on the situation – decide to:

- give a reasonable direction to the person – LEPRA, section 197 (set out in full in Appendix B)
- detain the intoxicated person for his or her care and protection – LEPRA, section 206
- remove the person from licensed premises – *Liquor Act 2007*, section 77
- take action under the *Young Offenders Act 1997* if the intoxicated person is under 18 years, or

69 LEPRA, s. 201(2D). Since May 2014, this provision is now contained in section 198(6) of the *Law Enforcement (Powers and Responsibilities) Act 2002*. See *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1] and 2[12].

70 Since May 2014, this provision is now contained in section 202 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. See *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1].

71 LEPRA, s. 201(2C)(a). Since May 2014, this provision is now contained in section 203(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002*. See *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1].

72 LEPRA, s. 201(2C)(b). Since May 2014, this provision has been repealed. See *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1].

73 *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1].

74 An 'intoxicated person' is defined as 'a person who appears to be seriously affected by alcohol or another drug or a combination of drugs': LEPRA, s. 205.

75 LEPRA, s. 206(1).

76 LEPRA, s. 206(3).

77 LEPRA, s. 206(2).

78 *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011*, Schedule 2.2[4].

- detain an intoxicated person who is in a public area near a mandatory or voluntary sobering up centre, in that centre – *Intoxicated Persons (Sobering Up Centres Trial) Act 2013*.

In relation to the LEPRA powers, 'public place' is defined broadly to include places that are open to everyone without restriction (such as streets, parks and beaches), places that are open to the public but may restrict or control entry (such as licensed premises and railway stations), and private property open to the public (such as car parks and common areas in apartment blocks).[79] In relation to the detention of intoxicated people under Part 16 of LEPRA, a public place can also include a school.[80]

3.5. NSW Police Force policies about dealing with intoxicated people in public places

Although there are no NSW Police Force SOPs about the use of the section 9 offence, police do have a number of resources that contain information about dealing with intoxicated people in public places, including information about the new provisions.

The NSW Police Force has created a factsheet about the section 9 offence.[81] Two short online training modules provide police with scenarios where use of the section 198 power would be appropriate. However, these modules have not been updated since the 2011 amendments and do not refer to the section 9 offence.[82]

The *NSW Police Force Handbook* states that the NSW Police Force 'supports the harm minimisation approach to alcohol-related incidents and is committed to ethical and respectful policing'.[83] A short online training module is provided. It outlines the harm minimisation approach, based on the principles in Australia's National Drug Strategy.[84] An online training module on alcohol-related crime provides a scenario in which early intervention by police would be appropriate in response to people who are drinking excessively, with a view to reducing alcohol-related crime.[85]

The Handbook states that 'two ways of dealing with intoxicated persons in public places' is that they may be given a direction to move on, or they may be detained.[86] There is a section on issuing move on directions to people who are intoxicated in public places, summarising the section 198 power, the section 9 offence and the section 199 offence.[87] The Handbook also states that 'police should always consider the safety of an intoxicated person and are reminded to seek urgent medical attention where appropriate'[88] and:

> Police should be mindful that an intoxicated person seriously affected by alcohol or other drugs may require immediate medical attention. Medical assessments of people who appear to be severely intoxicated are to be conducted by a doctor or a registered nurse at a public hospital.
>
> Be alert to the possibility that some people who appear to be intoxicated may in fact be ill or injured.[89]

The NSW Police Force has SOPs relating to Criminal Infringement Notices (CINs). 'CINs' is a term used to refer to penalty notices issued by police for certain criminal offences,[90] including those issued under section 9. The CINs SOPs note that a CIN should not be issued to seriously intoxicated or drug affected persons where the officer believes the person cannot comprehend the procedure.[91] They also state that the capacity to issue a CIN does not affect other options available to an officer, including issuing a caution.

In March 2012, a Nemesis email message[92] to police included brief information that a CIN could be issued for a section 9 offence.

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79 See the definition of 'public place' in LEPRA, s. 3(1).

80 LEPRA, s. 205

81 Alcohol Licensing & Enforcement Command, NSW Police Force, *Fact Sheet: Move On (Intoxicated Persons) – Updated,* 2011.

82 NSW Police Force, *Six Minute Intensive Training (SMIT): PA040 Power to Disperse Intoxicated Persons,* 28 September 2011; NSW Police Force, *SMIT: PA041 Part 16 LEPRA – Power to give move on directions to and/or detain intoxicated persons*, 7 December 2011.

83 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 15.

84 NSW Police Force, *SMIT: DA016 Illicit Drugs / Harm Minimisation*, 22 May 2008.

85 NSW Police Force, *SMIT: DA049 Alcohol Related Crime – NSW State Plan*, 12 November 2009.

86 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 431.

87 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, pp. 431-432.

88 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 431.

89 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 434.

90 Currently, the offences for which a CIN may be issued are: larceny (if the value does not exceed $300), persons unlawfully in possession of property, offensive conduct, offensive language, obstructing traffic, unauthorised entry of vehicle or boat, and continuation of intoxicated and disorderly behaviour following move on direction. See Criminal Procedure Regulation 2010, Schedule 3.

91 Police Prosecutions Command, NSW Police Force, *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPS) V.4*, 6 March 2012, p. 7.

92 A Nemesis message is an email that can be sent to all NSW police officers if it fits within certain criteria and is authorised by an Inspector or above.

The Alcohol & Licensing Enforcement Command, a unit within Drug and Alcohol Coordination, has developed a handbook to assist police in dealing with alcohol and licensing related matters.[93] This handbook summarises laws and police powers relating to liquor licensing administration and enforcement, consumption of alcohol in a public place, offences by members of the public on licensed premises, and offences by licensees. It includes a section on issuing a section 198 direction, but does not refer to the section 9 offence.

Several other NSW Police Force policies provide guidance on dealing with intoxicated people:

- SOPs and a short online training module about alcohol-free zones, outlining where, when and how to use the power to confiscate alcohol in an alcohol-free zone,[94] in addition to a module about alcohol prohibited areas[95]
- a short online training module about evicting a person from licensed premises[96]
- fact sheets on orders made by the Independent Liquor and Gaming Control Authority banning a person from entering or remaining on licensed premises,[97] and advising how place restriction orders may be useful in a licensing context.[98]

There are a number of online resources about policing licensed premises and the duties of licensees and their employees, including licensees' responsibilities in relation to intoxicated people,[99] and how to conduct a 'walk through' of licensed premises.[100] Three training sheets relate specifically to alcohol-related matters involving children and young people.[101] Five short online training modules provide instruction on implementing the Alcohol Linking Program,[102] a system within COPS for relating alcohol-related incidents to the last place where intoxicated people involved in an incident consumed alcohol. This system requires police to question people about which venues they have been to and enter the information into COPS.

Four short online training modules about the NSW sobering up centres trial are also available to police. Each module explains police officers' options and responsibilities in a different scenario, including one scenario that involves a person failing to comply with a section 198 direction.[103]

3.6. Operations and programs that target alcohol-related harm

Periodically, police apply the new provisions and other policies and strategies in specific operations that are aimed at reducing alcohol-related violence and anti-social behaviour. The evaluation of section 9 needs to be understood in the context of how police deal with these social issues overall. We observed one such operation (Operation Rushmore) during this review. Relevant police operations and programs during the review period included:

- *Operation Unite* – Twice yearly since 2009, the NSW Police Force has conducted a national, coordinated weekend-long operation targeting street and traffic offences associated with alcohol and drugs, called Operation Unite. In NSW, Operation Unite involves police from all regions, the Alcohol & Licensing Enforcement Command (ALEC) and specialist units such as the Public Order and Riot Squad. During the review period, this operation was run on 2 - 4 December 2011.[104]
- Local Area Commands periodically run operations which have a broader public order focus. Some include a focus on alcohol-related crime (for example, operations run on Anzac Day and Australia Day).

93 Alcohol & Licensing Enforcement Command, NSW Police Force, *Licensing Aide-Mémoire – Handbook*, August 2013.

94 Alcohol & Licensing Enforcement Command, NSW Police Force, *Standard Operating Procedures: Alcohol Free Zones*; Alcohol & Licensing Enforcement Command, NSW Police Force, *SMIT: Alcohol Free Zones*.

95 NSW Police Force, *SMIT: DA056 Confiscating alcohol in an alcohol prohibited area*.

96 NSW Police Force, *SMIT: DA027 Fail to Quit Licensed Premises*.

97 Alcohol & Licensing Enforcement Command, NSW Police Force, *Fact Sheet: Banning Orders – Section 78 of the Liquor Act 2007*, November 2011.

98 Alcohol & Licensing Enforcement Command, NSW Police Force, *Fact Sheet: Place Restriction Orders – Crimes (Sentencing Procedure) Act 1999 & Children (Criminal Proceedings) Act 1987*, November 2011.

99 Alcohol & Licensing Enforcement Command, NSW Police Force, *Fact Sheet: Licensee Permit Intoxication – Investigation, Liquor Act 2007*, April 2012; NSW Police Force, *SMIT: DA011 Intoxication in Licensed Premises*; NSW Police Force, *SMIT: DA036 Permit intoxication in licensed premises*, 22 October 2008; NSW Police Force, *SMIT: DA019 Responsible Service of Alcohol.*

100 NSW Police Force, *SMIT: DA035 Conducting a 'walk through' of a licensed premises*, 19 August 2008.

101 NSW Police Force, *SMIT: DA001 Minor in Licensed Premises*, 19 August 2008; NSW Police Force, *SMIT: DA041 Consumption of Alcohol by Minors*, 9 October 2008; NSW Police Force, *SMIT: DA043 Consumption of alcohol by minors at a private residence.*

102 NSW Police Force, *SMIT: DA017 Alcohol Linking Program*, 22 May 2008; NSW Police Force, *SMIT: DA030 Alcohol Linking Program Scenario 1*, updated 29 January 2014; NSW Police Force, *SMIT: DA031 Alcohol Linking Program Scenario 2*, updated 29 January 2014; NSW Police Force, *SMIT: DA032 Alcohol Linking Program Scenario 3*, updated 29 January 2014; NSW Police Force, *SMIT: DA033 Alcohol Linking Program Scenario 4*, 22 May 2008.

103 NSW Police Force, *SMIT: DA052 Accredited Sobering Up Centres Trial – Scenario 1*; NSW Police Force, *SMIT: DA053 Accredited Sobering Up Centres Trial – Scenario 2*; NSW Police Force, *SMIT: DA054 Sydney City Sobering Up Centres Trial – Scenario 1*; NSW Police Force, *SMIT: DA055 Sydney City Sobering Up Centres Trial – Scenario 2*.

104 Operation Unite is an initiative of the Commissioners of Police through the Australia New Zealand Policing Advisory Agency.

- *Operation Viking* provides financial support to Local Area Commands and Regions to employ a high visibility policing strategy to target alcohol-related crime, anti-social behaviour and a broad range of other types of criminal activity. The NSW Police Force advised us that 'at any given time, there are approximately 80 operations funded by Operation Viking being conducted across New South Wales'.[105] Operation Viking has previously provided funding for Operation Unite, and currently is assisting *Operation Spartan* (targeting public order and safety in the South West Metropolitan area) and *Operation Rushmore* (targeting alcohol-related crime and anti-social behaviour in the Central Metropolitan area).
- *Operation Jindella* – ALEC has concentrated resources on policing licensed venues that are considered to be 'most at risk' of alcohol-related violence and anti-social behaviour. This includes premises declared under Schedule 4 of the Liquor Act and required to comply with special licence restrictions, such as providing additional security measures, lock outs, restriction of the use of glass and breakable plastic containers at specified periods, prohibition on the sale of some drinks (such as 'shots') during specified periods.
- *Your choice* – This is a diversionary program aimed at persons under the age of 18 years, found in possession of or consuming alcohol in a public place. Rather than pursuing formal legal processes, such as issuing a penalty notice, police issue the young person with a referral to the Your Choice program. The young person attends a two-hour educational session together with a parent or guardian. The program is run by drug and alcohol workers and police and:

  > seeks to challenge perceptions about underage drinking and excessive consumption of alcohol and to educate young people about the health, legal and social consequences of drinking. It also aims to enhance the capacity of parents/guardians to influence their child's behaviour and attitudes towards drinking.[106]

- *Focus on Karaoke bars* – ALEC has targeted policing resources on karaoke bars throughout the Sydney Metropolitan area. Whilst karaoke bars make up a small proportion of all licensed venues in NSW, this type of business activity has been identified by the NSW Police Force as 'high-risk' in terms of non-adherence to liquor licences, poor responsible service of alcohol practices, and the ensuing alcohol-related crime.[107]
- In early 2012, the Marine Command conducted a number of covert operations targeting responsible service of alcohol and illegal drug supply on 'party boats'.
- *Remove All Impaired Drivers (RAID)* – an annual traffic operation to reduce drink driving which is run by the NSW Police Force for three weeks from November each year. The aim of the operation is to significantly increase the profile of random alcohol breath testing (RBT) and to reinforce that police are actively testing at all times of the day and in a range of locations.

105 Email from Alcohol & Licensing Enforcement Command, NSW Police Force, dated 15 April 2013.
106 NSW Police Force, *Your Choice,* 6 December 2012, viewed 16 April 2014, www.police.nsw.gov.au.
107 Email from Alcohol & Licensing Enforcement Command, NSW Police Force, dated 15 April 2013.

Part B – The operation of section 9

In this Part we report on our observations on the use of the section 9 offence provision by police officers during the review period and our evaluation of its operation and implementation in practice. Our evaluation was based on the information that we received or accessed from the NSW Police Force, our consultations with police officers, and submissions we received in response to our issues paper.

In chapter 4, we outline demographic information about people fined or charged under section 9 of the Act, the locations where the provisions were most commonly used, and the times of the day and year when the alleged offences occurred.

In chapter 5, we report our findings on the use of the section in relation to certain vulnerable groups of people, including Aboriginal people.

In chapter 6, we discuss issues arising from police use of discretion in relation to:

- whether to take legal action under section 9 or section 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) where the circumstances establish that both offences have been committed (see section 6.1)
- the interpretation of 'disorderly' behaviour (see section 6.2)
- whether to use the power under section 206 of LEPRA to detain an intoxicated person for their own care and protection (see section 6.3).

In chapter 7, we report our findings on police compliance with the legal and policy requirements they must follow when taking legal action for a section 9 offence. We also discuss the practical challenges experienced by officers when using the new provisions and make recommendations for improvement. In particular, officers face difficulties in communicating to other officers that a move on direction has been given to an intoxicated person, and with giving warnings to intoxicated people.

Chapter 4. Characteristics of people and incidents involving a section 9 penalty

In examining the use of section 9 of the *Summary Offences Act 1988* to deal with failure to comply with section 198 directions, we considered data about who was fined or charged, and where and when the breaches of section 9 were detected.

As previously noted, section 197 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) provides police officers with broad powers to issue legally enforceable directions to members of the public in certain circumstances. Additionally, section 198 of LEPRA provides a specific authority for police to 'give a direction to an intoxicated person who is in a public place to leave the place and not return' for up to six hours.

During the 12-month review period, police records show that officers issued 110,949 directions[108] to people across NSW. Almost a third of these (33,580) were 'move on directions' issued to intoxicated people under section 198 of LEPRA.[109]

Most of the section 198 directions given during the review period were complied with. In those instances where there was a failure or refusal to comply, records provided by police indicate that legal action under section 199 of LEPRA ('failure to comply with direction') was taken in 1,768 instances (5.3%)[110] and under section 9 of the Summary Offences Act (continue 'intoxicated and disorderly' behaviour in a public place after being given a direction to move on) in 484 instances (1.4%).

4.1. Location of section 198 directions

Before police can act on a breach of section 9 of the Summary Offences Act, the person must first have been given a 'move on direction' under section 198 of LEPRA within the previous six hours. We therefore considered where the section 198 directions were being issued. Table 2 shows the 10 Local Area Commands (LACs) that issued the highest number of section 198 directions during the review period.

Table 2. LACs with highest number of section 198 directions issued

LAC	No.^	% of all s. 198 directions issued
City Central*	2,667	8
Tweed-Byron	1,850	5
Manly	1,261	4
Surry Hills	1,140	3
Kings Cross	1,048	3
Wollongong	988	3
Northern Beaches	888	3
Eastern Suburbs	883	3
The Rocks*	822	2
Redfern	821	2

Source: NSW Police Force – COPS. n=110,949 (number of move on directions issued between 1 October 2011 and 30 September 2012).

^ We identified 34,093 s. 198 directions given between 1 October 2011 and 30 September 2012 by identifying those COPS event records that had a 'Reason' relating to s. 198 LEPRA or an 'Incident Further Classification' relating to intoxicated people.

* Data for City Central LAC does not include The Rocks LAC.

108 Dataset provided by NSW Police Force on 7 January 2013.

109 Email from NSW Police Force, dated 25 February 2013.

110 Email from NSW Police Force, dated 3 June 2013. The police estimate of total section 198 directions issued did not include details of the LACs that issued the section 198 direction, or details of the action taken in relation to section 9 and section 199 offences. For this reason our analysis relied on data provided by NSW Police Force on 7 January 2013 about the 110,949 directions issued during the review period (Ref: 2013/001047).

More than a third (36%) of all section 198 directions during the review period were issued by police in these 10 LACs. As expected, City Central police were among the most frequent users of the section 198 power. The command has since amalgamated with The Rocks, another frequent user of section 198, to form Sydney City LAC. Although these two LACs are geographically small and have few residents, both have high concentrations of licensed premises and high influxes of daily and overnight visitors. Together, City Central and The Rocks issued 10.2% of all section 198 directions in NSW during the review period.

Police in the adjoining LACs of Surry Hills, Kings Cross and Redfern also made frequent use of section 198. When added to City Central and The Rocks, their uses accounted for almost one in every five section 198 directions issued.

While most uses of section 198 appeared to be concentrated in larger centres and locations with busy entertainment precincts, the second highest user of these provisions was Tweed-Byron LAC, whose officers issued 5.4% of all section 198 directions in NSW. Of the 1,850 directions issued by Tweed-Byron police, police 'suburb/town' records indicate that 1,238 (67%) were issued in Byron Bay.

4.2. Location of section 9 offences

We then considered the location of section 9 offences – that is, instances where an alleged failure to comply with a section 198 direction led to a fine or charge under section 9 of the Summary Offences Act.

Table 3. LACs with highest use of section 9 legal actions

LAC	s. 9 Summary Offences Act fines/charges†	s. 199 LEPRA fines/charges^	Directions issued s. 198 LEPRA*	s. 9 offences as % of s. 198 directions
Kings Cross	35	20	1,048	3
Tweed-Byron	35	70	1,850	2
Manly	24	52	1,261	2
City Central‡	22	30	2,667	1
New England	22	22	368	6
Canobolas	17	11	211	8
Richmond	17	20	629	3
Surry Hills	17	12	1,140	1
Coffs-Clarence	16	24	557	3
Goulburn	16	16	679	2

Source: NSW Police Force – COPS. n=110,949 (number of move on directions issued between 1 October 2011 and 30 September 2012).

† Law Part Code 75587 used to identify s. 9 offences.

^ Law Part Code 58321 and 58302 used to identify s. 199 offences.

* We identified 34,093 s. 198 directions given between 1 October 2011 and 30 September 2012 by identifying those COPS event records that had a 'Reason' relating to s. 198 LEPRA or an 'Incident Further Classification' relating to intoxicated people.

‡ Data for City Central LAC does not include The Rocks LAC.

As Table 3 shows, the Kings Cross and Surry Hills LACs both issued high numbers of section 198 directions during the review period. Kings Cross police recorded 35 uses of section 9 to fine or charge people for not complying with the direction given – about double the number in neighbouring Surry Hills LAC. City Central police, who issued far more section 198 directions than any other LAC, issued just 22 fines and charges for not complying with a section 198 direction. Appendix D provides a breakdown of section 9 use by all LACs.

Caution is required when interpreting the data relating to the recorded uses of section 9 offences. As discussed later in this report, most of the alleged breaches of section 9 recorded during the review period could instead have been dealt with as general 'failure to comply with direction' offences under section 199 of LEPRA. Similarly, most of the police directions recorded as section 198 directions could instead have been issued using section 197 of LEPRA, which gives police broad powers to issue directions. The choices made by different officers and different LACs as to which powers to use and how they should be recorded can therefore affect the data.

Nonetheless, the difference in the recorded use of section 9 offences in the adjoining Kings Cross and Surry Hills LACs – which both have high concentrations of licensed premises and similarly high recorded uses of section 198 directions – raised the question of whether Surry Hills police might have been making greater use of the general 'failure to comply with direction' provision under section 199 of LEPRA to deal with non-compliance.

However, our checks of the section 199 fines and charges that were linked to failure to comply with a section 198 direction, did not support this hypothesis. Table 3 shows that, compared with Kings Cross LAC, police in the adjacent Surry Hills LAC actually initiated fewer actions for breaches of section 199 following failure to comply with a section 198 direction. It should also be noted that in both the Kings Cross and Surry Hills commands, the overall numbers of section 199 offences in these circumstances was low.

Table 4 shows the LACs where the issuing of a section 198 direction was more likely to lead to a fine or charge under section 9 for not complying with the direction.

Table 4. LACs with highest use of section 9 legal actions as a proportion of section 198 directions issued

LAC	s. 9 Summary Offences Act fines/charges†	s. 199 LEPRA fines/charges^	Directions issued s. 198 LEPRA*	s. 9 offences as % of s. 198 directions
Canobolas	17	11	211	8
Albury	9	7	149	6
New England	22	22	368	6
Lake Macquarie	9	14	180	5
Barrier	13	15	290	4
Mid North Coast	14	6	394	4
Kings Cross	35	20	1,048	3
Coffs-Clarence	16	24	557	3
Richmond	17	20	629	3
Parramatta	9	11	338	3

Source: NSW Police Force – COPS. n=110,949 (number of move on directions issued between 1 October 2011 and 30 September 2012).

† We used Law Part Code 75587 to identify s. 9 offences.

^ We used Law Part Code 58321 and 58302 to identify s. 199 offences.

* We identified 34,093 s. 198 directions given between 1 October 2011 and 30 September 2012 by identifying those COPS event records that had a 'Reason' relating to s. 198 LEPRA or an 'Incident Further Classification' relating to intoxicated people.

The regional LACs of Canobolas (based at Orange), Albury and New England (Armidale) top this list. Although the 1,048 section 198 directions issued by police in Kings Cross LAC vastly outnumber those issued by the other commands on this list, its relatively high use of section 9 offences means that it is also among the LACs where such a direction is more likely to result in a fine or charge.

The records provided by police also note the town or suburb where the alleged section 9 offence occurred. Separate analysis of this information showed that 45 section 198 directions were issued to people in Boggabilla in the Barwon LAC. Of these, six (13.3%) subsequently led to people being fined or charged under section 9. Similarly, of the 92 section 198 directions in Orange, there were 8 (9%) subsequent fines or charges.[111]

4.3. When the alleged section 9 offence was detected

As the use of the new section 9 offence was intended to target alcohol-related violence on weekends, our analysis of the 484 section 9 offences in dataset 1 also considered when the alleged offences were detected. For the purpose of this analysis, nights were deemed to include the early hours of the next morning (midnight to 5am).

111 In its response to the consultation draft of this report, the NSW Police Force states: 'The reference in the report to Western Region Local Area Commands (LACs) featuring in the top 10 of LACs with the highest number of legal actions under section 9 during the period 1 October to 30 September 2012 is not considered problematic. The NSW Police Force considers these figures to be small (a total of 81 for the Region) and indicate the wide use of discretion by police not to charge and/or fine.' Correspondence from the Commissioner of Police, dated 6 June 2014.

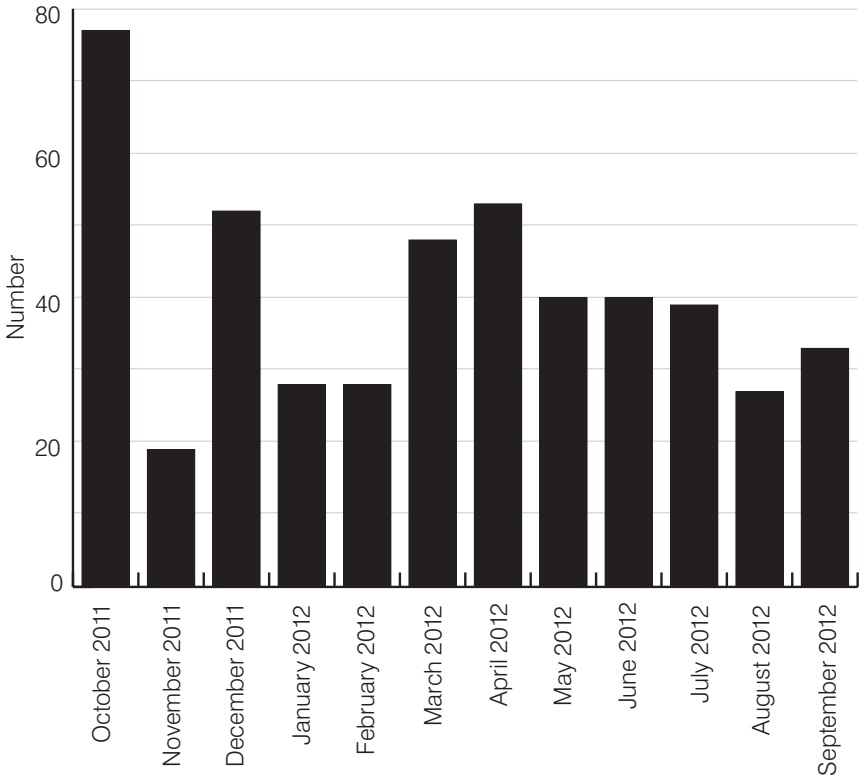
Table 5. Day of week and time of day that section 9 offence was detected

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total
Day (5.00am-6.59pm)	4	9	10	16	13	13	13	78
Night (7.00pm-4.59am)	7	15	29	45	131	171	8	406
Total	**11**	**24**	**39**	**61**	**144**	**184**	**21**	**484**

Source: NSW Police Force. n=484 (dataset 1, 1 October 2011 to 30 September 2012).

As Table 5 shows, most fines or charges for section 9 offences related to conduct that occurred on Saturday nights (35%, or 171 cases), Friday nights (27%, 131 cases) and Thursday nights (9%, 45 cases). Together, almost three out of every four (72%) section 9 offences were detected on these three nights. Daytime offending was relatively rare. Just 78 (16%) of section 9 offences occurred during daytime hours. These findings are consistent with research indicating that anti-social behaviour by intoxicated people peaks late at night or in the early hours at weekends, and in entertainment areas.[112] We also considered whether the use of section 9 in its first 12 months was concentrated in the summer period, or spread across the year.

Figure 1. Section 9 offences by month



Month	No.	%
October 2011	77	16
November 2011	19	4
December 2011	52	11
January 2012	28	6
February 2012	28	6
March 2012	48	10
April 2012	53	11
May 2012	40	8
June 2012	40	8
July 2012	39	8
August 2012	27	5
September 2012	33	7
Total	**484**	**100**

Source: NSW Police Force – COPS. n=484 (dataset 1, 1 October 2011 to 30 September 2012).
Note: In November 2011, industrial action by police officers resulted in little data being recorded in the COPS system.

As Figure 1 shows, more section 9 fines and charges were issued in the first month after the provision commenced than at any other time. Other than the relatively high use of the provision in October 2011, there were no other discernible trends. Although there was an apparent fall in the recorded use of section 9 offences in November 2011, police industrial action in late November 2011 and early December 2011 meant that fewer incidents than expected were recorded for offences involving police enforcement and the issuing of infringement notices.[113]

112 For example, see Josh Sweeney and Jason Payne, Australian Institute of Criminology, *Alcohol and disorderly conduct on Friday and Saturday nights: Findings from the DUMA program*, Research in Practice No 15, May 2011; Crime and Misconduct Commission, *Police move-on powers: A CMC review of their use*, December 2010.

113 Moffatt, S. and Goh, G., NSW Bureau of Crime Statistics and Research, *An update of long-term trends in property and violent crime in New South Wales: 1990-2011*, Issue paper No. 78, Sydney 2012.

4.4. Who was fined or charged with a section 9 offence

Of the 484 fines or charges for alleged section 9 offences during the review period:

- 89% (430) were issued to males and 11% (54) to females
- 55% (266) involved people aged between 18 and 25 years, and 4.5% (22) were issued to people aged younger than 18 years
- 31% (150) were issued to Aboriginal people, even though they comprise just 2.5% of the NSW population,[114] and
- of the 54 section 9 fines or charges issued to women, half (27) were issued to Aboriginal women.

While acknowledging that Aboriginal people were over-represented, the NSW Police Force argued that it was more accurate to report demographic data with reference to the number of people fined or charged during the review year, rather than calculating the number of fines or charges issued to Aboriginal people. During that time, 11 people were fined or charged twice, and one person was fined or charged three times. This means the 484 fines or charges related to only 471 separate individuals. Our analysis showed that, of those 471 people, 145 (30.8%) identified as Aboriginal. Although there was a difference, it was not statistically significant.

4.5. Concluding observations

The data relating to section 9 fines and charges in the first 12 months of this provision indicates that members of the public generally comply with police directions to move on without police having to take further action for failure or refusal to comply.

There is also evidence indicating that the initial uses of section 9 were focused on continuing intoxicated behaviour occurring in 'entertainment districts' (broadly defined) and on Friday and Saturday nights.

As might be expected, the majority of people who were fined or charged with section 9 offences were young men. However, the very high over-representation of Aboriginal and Torres Strait Islander people – who received 31% of all section 9 fines or charges in the first year – is an issue that warrants ongoing scrutiny. This is discussed further in chapter 10 – 'Safeguards relating to issuing and enforcing penalty notices'.

114 Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians, 2011*, cat. no. 2075.0, Canberra, 2012.

Chapter 5. Vulnerable people penalised under section 9

When the new section 9 offence was introduced, the then Attorney General emphasised that the reforms were intended to strengthen police powers to deal with drunken, unruly behaviour in entertainment precincts, but that 'the homeless, the mentally ill, the Aboriginal community or the disadvantaged in our society' would not be targeted.[115] Our analysis considered the use of section 9 offences in relation to Aboriginal people and other vulnerable groups, including young people, homeless people, and people with a mental illness or a cognitive impairment. This chapter summarises data about those groups.

Parliament also required that we review 'the issue of penalty notices in respect of offences against section 9'.[116] Issues relating to the impact of fines for section 9 offences, and the impact of the current system for administering and enforcing penalty notice debts, are discussed in Part C of this report.

5.1. The use of section 9 in relation to vulnerable people

From the information available to us,[117] we sought to identify how many Aboriginal people and people aged under 18 years were fined or charged for a section 9 offence. In our examination of the 447 matters in dataset 2, we also checked the details of COPS narratives for any reports noting that the person was homeless, had mental health issues or some form of cognitive impairment, either at the time of the alleged section 9 offence or during the three years prior to the review period.

Table 6 shows all section 9 matters during the review period where these characteristics were noted in connection with either the record of the section 9 offence or in the person's recent police history.

Table 6. Section 9 legal actions where alleged offender had vulnerable characteristic

Vulnerability	s. 9 matters	% of all s. 9 matters
Homelessness	23	5
Mental health issue	61	13
Cognitive impairment	3	1
Aboriginal/Torres Strait Islander	150	31
Young people	22	5

n=484. Source: NSW Police Force – COPS and Police Integrity Commission – PODS (1 October 2011 to 30 September 2012).

For this analysis, any record showing the person had more than one characteristic was counted in each relevant group. In total, we identified 196 matters where the person involved was affected by at least one of these vulnerabilities, including 51 where the individual had more than one characteristic.[118]

As previously noted in Table 5, 78 (16%) of the 484 matters in dataset 1 related to fines or charges for alleged section 9 offences during daytime hours. We found that 43 (55%) of these 78 records indicated the person fined or charged may have been vulnerable in at least one way, and many had multiple vulnerabilities.[119] Of the 30 records relating to Aboriginal people in this group of daytime offences, 18 records indicated the person had also experienced homelessness or mental health issues.

115 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3135.

116 *Summary Offences Act 1988*, s. 36(1)(b).

117 Information on Aboriginal status and a person's age was included in the COPS data provided by the NSW Police Force. Information on the other vulnerable groups was collected during our examination of the 447 matters in dataset 2. We counted a person as vulnerable if either the COPS or PODS record indicated a vulnerability.

118 Ref: 2013/064572 worksheet 87.

119 Ref: 2013/064572 worksheet 30.

5.2. People experiencing homelessness

We identified 23 records showing legal action taken against homeless people for breaches of section 9. Of these, 11 fines or charges were to people recognised by police as being homeless at the time of the alleged offence, and the other 12 were issued to people who – according to police records – had experienced homelessness at some point during the three years prior to the review period.[120]

Of the 23 section 9 fines or charges to homeless people:[121]

- 21 were issued to males, and two to females
- nine were to people recognised as also having, or having had, mental health issues, and two to people who had a cognitive impairment
- 17 were to homeless Aboriginal people
- 13 (57%) were to homeless people in Sydney,[122] and the other 10 (43%) were issued in regional areas.

A number of submissions to this review questioned how homeless people could comply with the requirement inherent in section 9 to obey the section 198 direction and not return to the same or another public place within six hours of the initial direction. Since they live in public spaces, there is nowhere homeless people can go to avoid being in a public place.

Case study 1 illustrates the use of section 9 in relation to an intoxicated homeless person.

Case study 1. Homeless person charged with section 9 offence

Police in a large town in northern NSW responded to reports in the early afternoon that several men at a bus shelter in the main street were yelling abuse. Some of the men left when police arrived but one man refused to leave. He was then issued with a move on direction. He initially complied, but about an hour later officers found him in the same location, still heavily affected by alcohol. He was issued with a section 9 CIN and taken to a nearby park to sit quietly. The police records showed that the man had experienced homelessness at some point in the three years prior to the review period.

5.3. People with mental health issues

One concern raised in Parliament when the amendment Act was introduced was whether behaviour associated with mental illnesses or certain disabilities might be mistaken for intoxication.[123]

We identified 61 cases where mental health issues had been identified by police. This included seven cases where the person's mental health issue was evident to police and had been included in the police record of the section 9 offence and another 54 cases where the police records showed they had a mental health issue at some point during the three years prior to the review period. In relation to the latter group, it is important to note the episodic nature of many mental illnesses.

None of the records relating to these 54 cases indicated that the person was exhibiting signs of mental illness at the time of the alleged offence. Instead, the records indicated that the person's behaviour appeared to be as a result of intoxication. Nonetheless, it is possible that behaviours associated with a person's mental illness might have been attributed to intoxication in at least some cases.

The police records relating to these 61 people showed that:[124]

- 51 were male and 10 were female
- 34 were Aboriginal
- nine were homeless, or had experienced homelessness in the three years prior to the review period.

Case study 2 describes a police encounter with an intoxicated Aboriginal man whose history of mental illness was known to local officers, but where police nonetheless decided it was appropriate to issue a penalty notice.

120 Ref: 2013/064572 worksheet 20.
121 Ref: 2013/064572 worksheet 85.
122 This includes any NSW Police Force commands in the Central Metropolitan, North West Metropolitan and South West Metropolitan Regions.
123 David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3611-3612.
124 Ref: 2013/064572 worksheet 22.

Case study 2. Person with a history of mental illness charged with a section 9 offence

Police were called to a residential street in a regional town, where an Aboriginal man was in the middle of the street and allegedly abusing and threatening people. Records relating to the man's previous encounters with police indicated he had past mental health issues. When police arrived, the man was standing in the roadway and appeared to be 'seriously' intoxicated. He was unsteady on his feet, very agitated, and screaming and swearing. Police asked him to stop swearing and gave him a direction to move on. The man initially complied, but soon returned and resumed swearing. Police warned the man about his abusive language and about failing to move on. The man then ripped off his shirt, raised his fists and threatened to fight police. He was sprayed with OC spray, cautioned and arrested, and taken to the police station to be detained as an intoxicated person under section 206 of LEPRA. At the station, the man continued to spit, yell and scream. After several hours he was issued with criminal infringement notices for offensive language and the section 9 offence, and released from custody.

5.4. People with a cognitive impairment

We found no police records indicating that the person had a cognitive impairment at the time of the offence, but there were three people whose police records showed they had a cognitive impairment at some point during the three years prior to the review period. The police records relating to them showed that:

- all were male
- one had a mental illness
- two were Aboriginal, and
- two were homeless, or had experienced homelessness in the three years prior to the review period.

5.5. Young people

Of the 484 fines or charges issued for section 9 offences during the review period (dataset 1), 22 were to people aged under 18. Of these 22:[125]

- 19 were issued to males and three to females
- nine were issued to Aboriginal people, and
- one had experienced homelessness in the three years prior to the review period.

Chapter 7, Part 3 of the *Criminal Procedure Act 1986* permits police officers to issue penalty notices known as Criminal Infringement Notices (CINs) for certain offences. As previously noted, section 9 is one of the prescribed CIN offences, giving police officers the option of issuing an on-the-spot fine to any person whom they reasonably believe has committed a section 9 offence.[126]

However, the Act specifically prohibits police from issuing a CIN to anyone who is under the age of 18 years.[127] In the event that a CIN is mistakenly issued to a person under 18, the fine is deemed to be not payable. Police may still deal with suspected section 9 offences by intoxicated children, but not by issuing a CIN.

Of the 22 records relating to young people alleged to have committed a section 9 offence during the review period, we found that in five cases the person was given a formal caution or warning under the *Young Offenders Act 1997* or an informal caution or warning, and three were arrested and issued with a court attendance notice. The remaining 14 were wrongly issued with a CIN. Commenting on this issue, the NSW Police Force response to the consultation draft of this report noted that the fact that 14 young persons were issued CINs does not necessarily indicate that police acted 'inappropriately'.[128] Irrespective of whether police acted in good faith at the time they issued the CIN for a section 9 offence, there is no legal basis for issuing a CIN to a child. Further, the law requires that action be taken to withdraw any CIN that is issued in error to a child. We discuss issues relating to the lawfulness of issuing a young person with a CIN in chapter 7.

125 Ref: 2013/064572 worksheet 11.

126 Criminal Procedure Regulation 2010, Schedule 3. During the review period, the on-the-spot fine was $200. In early 2014, Parliament increased the on-the-spot fine to $1,100; see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, Schedule 5.2.

127 *Criminal Procedure Act 1986*, s. 335.

128 Correspondence from the Commissioner of Police, dated 6 June 2014.

5.6. Aboriginal people

Almost a third of all fines or charges for section 9 offences during the review period were issued to Aboriginal people.

Of the 150 fines or charges to Aboriginal people for alleged section 9 offences:[129]

- 123 were issued to males and 27 to females
- 108 (72%) were issued in regional areas and 42 (28%) were issued in Sydney[130]
- 17 were issued to people who were homeless, or had experienced homelessness in the three years prior to the review period
- 34 were issued to people recognised as having, or previously having had, mental health issues
- two were issued to people whose police records indicated evidence of a cognitive impairment
- nine were issued to children or young people.

As we observed earlier in the report, people who identify as Aboriginal make up approximately 2.5% of the NSW population.[131] To understand why Aboriginal people are so over-represented in relation to section 9 offences, we examined police data relating to the directions issued under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* during the review period.[132]

Our analysis showed that 28% (9,712) of section 198 directions issued in the review period were to Aboriginal people. Of those, 95% (9,196) were complied with, which is the same percentage for compliance generally (see discussion in chapter 4 – 'Characteristics of people and incidents involving a section 9 penalty'). That is, the data suggests that Aboriginal people are no more likely to comply or not comply with a section 198 direction than any other member of the public. The main reason why almost a third of all section 9 matters involve Aboriginal people is that significantly more Aboriginal people are issued with section 198 directions to move on than might be expected for such a small population group.

5.7. Concluding observations

The data shows that police make frequent use of their power to issue section 198 directions, and that most people comply when a direction is given. The comparatively modest number of section 9 offences, compared to the very high volume of directions given, may suggest that the section 198 move on powers are being used responsibly.

Of the 484 fines and charges for section 9 offences, 196 (40%) involved people with one or more vulnerability.

Despite concerns expressed when the new provisions were introduced that homeless people might be disproportionately affected because of the difficulties they would have in complying with directions to leave a public place and not return to that or any other public place, the figures do not indicate that the new provisions have had a significant adverse impact on homeless people.

The data does show that a significant proportion of the fines or charges under section 9 of the Summary Offences Act were directed at Aboriginal people and people who had, or who previously had, mental health issues.

More than half of the 78 cases involving people fined or charged for behaviour that occurred during the day may have been vulnerable in at least one way. This seems to be at odds with the intention that the new section 9 offence should be focused on the behaviour of people in entertainment districts at night.

129 Ref: 2013/064572 worksheet 23.

130 This includes any NSW Police Force commands in the Central Metropolitan, North West Metropolitan and South West Metropolitan Regions.

131 Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians*, 2011, cat. no. 2075.0, Canberra, 2012.

132 Information about 110,949 directions issued between 1 October 2011 to 30 September 2012 was provided by NSW Police Force on 7 January 2013. We identified 34,093 of these directions were issued under section 198 by counting those COPS event records that had a "Reason" relating to s. 198 LEPRA or an "Incident Further Classification" relating to intoxicated people.

Chapter 6. Police discretion in determining when to apply section 9

When the amendment Act was introduced, Parliament was told that broadening the move on power and creating a new penalty for non-compliance would provide police with a 'low-cost and effective enforcement tool' to deal with 'excessive intoxicated behaviour seen in entertainment districts on weekends'.[133] While the rationale for the changes was to help police target more serious forms of drunken violence, the provisions were drafted broadly to recognise the 'myriad of different circumstances' confronting frontline officers who deal with alcohol-related violence in the street. As the then Police Minister stated:

> This bill gives police the maximum flexibility to allow the nature and gravity of the behaviour to guide and determine the appropriate process for dealing with intoxicated and disorderly behaviour.[134]

This chapter examines some of the issues that impact on the operation of the section 9 offence, particularly in relation to:

- circumstances where either the new section 9 offence or the general 'failure to comply with direction' offence under section 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) may apply (see section 6.1)
- applying the new 'disorderly' behaviour provisions and the difficulties associated with distinguishing the kinds of disorderly behaviour that should attract a criminal sanction (section 6.2)
- the use of arrest and charge in conjunction with section 9 offences (section 6.4), and
- alternatives to arrest, including the power under section 206 of LEPRA to detain an intoxicated person for their own care and protection (section 6.4).

6.1. Overlap between the section 9 and section 199 offences

Section 198 gives police the power to issue 'a direction to an intoxicated person who is in a public place to leave the place and not return for a specified period'. Section 199 of LEPRA makes it an offence for a person to 'refuse or fail to comply with' a section 198 direction or any other relevant direction, without reasonable excuse. Section 9(1) of the *Summary Offences Act 1988* makes it an offence for a person who has been given a 'move on direction' under section 198 of LEPRA to be 'intoxicated and disorderly in the same or another public place' for up to six hours after being given such a direction. Although, as discussed in this section, there is considerable overlap between these two offences, the maximum fine for committing an offence under section 9(1) of the Summary Offences Act, at $1650, is substantially higher than the maximum fine of $220 for the offence under section 199 of LEPRA.

Several members of Parliament argued that it was unnecessary to amend the Summary Offences Act to enable police to fine or charge people who continued their intoxicated and disorderly behaviour in contravention of a section 198 direction, as the existing offence provision at section 199 of LEPRA already empowered police to fine or charge people for not complying with such a direction. As one MP argued, 'the only offence in this bill is failing to obey a move-on direction, which already exists'.[135]

However, an important justification for the new section 9 offence was a concern that section 199 of LEPRA might not provide police officers with clear authority to act on *continuing* conduct that occurred some time later and in another public place, particularly in circumstances where the person had initially moved on, in compliance with the move on direction. The new section 9 offence applies to any 'intoxicated and disorderly' behaviour, whether at the same location or somewhere else. As the then Minister for Police explained in his second-reading speech:

> … intoxicated individuals who engage in disorderly conduct in *any* public place after being given a move on direction will be committing an offence… The offence will not be limited to the area that is subject to the move-on direction, but will apply to *any* public place in which disorderly conduct takes place. [emphasis added][136]

As the Minister's repeated references to 'disorderly conduct' indicate, another important justification for creating the new section 9 offence was a concern that police be encouraged to curb intoxicated and disorderly behaviour that continued after a move on direction had been given.

133 The Hon. Michael Gallacher MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 4 August 2011, p. 3589.
134 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3591.
135 Nick Lalich MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3658.
136 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.

6.1.1. Comparing uses of the section 9 and section 199 offences

During the review period, police issued 1,768 fines or charges under section 199 of LEPRA for failure to comply with a section 198 direction,[137] and 484 fines or charges for section 9 offences – see Table 7. Table 7 also shows the data for offences related to section 198 in the three years immediately before the review period.

Table 7. Total legal actions for not complying with section 198 directions, October 2008 to September 2012

Police action taken	Oct 2008 to Sep 2009	Oct 2009 to Sep 2010	Oct 2010 to Sep 2011	Oct 2011 to Sep 2012
Intoxicated move on directions issued – (s. 198, LEPRA)	36,751	38,582	38,827	33,580
Offence – fail/refuse to comply with s. 198 direction (s. 199, LEPRA)	2,387	2,439	2,332	1,768*
Offence – not comply with s. 198 direction (s. 9, Summary Offences Act)	-	-	-	484*

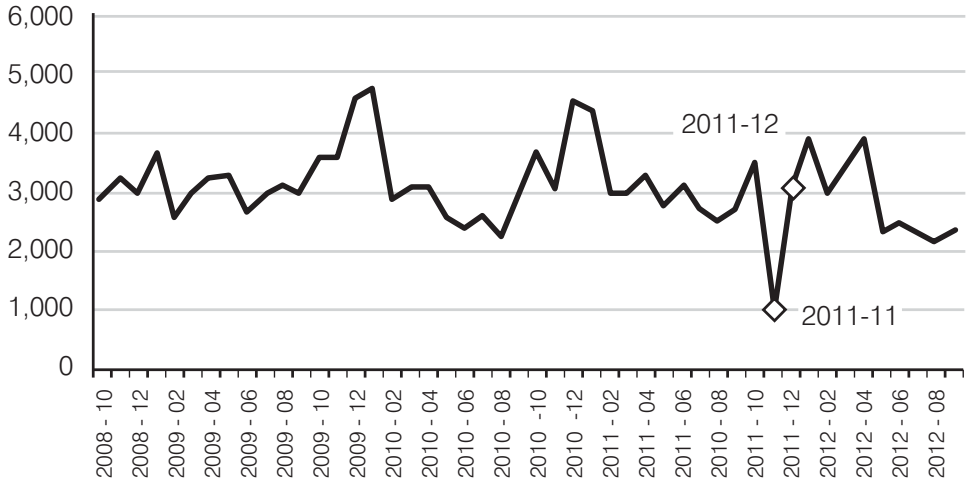
Source: NSW Police Force – information received on 3 June 2013.

* Police industrial action in late November 2011 and early December 2011 reduced the number of infringement notices issued and affected the recording and enforcement of these and other less serious offences.

In the 12 months following the introduction of the new section 9 offence in October 2011, there was a sharp drop in police use of section 199 to deal with people who did not comply with section 198 directions. The number of fines and charges fell from 2,332 to 1,768, representing a 24% decline in use. However, total legal actions for failing to comply with a section 198 direction, including use of section 199 *and* section 9, were just 3.4% fewer than in the previous 12 months. These figures show that at least some of the conduct that previously would have attracted a section 199 sanction was instead being dealt with using the section 9 offence.

Even though the drop in total legal actions for non-compliance in the 12 months following the introduction of the section 9 offence was not statistically significant, there were 23.5% fewer recorded section 198 directions issued in this period. A factor in the sharp fall in the recorded use of section 198 directions – and also another likely contributor to the reduced use of section 199 offences – was police industrial action that occurred in November and part of December 2011[138] in which NSW police officers declined to record section 198 directions and other minor incidents, and issued fewer penalty notices for minor infringements.[139] Figure 2 shows the monthly recorded uses of section 198 directions issued between October 2008 and September 2012.

Figure 2. Monthly section 198 LEPRA directions issued, October 2008 to September 2012



Source: NSW Police information received on 25 February 2013.

137 Email from NSW Police Force, dated 3 June 2013

138 Moffatt, S. and Goh, G., NSW Bureau of Crime Statistics and Research, *An update of long-term trends in property and violent crime in New South Wales: 1990-2011*, Issue paper No. 78, Sydney 2012.

139 In its response to the consultation draft of this report, the NSW Police Force expressed the view that 'there is no evidence that the use of the powers is being abused, with the total number of 'move on' directions issued during the review period being fewer than during any of the preceding three years'. This analysis appears to overlook the one-off impact of police industrial action in November and part of December 2011.

The reduction in recorded section 198 directions issued in November 2011, and the police industrial action associated with this fall, is likely to have had some influence in lowering the number of related section 199 offences. However, the introduction of the section 9 offence indicates that this one-off factor can account for only part of the marked decrease in section 199 offences associated with section 198 directions.

6.1.2. Police policy on using the new provisions

When the new provisions were introduced, there was an expectation that the NSW Police Force would provide written directions on how the provisions should be used. In response to various concerns raised during Parliamentary debates about the breadth of the new provisions, Parliament was assured that the NSW Police Force would develop Standard Operating Procedures (SOPs) to assist officers in exercising their discretion. The then Minister for Police said:

> Police will develop comprehensive standard operating procedures to guide them in whether to deal with matters by an on-the-spot fine or court attendance notice and will retain discretion to deal with situations involving intoxicated individuals as they see fit.[140]

In particular, the then Attorney General said that 'Police will develop appropriate standard operating procedures – SOPs – for the [section 9] offence, which will reflect the Government's policy goals'.[141]

The procedures were also expected to address the following issues raised in Parliamentary debate:

- In practice, the powers should focus on targeting anti-social behaviour at night-times in entertainment hubs, and avoid adversely impacting on vulnerable people in public spaces.[142]
- Relatively minor infractions might lead to more convictions for criminal offences, thereby increasing the number of people being unnecessarily caught up in the criminal justice system.[143]
- People should be given a 'reasonable time' to comply with a section 198 direction.[144]

The advice in the *NSW Police Force Handbook* about dealing with intoxicated people in public places notes the provisions relating to the new section 9 offence and section 199 of LEPRA, but has no advice about which provision should be used in circumstances where either offence may be applicable.[145] The Handbook simply notes the requirement at section 9(4) of the Summary Offences Act that a person 'cannot be proceeded against for an offence against section 9 of the Summary Offences Act and an offence against section 199 LEPRA in relation to the same conduct'.[146]

Briefings before policing operations that are likely to make use of the powers are another important source of practical advice for frontline officers. At a briefing preceding a special operation targeting intoxicated and disorderly conduct during the review period, a slide presentation shown to officers advised that either provision could be used for the same set of circumstances. The briefing did not include any guidance about how to determine which offence provision to use in which circumstances.[147]

The NSW Police Force advised us that officers are required to use their discretion in determining which offence to proceed with.[148] In its response to the consultation draft of this report, the NSW Police Force confirmed that there was considerable 'overlap' between the two offences and that police practice is that 'these offences are used interchangeably':[149]

> If a person does not comply with a move on direction under section 198 of LEPRA, police may issue a penalty notice under either section 9 of the *Summary Offences Act* or section 199 of LEPRA if the person has not moved from the place where they received the move on direction.[150]

140 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3590.
141 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3662.
142 The Hon. Paul Lynch MP, NSWPD, (Hansard), Legislative Assembly, 3 August 2011, pp. 3558-3559; see also Jan Barham MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3622-3623.
143 As raised by David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3609-3612; see also Dr John Kaye MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3624-3625.
144 As raised by David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3631-3632.
145 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 432.
146 Ibid.
147 NSW Police Force, *Operation Rushmore Briefing Presentation*, 28 September 2012.
148 Email from Drug and Alcohol Coordination, NSW Police Force, 15 April 2013.
149 Response to draft recommendation 2, correspondence from the Commissioner of Police, dated 6 June 2014.
150 Correspondence from the Commissioner of Police, dated 6 June 2014.

The NSW Police Force is yet to develop SOPs that directly address these issues. Some information about the new section 9 offence was included in an update to the existing SOPs relating to Criminal Infringement Notices (CINs) made in March 2012 (five months into the review period).[151] The updated SOPs added the new section 9 offence to the list of the offences for which a CIN could be given, and also included detailed discussion about the different options police have when dealing with behaviour for which a CIN could be issued.

Later in this chapter (at the conclusion of section 6.2.3), we recommend measures to clarify when police should deal with a failure to comply with a section 198 direction by issuing a $1,100 on-the-spot fine for a section 9 offence instead of the standard $220 section 199 fine. Police oppose these measures, arguing that current police practice is to use the two offences 'interchangeably'. Police assert that the overlap between the two offences is actually a desirable feature of the current scheme, and that any attempts to focus the use of section 9 on more egregious instances of intoxicated and disorderly conduct 'would be complex and create unnecessary confusion'.[152]

6.1.3. Concerns about the operation of section 9

A submission from the Office of the Director of Public Prosecutions raised concerns about the operation of section 9 in practice:

> … section 199 is a preferable offence as section 9 is unsatisfactory in two ways. Firstly … On a literal construction of … section [9(1)(b)] they immediately commit an offence as they are given the direction. While the disorderliness may diminish immediately (depending quite possibly on the level of intoxication) it is unlikely to effectively abate until the person has had time to sober up. Secondly section 9(1)(b) provides that the further behaviour can happen in the same or another place. If the person is homeless for instance, they would be continuing to commit the offence wherever they go in the next six hours.[153]

The Law Society of NSW also criticised the breadth of section 9(1)(b), arguing that any person who is given a section 198 direction may be immediately in breach of section 9 as soon as the direction is given.

> Section 9(1)(b) of the *Summary Offences Act 1988* provides that the offence is committed if *'at any time* within six hours after the move on direction is given' the person is intoxicated and disorderly. That construction has the consequence that the person literally commits the offence *immediately* upon being given the move on direction and *continuing* to be drunk and disorderly, even if they are actually complying with the move on direction. For instance, if the person walked away, presumably still intoxicated, and told the police officer what they thought about them, they would commit the offence despite substantively complying with the direction and not committing any other offence. This circumvents the purpose of a move on power which is to give a person an opportunity to leave the area before they commit an offence.[154]

Parliament rejected an amendment proposed by a Greens Party MP to provide a person with reasonable time to comply with a move on direction,[155] on the basis that SOPs and other written directions would be developed to:

> … guide police on the appropriate and reasonable use of the move-on direction and the offence provision…
>
> What is a reasonable time to comply depends on the circumstances in which the intoxicated and disorderly behaviour occurs. Every situation is different … It is best left to police discretion, in conjunction with written directions, to determine what a reasonable time requirement is before proceeding with the offence.[156]

As previously noted, the NSW Police Force opposes the development of procedures that directly address this aspect of police decision-making relating to the use of section 9.[157]

Another difference between the two offences is that section 199(2) of LEPRA requires police to prove that 'the person persisted, after the direction concerned was given, to engage in the relevant conduct or any other relevant conduct', whereas section 9 puts the onus on the defendant to prove that he or she 'had a reasonable excuse for conducting himself or herself in the manner alleged'.[158]

151 The SOPs were updated to include a reference to the section 9 offence, a new section 2.11 (Issuing CANS, CINS and cautioning – issues to consider), a new section 3.2 (Service of a CIN), changes to section 3.3 (Taking fingerprints in the field) and 3.4 (Actions on return to the police station) to take into account changes in technology, and an addition of the section 9 offence to the 'Fixed Penalty Offence Card' in section 5.4.

152 Correspondence from the Commissioner of Police, dated 6 June 2014.

153 Office of the Director of Public Prosecutions, Submission, 15 February 2013.

154 Law Society of NSW, Submission, *Summary Offences Act Review*, 13 February 2013, pp. 1-2.

155 David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3631-3632.

156 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3632.

157 Correspondence from the Commissioner of Police, dated 6 June 2014

158 *Summary Offences Act 1988*, s. 9(5).

Although these differences are significant, in practice both offences depend on police proving that a legally enforceable section 198 direction was issued in the first place, and that the statutory safeguards in Part 15 of LEPRA were also applied. The effect of these safeguards is to ensure that the person understands that he or she is required by law to comply with the direction given and that any failure to do so is an offence. In the case of section 198 directions, section 201(2D)[159] now also requires the police officer to:

> ... provide the person the subject of the direction with a warning that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given.

Some submissions, including that by the NSW Young Lawyers Criminal Law Committee, proposed that the law be amended to make a clear distinction between the circumstances that constitute an offence under section 199 and those that constitute an offence under section 9:

> The Committee suggests that refusing to comply with a s198 direction 'on the spot' should be prosecuted under s199. Continuation of intoxicated and disorderly behaviour in another public place, or in the same public place after returning or at a later time, should be prosecuted under s 9 [Summary Offences] Act. That would correspond with the stated and apparent purpose of the legislation, and prevent duplicity of powers and penalties.[160]

A related concern was that having two offences in two Acts deal with substantially the same conduct added unnecessary complexity and eroded the benefits of the 2002 LEPRA reforms, which simplified the law relating to criminal law enforcement by consolidating the most commonly used police powers and related offences into one Act. The Police Association said it was 'cumbersome at best'[161] to have similar offence provisions in two Acts, and proposed that the section 9 offence should be incorporated into LEPRA.

A number of submissions argued that the creation of a new Summary Offences Act offence to deal with conduct already covered by section 199 of LEPRA was unnecessary and/or confusing, and advocated that the new offence be repealed.[162]

6.1.4. Penalties for breaching section 199 and section 9

While failure to comply with a section 198 direction may be treated as either a breach of section 9 or a breach of section 199, there are now marked differences in the penalties imposed for each offence – see Table 8.

Table 8. Penalty amounts for section 199 and section 9 offences

Offence	Penalty notice type	On-the-spot fine	Court-imposed fine
Section 9, Summary Offences Act	Criminal Infringement Notice	$200 *(now $1,100)**	Max penalty: 6 penalty units ($660) *(now 15 penalty units or $1,650)**
Section 199, LEPRA	Infringement Notice	$220	2 penalty units ($220)

• Penalties were increased in March 2014 by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*.

During the review period, the on-the-spot fines that applied to each offence were similar – $200 for section 9 offences and $220 for section 199 offences. The main difference was in the maximum fines a court could impose – up to $660 for a section 9 offence and up to $220 for a section 199 offence.

If someone who receives a $220 on-the-spot fine for a section 199 offence elects to have the matter heard at court, the maximum penalty a court can impose is $220. By contrast, if a person who has been issued a $200 CIN for a section 9 offence elects to have the matter heard at court, there is a risk that he or she could incur a much harsher penalty – up to $660 at the time of the review but up to $1650 since March 2014. This indicates that section 9 is not simply an alternative to the general section 199 'failure to comply' offence, but would appear to be aimed at more serious misconduct.

159 Since May 2014, this provision is now contained in section 198(6) of the *Law Enforcement (Powers and Responsibilities) Act 2002*. See *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, Schedule 2[1] and 2[12].

160 NSW Young Lawyers Criminal Law Committee, Submission, *Response to Issues Paper: Summary Offences Amendment Review*, 15 February 2013, p. 10.

161 Police Association of NSW, Submission, *Review of Summary Offences Act 1988*, section 9, 18 February 2013, p. 3.

162 Law Society of NSW, Submission, *Summary Offences Act Review*, 13 February 2013, p. 5; Inner City Legal Centre, Submission, *Summary Offences Act Review,* 12 April 2013, p. 3.

Some submissions to this review advocated making the penalties for these two offences consistent.[163] The NSW Police Force pointed out that this would 'eliminate any disadvantage to the offender from the use of one [offence provision] over the other'. The Australian Hotels Association argued that the penalties should be consistent with the *Liquor Act 2007* offence of failing to quit.[164] This would make the penalty for all these related offences $550. The Association said:

> If that is perceived as an unjust impost on marginalised groups, then consideration should be given to at least increasing the move-on penalty in entertainment precincts (as prescribed under Schedule 2 & 3 of the *Liquor Act 2007*) where, in those areas, people have the financial capacity to pay night-time prices for alcohol and pay to enter licensed venues and thus the financial ability to pay a fine.[165]

Earlier in 2014, Parliament decided to increase the penalties for section 9 offences from $200 to $1,100 for on-the-spot fines, and from $660 to $1,650 for the maximum fine that a court can impose.[166] In addition, Parliament also approved increases in the on-the-spot fines issued by police for offensive language (from $150 to $500) and offensive behaviour (from $200 to $500). The then Premier explained that the higher penalties were a direct response to escalating concerns about alcohol-fuelled violence and public disorder. He said it was critical that police be able to fine offenders who behave in such a manner and that 'the fine is a sufficient amount to act as a deterrent for this unacceptable behaviour'.[167]

The penalties for breaches of section 199 of LEPRA remain unchanged.

The markedly higher penalties that now apply to section 9 offences mean that police discretion in deciding which offence to use can have significant consequences for the person fined or charged.

6.1.5. Police practice in applying the new section 9 offence

Our examination of police records during the review period found that the most common situations that gave rise to police decisions to fine or charge a person for a section 9 offence were where:

- the person refused to comply with the section 198 direction at the time it was given
- the person initially complied by leaving the location as directed, but then returned to the area defined by police in the direction within six hours.

In both situations police could have instead fined or charged the person for breaching section 199. For examples, see case studies 3 and 4.

Case study 3. Refusing to leave when direction is given

Police in a regional town spoke to a woman in a residential street after receiving a report that her behaviour was disturbing nearby residents. Police observed that she was intoxicated, and described her behaviour as abusive and obnoxious. She was given a move on direction, but refused to comply and continued to abuse the officers. After police gave her three warnings, she still refused to comply, so police issued her with a CIN for a section 9 offence.

Case study 4. Returning to area within six hours

A man and a woman were heavily intoxicated at a beachfront location, and behaving in a manner that could intimidate others. They were given a move on direction, and complied. About half an hour later, the man was found in the same area by the same officers. Police gave him a CIN for a section 9 offence.

It is important to note that whether a section 199 offence has been committed can depend on the scope of the section 198 direction. For example, if a person was in Hyde Park, Sydney, and was directed to leave the Sydney CBD and not return for six hours, then if that person was found anywhere within the Sydney CBD during those six hours,

163 NSW Council for Civil Liberties, Submission, received 15 February 2013; Randwick Council, Submission, received 22 February 2013.
164 Australian Hotels Association, Submission, *Summary Offences Act Review*, 15 February 2013.
165 Ibid.
166 *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*.
167 The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 30 January 2014, p. 26623.

he or she would have failed to comply with the direction and therefore committed a section 199 offence. In contrast, if the direction was to leave and not return to Hyde Park, and the person moved to a public place outside Hyde Park, he or she would not have committed an offence.[168]

In an attempt to assess the extent to which the new section 9 offence might have been used to penalise behaviour that might otherwise have been dealt with as a breach of section 199 of LEPRA, our examination of the 447 matters in dataset 2 tried to identify cases where the police power to act only derived from section 9 and not section 199. Our analysis therefore included consideration of:

- the location of the continuing intoxicated and disorderly behaviour
- the time that elapsed between police giving the initial direction and police taking action for the alleged section 9 offence.

Table 9 shows whether the alleged breach occurred in the location where the initial section 198 direction was issued.

Table 9. Location of continuing behaviour, same or different as location of section 198 direction

Location of alleged s. 9 offence	No.	%
Same location as initial s. 198 direction	426	95.3
Different location	2	0.4
Not clear from the police narrative	19	4.3
Total	**447**	**100**

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

We found that 426 of the 447 matters examined (95%) occurred in the same location as where the initial section 198 direction was issued or in a location covered by the terms of the initial direction, indicating that police could have used section 199 in the majority of cases. The only cases where it was clear that section 199 was not an option were the two matters where the alleged offence was detected at a location other than where the initial move on direction was issued, and it was not covered by the terms of the move on direction. There might also have been impediments to using section 199 in some of the 19 cases where information in the records about the location information was unknown or unclear.

Since part of the rationale for introducing a separate 'continuing intoxicated and disorderly' offence was to give police clear authority to act if someone continued their behaviour within six hours after being directed to move on, we looked for information in the police records about how soon after issuing the move on direction police acted on the alleged breach of section 9. There is no formal requirement for police to record either the time a direction was given or when they acted on an alleged breach. However, we found 307 records that provided a clear indication of the time that had elapsed.

Table 10. Time between section 198 direction and section 9 offence

Time	No.	%	Cumulative total	Cumulative %
Less than 15 minutes	150	49	150	49
Between 15 mins and 1 hour	77	25	227	74
Between 1 and 3 hours	60	19	287	93
Between 3 and 5 hours	12	4	299	97
Between 5 and 6 hours	8	3	307	100
Total	**307**	**100**		

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

Of the 307 cases where a timeframe was provided, almost half (49%) of the alleged breaches occurred at approximately the same time that the section 198 direction was given (within 15 minutes), and three-quarters (74%) were identified within an hour of the initial direction being given, as shown in Table 10.

168 The person would only commit a section 9 offence if their behaviour was intoxicated and disorderly.

Table 11 combines the information relating to the location of the section 9 offences with information about whether action was taken within 15 minutes of the move on direction, or some time later. It also identifies whether the officer who initiated the section 9 fine or charge was the same as the officer who gave the move on direction.

Table 11. Circumstances in which the offending behaviour took place

	Time between s. 198 direction and s. 9 penalty	Officer			Total
		Same officer	Different officer	Unknown	
Same location	Less than 15 minutes	143	1	6	150
	More than 15 minutes	119	13	22	154
	Time unknown	57	2	63	122
	Total	**319**	**16**	**91**	**426**
Different location	Less than 15 minutes	0	0	0	0
	More than 15 minutes	1	1	0	2
	Time unknown	0	0	0	0
	Total	**1**	**1**	**0**	**2**
Location(s) unknown or unclear	Less than 15 minutes	0	0	0	0
	More than 15 minutes	1	0	1	2
	Time unknown	0	0	17	17
	Total	**1**	**0**	**18**	**19**
Total	Less than 15 minutes	143	1	6	150
	More than 15 minutes	121	14	23	158
	Time unknown	57	2	80	139
	Total	**321**	**17**	**109**	**447**

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

In 72% of cases examined (321 of 447), the officer who issued the direction was the officer who acted on the continuing intoxicated behaviour, usually in the same location as where the section 198 direction was given. For the two cases where the section 9 offence was detected some time later and in a different location, one involved the same officer. In relation to all uses of the section 9 offence, it was rare for different officers to be involved. This is discussed further in chapter 7.

See case studies 5 and 6 for a summary of two matters where the alleged section 9 offence was detected in a location other than where the initial move on direction was given. In case study 5, the location of the alleged section 9 offence was not part of the area described in the direction.

Case study 5. Section 9 offence not covered by direction

About 1.55am on a Saturday morning in the main street of a large regional town, police stopped a man who was 'being extremely argumentative' with a hotel licensee. The man yelled abuse at police and passers-by, and was given a direction to leave the main street and not return for six hours. As he made his way down the street, he unsuccessfully tried to enter another hotel and was given further move on directions. He then caught a taxi but, as he was being driven home, directed the driver to turn back and drop him at the police station. He went to the front counter and resumed abusing police. The following Monday he was given a CIN for the section 9 'continued intoxicated and disorderly behaviour' offence, as well as warnings for two Liquor Act offences that had occurred earlier that evening.

As the police station in this town is adjacent to the main street and was arguably within the area covered by the direction given, a section 199 penalty could probably have been issued for the failure to comply with the police direction. However, the use of section 9 obviated any question about whether police could act on the man's failure to comply and continued abusive behaviour in this instance.

The next case study describes the second case we identified where the alleged breach of section 9 occurred in a different location to where the direction was given.

Case study 6. Section 9 offence in a different location

Patrolling police found three young intoxicated men walking in the bus lane of a main road in suburban Sydney late on a Saturday night. After several unsuccessful attempts, police eventually stopped all three. A heated discussion followed. Police then issued a section 198 direction, warning the men that:

... as they are intoxicated and disorderly in a public place they must leave the public place and if they are found to be intoxicated and/or disorderly in a public place in the next 6 hours they would be arrested.

About 200 metres down the road, a further move on direction was given. They agreed to walk home.

Less than two hours later, police were called to a hotel in the same suburb and arrested two of the men for failing to quit licensed premises. The third man was given a penalty notice for a section 9 offence because he was 'moderately affected by alcohol' and 'acting in a disorderly manner'. At that point, 'he became extremely argumentative with police about receiving this infringement notice and continued to be disorderly by failing to comply with police directions'. Police then drove all three men home.

The nature of the man's 'disorderly' behaviour was not clearly described in the COPS narrative, although the record notes that the man was 'argumentative'. It appears that police relied on the terms of the new provisions to enable them to issue a wide direction, covering any public place, and to give them authority to act on any apparent failure to comply.

6.1.6. The need for simplification

As a substantial element of the section 9 offence is failure or refusal to comply with a section 198 direction, there is considerable overlap between the new section 9 offence and the existing section 199 offence. While this gives police flexibility in deciding how to proceed in the many situations where either offence may apply, it also creates uncertainty among police officers and members of the public about when non-compliance with a section 198 direction should result in a criminal sanction under section 9, instead of a standard penalty for a section 199 offence.

During the review period, there was little difference in the on-the-spot fines issued for each offence – $200 for a section 9 offence, and $220 for a section 199 offence. In practice, the offence which police chose to use therefore made little practical difference to the penalty for an on-the-spot fine (as distinct from a charge). However, the recent increases in penalties imposed for a section 9 offence means that not complying with a section 198 direction could result in an on-the-spot fine of either $1,100 or $220, depending on whether the issuing officer decides to use section 9 or section 199. Similarly, the maximum fine a court may impose is either $1,650 or $220, depending on which provision the officer uses. This means police decisions on which offence provision to use can have important consequences.

The difference between the fines is particularly significant for those who fail to pay on time. Almost a third of all section 9 CINs are issued to Aboriginal or Torres Strait Islander people and fine default among CIN recipients generally is high. Additional enforcement costs and serious enforcement actions can have a disproportionate impact on vulnerable people (see discussion on legal actions taken for a section 9 offence in chapter 9).

Despite the stark differences in penalties, neither the legislation nor police procedures provide a clear rationale to help officers decide when to apply section 9, or to help members of the public understand the circumstances in which they may receive a substantial fine for failing to comply with a move on direction.

In its response to the consultation draft of this report, the NSW Police Force claimed that it was accepted practice for officers to use the provisions interchangeably and that police were best-placed to decide which penalty to apply:

> Operational police have indicated that these offences are used interchangeably, making it preferable not to make them mutually exclusive.[169]

In our view, Parliament's decision to substantially increase the penalties for breaches of section 9 and certain other summary offences signals a clear intention to take a strong stand against certain forms of alcohol-related offending. Without legislative provisions or police policies to guide the use of police discretion to issue a penalty notice for $1,100 under section 9 instead of a $220 fine under section 199, members of the public may see any police decision to issue a penalty notice for the greater amount as arbitrary and unfair. Over time, this can undermine community trust in police and confidence in the law. In our view, there is an urgent need for Parliament and/or the NSW Police Force to stipulate when non-compliance with a section 198 direction should attract the higher penalty.

169 Correspondence from the Commissioner of Police, dated 6 June 2014.

Particular care is needed in using section 9 offences against people who have multiple vulnerabilities, such as Aboriginal people whose police histories indicate they have experienced periods of homelessness and/or mental illness. There should be effective safeguards to ensure that the use of the section 9 offence against vulnerable people is appropriate.

In our view, it should be made clear that section 199 of LEPRA should be used to deal with failure or refusal to comply with a section 198 direction, and the section 9 offence should be used in circumstances where there is *additional* disorderly behaviour that warrants a more serious sanction. As previously noted, our review found that almost all of the section 9 offences during the review period occurred in circumstances where police could have instead used section 199 of LEPRA. Therefore, the main legislative amendment would be to amend section 9 to make it clear that the purpose of the provision is to enable police to impose a sanction for continued intoxicated and disorderly behaviour, and not simply for failure or refusal to comply with a reasonable direction.

Table 10 indicates that there will continue to be a small number of cases where the intoxicated person's failure to comply with the move on direction occurs in circumstances where the section 199 might not apply – principally, situations where the continuing intoxicated and disorderly behaviour is detected some time after the initial direction and in a location outside the area defined by police when giving the initial direction. In these cases section 9 would be the appropriate option.

The NSW Police Force response to the consultation draft of this report argued that the current overlap in these provisions was actually a strength of the current arrangements:

> It is unclear from the draft Report why the overlap is an issue. It is also noted that s 199 of LEPRA can be used in much broader circumstances than s 9 of the SOA.[170]

Our analysis confirms the NSW Police Force view that police use the two provisions 'interchangeably'. Almost all section 9 fines are imposed in situations that are also covered by section 199. The conduct the subject of section 9 offences is often hard to distinguish from conduct dealt with using the section 199 offence, where there is no requirement for associated 'disorderly' behaviour. It is unclear how the breadth of the section 199 offence mitigates the concerns we have about the overlap between these offences.

When the new provisions were introduced, Parliament was assured that police would focus their use of the broader powers and harsher penalties on 'drunken and violent hooligans' involved in more serious incidents of disorder.[171] Any people 'who are determined to drink to excess or party hard on their drug of choice' and then disregard reasonable police directions[172] could expect to be dealt with more harshly. However, our review has shown that failures to comply with a section 198 move on direction have attracted a section 9 sanction, even though not accompanied by some form of 'disorderly' behaviour.

The penalties imposed for breaches of section 9 are now substantially higher than for section 199 offences – $1,100 for an on-the-spot fine issued by police and up to $1,650 for fines imposed by courts, in contrast to the fixed fine, and maximum court imposed penalty, of $220 for breaches of section 199. Unless there are statutory provisions and/or police policies that require police to use the section 9 provision to target intoxicated and disorderly behaviour in entertainment districts, it will remain difficult for police officers and members of the public to understand when and in what circumstances the harsher penalties should apply.

The current difficulty in determining which fine to impose also exacerbates concerns about the impact of the new provisions on vulnerable groups who are already over-represented in the criminal justice system. While the new powers were drafted in a way that gives police wide discretion in determining where and when they might be used, Parliament was told that police guidelines would stipulate that officers should use the powers to target violent disorder in select locations, and not the homeless, the mentally ill, the Aboriginal community and other disadvantaged or marginalised groups.[173] Yet, as noted in chapter 5, our analysis of police data shows that 40% of all fines and charges for section 9 offences during the review period involved people with one or more of those characteristics.

170 Correspondence from the Commissioner of Police, dated 6 June 2014.
171 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
172 Ibid.
173 Ibid.

6.2. Defining 'disorderly' behaviour

The main change the amendment Act made to section 198 of LEPRA was to introduce 'disorderly' as an additional basis for police to issue a move on direction. As a result of this amendment, section 198(1) of LEPRA allows a police officer to direct an intoxicated individual or group to leave a public place and not return for up to six hours if the officer has reasonable grounds to believe that the person's behaviour:

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

(b) is disorderly.

Section 198(2) also requires that the direction given must be for the purpose of:

(a) preventing injury or damage or reducing or eliminating a risk to public safety, or

(b) preventing the continuance of disorderly behaviour in a public place.

The amendment Act introduced section 9 of the Summary Offences Act, which refers to 'intoxicated and disorderly' behaviour:

9 Continuation of intoxicated and disorderly behaviour following move on direction

(1) A person who:

(a) is given a move on direction for being intoxicated and disorderly in a public place, and

(b) at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place,

is guilty of an offence.

The power conferred by section 198 of LEPRA was introduced in 2007 to make it easier for police to give legally enforceable directions to groups of three or more intoxicated people, especially in volatile crowd situations where there was a high risk of public disorder.[174] This power to disperse drunken crowds complemented the existing directions power in section 197 of LEPRA, which was principally directed at individuals. Among the subsequent changes to section 198 was a June 2011 amendment to enable police to use the section to give directions to intoxicated individuals whose behaviour poses a threat, not just to groups.[175]

The general directions power in section 197 allows police to give directions to groups or individuals who are obstructing, harassing, intimidating or causing fear. Section 198(1)(a) gives police the power to issue directions in response to behaviour likely to cause injury, damage to property or pose a risk to public safety. The NSW Young Lawyers Criminal Law Committee submitted that the additional move on power in relation to 'disorderly' conduct under section 198(1)(b) is unnecessary, noting is that it is difficult to envisage a scenario where the behaviour described in sections 197 and 198(1)(a) could not be regarded as 'disorderly'.[176]

While the amendment Act added 'disorderly' as a ground for giving a section 198 direction, it provided no indication as to the additional types of disorderly conduct contemplated under this provision. Nor is it clear whether the 'disorderly' behaviour referred to in LEPRA has the same meaning as in the Summary Offences Act. Section 9(1) makes it an offence for anyone given a section 198 direction to be 'intoxicated and disorderly' in that or another public place, and section 9(3) refers to proceedings against a person found to be 'intoxicated and disorderly' in a public place. Although 'intoxicated' is defined in the Summary Offences Act, 'disorderly' is not defined in either the Summary Offences Act or LEPRA.

When the new provisions were introduced, the then Minister for Police explained that the absence of a definition for 'disorderly' behaviour was intentional and that police would have flexibility in determining what kinds of 'disorderly' behaviour should be subject to criminal sanction.

174 The Hon. John Hatzistergos MLC, NSWPD, (Hansard), Legislative Council, 28 November 2007, p. 4506.

175 *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011*, s. 3.

176 NSW Young Lawyers Criminal Law Committee, Submission, *Response to Issues Paper: Summary Offences Amendment Review*, 15 February 2013, p. 11.

> There is no definition of 'disorderly' in the bill. The intention of the Government is to impose sanctions against behaviour that contravenes community standards to the extent that it warrants the intervention of the criminal law.
>
> Disorderly behaviour can vary according to time, place and the context in which it is conducted. Behaviour that may not disturb or annoy others in one instance could amount to a criminal offence in another.[177]

The Minister said that, depending on the context, an intoxicated individual who yells loudly and persistently to the extent that it annoys others, and who does not cease that behaviour when asked to move on by police, could be committing the section 9 offence of continuing intoxicated and disorderly behaviour. He said it will be for police to determine the appropriate response.[178]

One MP who was critical of the Bill said that adding the word 'disorderly' to section 198 and to the related offence provision in section 9 would make no meaningful difference, as the section 198 'intoxicated move on' provision and the general section 197 'reasonable directions' provision already provided police with broad powers to issue legally enforceable directions.

> It is theoretically possible to imagine behaviour that is disorderly that is not already caught by the existing terms of section 197 and 198. In practical terms, I am sceptical that it will make any difference.[179]

This scepticism extended to doubts about the necessity for creating the new section 9 offence, which was 'largely identical' to the existing offence under section 199 of LEPRA:

> In legal drafting it is preposterous to have almost identical provisions in separate pieces of legislation... [This is] unnecessary legislation.[180]

However, most MPs – including many who opposed the Bill – said that the inclusion of 'disorderly' would broaden the powers to move people on and widen the scope to act on non-compliance.

Many supporters of the amendments said it was appropriate for police to have wide flexibility in determining when to act:

> The term 'disorderly' is wider in scope and may vary according to time, place and context of behaviour. Rightly, it is for the police to determine if the behaviour is serious enough to warrant intervention.[181]

It was also emphasised that there should have to be some evidence of 'disorderly' conduct to trigger a police response:

> … the bill is about intoxication and disorderly conduct, not just intoxicated behaviour ... It provides the police with further tools to give a measured but escalating response to intoxicated and – I reiterate – disorderly conduct.[182]

There were also concerns that broadening the powers – together with any subsequent increase in police operations targeting 'disorderly' behaviour – could increase the incidence of arbitrary or unfair arrests and escalate the number of vulnerable people being criminally sanctioned for minor infractions.[183]

Dr John Kaye MLC said it was important to recognise that section 9 would make being drunk a component of being disorderly, effectively reintroducing 'the offence of being drunk and disorderly' – an offence abolished long ago because it was too broad and subject to frequent misuse. He warned that the new offence could exacerbate the over-representation of Aboriginal people, young people, people with mental health issues and homeless people in the criminal justice system.[184]

In responding to this concern, the then Minister for Police explained that an important difference between the former 'drunk and disorderly' offence and the new 'intoxicated and disorderly' offence is that the latter is subject to the statutory safeguards in LEPRA. These require police to warn a person who is given a section 197 or section 198 direction that he or she is required by law to comply:

> This bill is very clear: people are warned to leave and told that they must not return within six hours. If they return to the area intoxicated and continue to be disorderly they will be deemed to have breached the law. If a person quietens down and obeys the direction to move on that is the end of the matter. If a person continues to act in a disorderly manner police officers will have the option of issuing a criminal infringement notice or a court attendance notice.[185]

177 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.
178 Ibid.
179 The Hon. Paul Lynch MP, NSWPD, (Hansard), Legislative Assembly, 3 August 2011, p. 3558.
180 Ibid.
181 Leslie Williams MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3657.
182 The Hon. Gabrielle Upton MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, pp. 3652-3653.
183 Dr John Kaye MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3625; Jan Barham MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3623.
184 Dr John Kaye MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3625.
185 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3630.

Another MP said that the new provisions focus on behaviour – simply being present in a public place while intoxicated would not be an offence:

> This policy is not a simplistic regurgitation of the old drunk and disorderly offence; here the focus is on the behaviour. Nevertheless, these powers must be used responsibly by authorities and with sensitivity when dealing with people or families living in distress or hardship. I understand that the police will be directed to focus the use of the new power on entertainment precincts where there is an existing problem with anti-social and criminal behaviour fuelled by drunkenness or drug use.[186]

6.2.1. Guidance on when 'disorderly' behaviour might warrant a police response

As previously noted, the policy in the *NSW Police Force Handbook* about dealing with intoxicated people in public places notes that an intoxicated person can be directed to move on if their behaviour is disorderly, and that it is an offence under section 9 for anyone who is issued with such a direction 'to be intoxicated and disorderly in the same or another public place at any time within six hours after the direction is given'.[187] There is no guidance on how or when to apply the provisions relating to 'disorderly' conduct.

While the Handbook does not refer to vulnerable people in this context, a NSW Police Force intranet bulletin explaining the effect of the legislative changes noted the following in relation to vulnerable people:

> The intoxicated and disorderly legislation is not designed to target vulnerable people. Police retain their discretion to deal with intoxicated people as they see fit, and consideration should be given to doing this when dealing with Aboriginal people, homeless people, people with a mental illness or people with a cognitive impairment.
>
> When dealing with intoxicated vulnerable persons, police may wish to provide them with assistance, refer them to support services or deliver them to a refuge or other place of safety...[188]

The NSW Police Force has advised us that there are currently no formal agreements between the NSW Police Force and welfare organisations regarding release under section 206(3).[189] However, individual Local Area Commands sometimes develop local procedures for cooperating with welfare organisations.

On the question of whether there might be a need for legislative or policy guidance on when 'disorderly' behaviour might warrant a move on direction or what kinds of 'intoxicated and disorderly' conduct might warrant use of the section 9 offence, the NSW Police Force has said that it:

> … supports police having the discretion to determine whether a person's behaviour is disorderly in the circumstances, without being constrained by a definition. This is not considered an unfettered discretion – police are always accountable for their actions, and decisions about what is disorderly may be subject to judicial scrutiny. [190]

Several other submissions – including those of the Police Association of NSW and the DPP – agreed that police should have flexibility in determining whether particular behaviour is disorderly according to the circumstances of the case.[191] The Police Association of NSW said community standards were an important factor in police decisions on the appropriate use of their discretion:

> Police officers are professionally trained to understand the requirements of the discretionary use of their powers. As professionals they exercise their discretion in the context of the local community standards.[192]

However, most submissions argued that it was unfair to both police officers and to members of the public to provide no legislative and/or policy guidance. The Law Society of NSW said:

> [We] have concerns about the phrase 'disorderly behaviour' which is vague and effectively provides no guidance to police on the parameters of the discretion.[193]

186 Greg Aplin MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3656.
187 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 432.
188 NSW Police Force, *Intoxicated & Disorderly*, Intranet Bulletin, 21 October 2011.
189 Email from NSW Police Force, dated 22 October 2012.
190 NSW Police Force, Submission, 26 February 2013, p. 1.
191 Including Australian Hotels Association, Submission, *Summary Offences Act Review*, 15 February 2013; Office of the Director of Public Prosecutions, Submission, 15 February 2013; Police Association of NSW, Submission, Review of *Summary Offences Act 1988, section 9*, 18 February 2013; and Randwick City Council, Submission, received 22 February 2013.
192 Police Association of NSW, Submission, *Review of Summary Offences Act 1988, section 9*, 18 February 2013.
193 Law Society of NSW, Submission, *Summary Offences Act Review*, 13 February 2013.

The Inner City Legal Centre expressed concerns about 'inconsistent approaches between different police officers'.[194]

The NSW Council for Civil Liberties said the lack of definition of 'disorderly' means that it is not clear to any person reading the legislation – including the police – what conduct Parliament has legislated to criminalise.

> It is undesirable for Parliament to legislate to impose sanctions on a category of behaviours that it has not specified, and whose specification is made by the police on a case-by-case basis … This reduces the predictability and clarity of the law for all and the transparency in how the law is being enforced.
>
> … the wide discretion granted to police [also] has the potential to increase the range of police behaviour that impinges on the freedoms of people in NSW without adequate supervision and transparency… In effect, behaviour may be taken as being disorderly on a decision of a police officer, a breadth of power that the NSW CCL opposes.[195]

Some submissions argued that police training was needed to ensure the powers were used responsibly, particularly in relation to 'young people, homelessness, cultural diversity and communication'.[196]

Many submissions warned that vulnerable groups were at particular risk, as the lack of guidance on how to apply these discretionary powers could exacerbate existing 'inequalities being experienced by vulnerable and disadvantaged' people.[197]

The NSW Council for Civil Liberties said care is needed to ensure that symptoms of mental illness are not mistaken for disorderly behaviour:

> … the broad degree of discretion granted to police officers may lead to persons who are mentally ill or otherwise have mental or physical conditions being considered to be acting in a disorderly way when this behaviour is merely a manifestation of their illness or condition.[198]

The NSW Young Lawyers Criminal Law Committee said community expectations should guide some aspects of police discretion, but further guidance is needed when applying the laws to vulnerable groups. For instance, community expectations were useful for officers applying discretionary powers to prevent violent criminal offences in a busy entertainment precinct such as Kings Cross. However, the Committee cautioned against using community expectations to guide the use of police discretion in relation to minority groups and vulnerable persons:

> … especially those who regularly occupy public spaces: Indigenous Australians, the mentally ill, young people, and the homeless overwhelmingly become the targets of the exercise of discretionary police move on powers.[199]

The Committee argued that:

> It is not the role of the criminal law to target unusual behaviour, behaviour that breaches what some perceive to be 'proper' or 'decorous', or behaviour that is considered unpleasant, discomforting or even disgusting. People use and enjoy public space in a multitude of ways, which may not be desirable to the majority, but nonetheless must be accepted in a diverse, tolerant and inclusive society.[200]

It also discussed particular risks associated with the policing of offensive language and public drinking.

> The committee is concerned that police may consider 'disorderly conduct' to include what they perceive to be offensive language or offensive behaviour. These offences are highly subjective and Indigenous persons have historically been overwhelmingly targeted for both offences ....
>
> The committee is also concerned that police may consider 'disorderly conduct' to include the mere act of drinking in public. Whilst there is a stigma attached to consuming alcohol in public places and some members of the community may consider it 'disorderly', such conduct is not illegal …
>
> Police should only issue move on directions to those intoxicated persons whose behaviour is a risk to public safety.[201]

Others, including the Hunter Community Legal Centre, proposed that a definition of 'disorderly' should be included in the law, and this should be supplemented by guidelines and training.[202]

194 Inner City Legal Centre, Submission, *Summary Offences Act Review*, 12 April 2013.
195 NSW Council for Civil Liberties, Submission, received 15 February 2013.
196 Newcastle City Council, Submission, received 28 February 2013.
197 Hunter Community Legal Centre, *Submission in Response to Issues Paper,* 15 February 2013.
198 NSW Council for Civil Liberties, Submission, received 15 February 2013.
199 NSW Young Lawyers Criminal Law Committee, Submission, dated 15 February 2013.
200 Ibid.
201 Ibid.
202 Hunter Community Legal Centre, *Submission in Response to Issues Paper*, 15 February 2013.

6.2.2. Police practice in responding to 'disorderly' behaviour

In examining whether the addition of 'disorderly' at section 198(1)(b) of LEPRA may widen the situations whereby police can issue a section 198 direction, and how 'intoxicated and disorderly' was being applied by police when deciding whether to act on an alleged section 9 offence, we examined COPS records of the 447 matters in dataset 2 for information about the basis for police actions.

In particular, we looked for information about whether the provisions relating to disorderly behaviour might have influenced the use of police discretion at two points in time:

- when police issued the initial section 198 direction,
- when they decided to act on the alleged section 9 offence.

NSW Police Force policy only requires that police have a lawful basis for their actions and can demonstrate that if required. In many cases, a handwritten record in the officer's official notebook will suffice. This means that COPS records do not always document the reasons for giving a section 198 direction or initiating proceedings in relation to a section 9 offence, even though police are generally expected to record the basis for using a power in COPS. Since this analysis is based on COPS records, it may not always be an accurate reflection of police practice, which may have been more fully documented in police notebooks.

6.2.2.1. Basis for issuing the section 198 direction

We examined the 447 matters in dataset 2 for any reasons noted in the narrative for the police decision to issue the initial direction. While all cases were recorded as section 198 directions, sometimes the reasons noted appeared to relate to the general section 197 move on power, but usually concerned conduct that was clearly disorderly. For the purpose of this analysis, we therefore deemed any behaviours caught by the existing terms of section 197 and 198(1)(a) to be a legitimate use of the move on provisions.

Our review of these records found that:

- In 102 cases (23% of the 447), the person's behaviour at the time of being directed to move on was described as threatening, intimidating or aggressive.
- In 98 cases (22%), the relevant behaviour was described as argumentative or quarrelsome.

Other common behaviours described in the COPS narratives included the person being abusive or insulting, yelling and fighting, and obstructing traffic or people.

However, our examination also identified a small number of records where the behaviour described did not appear to be 'disorderly':[203]

- In 40 cases (9%) the basis for issuing the section 198 direction was that the person had 'refused to leave' after having been informally asked to do so. No other relevant conduct was noted.
- In 20 cases (4%) the narrative noted that the person was drinking, or was in an intoxicated state, and no other relevant behaviour was noted.

It is possible that the officers issuing these directions believed that refusing to leave when requested or drinking or being intoxicated is 'disorderly' behaviour pursuant to section 198(1)(b). Another explanation is that they did not turn their minds to the legal basis for issuing the section 198 direction.

Case study 7 is an example of a section 198 direction being given because earlier informal police requests to leave had been ignored.

Case study 7. Ignoring police request to leave

A number of people, including some who were intoxicated, were standing outside a hotel in a regional town as it was closing at 3am. When police approached, all but seven people left. Police asked them to walk home but they continued to stand around, apparently socialising. After further requests to leave were ignored, the officers gave official move on directions. A short time later, the seven people were still talking in the street. All were issued CINs for breaches of section 9.

203 Ref: 2013/064572 worksheet 44.

The records relating to this and a number of similar incidents gave no indication that the people involved were arguing, causing a disturbance or engaging in any other disorderly conduct. In our view, simply ignoring informal police requests to go home did not provide a sufficient basis for issuing a direction under section 198(1)(b).

Additionally, even if ignoring an informal request does constitute the 'relevant conduct' needed to establish a basis for issuing a section 198 direction, it is unclear how police determined that there was continued behaviour that should be dealt with using the section 9 offence, rather than a penalty under section 199 of LEPRA.

Case study 8 is an example of a section 198 direction being given in circumstances where the main concern appeared to be the person's intoxicated state.

Case study 8. Person intoxicated without disorderly conduct

Police officers patrolling the business district of a large suburban centre in Sydney saw a local man, who was known to them, stop a passerby at 9.20am and ask for a cigarette. When they spoke with the man, the officers noted that he smelt of liquor and was slurring his words. They gave him a direction to leave and not return to the CBD area, which was described to him in specific detail. It appears the man had been directed to move on from the same area four times in the previous week due to intoxication. Two hours later, he was found drinking in a nearby park. Police poured out the alcohol, issued a CIN for a section 9 offence, and drove him home.

The detailed narrative linked to this matter described no disorderly behaviour at the time the man was issued with a move on direction, only that he had asked someone for a cigarette and appeared to be intoxicated. Even if this behaviour could be considered disorderly, it is not clear how the direction given could be considered reasonable for the purposes of preventing the continuance of those behaviours.

While our analysis of police records relating to the 447 matters in dataset 2 deemed that police had a valid reason for issuing the section 198 direction if the reason recorded related to any of the grounds set out in section 197 or section 198(1)(a) of LEPRA, it is important to note that section 9 of the Summary Offences Act can only be used in relation to a section 198 direction – that is, it must be 'reasonable' for the purpose of 'preventing injury or damage or reducing or eliminating a risk to public safety',[204] or 'preventing the continuance of disorderly behaviour in a public place'.[205] Thus the question of whether the 'disorderly' behaviour referred to at section 198(1)(b) includes conduct described in section 197 – obstruction, harassment, intimidation or causing fear – is crucial in determining the legal scope of the section 198 powers.

It seems likely that Parliament intended the term 'disorderly' to describe a miscellaneous category of conduct that at least includes the types of behaviour explicitly described in sections 197(1) and 198(1)(a), and might extend to less serious conduct of that kind. Our examination of dataset 2 found that police issued move on directions in response to a wide range of behaviours, ranging from threats, aggression, abuse and fighting, to yelling and refusing to leave. This seems to indicate that officers interpret 'disorderly' to include both the more serious types of behaviours described in sections 197(1) and 198(1)(a), and some less serious behaviours. One way to clarify the scope of section 198(1)(b) would be to amend it to read 'is *otherwise* disorderly' and include an explanatory note to make clear that the categories of behaviour described in section 197(1) are among the behaviours contemplated by this subsection.

When section 198 was introduced in 2007, its purpose was to give police specific authority to disperse volatile groups of 'seriously intoxicated persons' in public places and 'allow police to take a proactive approach ... by diffusing potentially volatile situations before they get out of hand'.[206] As the power at section 198 is no longer confined to situations involving the dispersal of drunken crowds, it could be incorporated into the broad powers for issuing directions under section 197. The section 197 and section 198 provisions both now include broad grounds to issue directions, and both can now be used in relation to groups or individuals. So there is no longer a clear rationale for maintaining a separate provision relating to intoxicated people.

In our view, it would be preferable to consolidate the fragmented move on provisions by:

- repealing section 198
- expanding the 'relevant conduct' requirements in section 197 to incorporate elements of the conduct described in section 198(1)(a) and conduct that 'is otherwise disorderly'.

204 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 198(2)(a).
205 LEPRA, s. 198(2)(b).
206 The Hon. John Hatzistergos MLC, NSWPD, (Hansard), Legislative Council, 28 November 2007, p. 4506.

In reviewing the relevant conduct requirements, consideration should also be given to whether requirements that were originally intended to assist police in applying the powers to disperse drunken crowds have the same applicability to intoxicated individuals. However, the deficiencies in the current section 198 'relevant conduct' requirements are likely to be addressed by making this specific intoxicated move on power part of a broader authority to issue directions.

6.2.2.2. Basis for acting on the alleged section 9 offences

Our analysis of the 447 matters in dataset 2 also looked for any reasons noted for the police decision to act on the alleged section 9 offence.

We found that about three-quarters of these records included information about behaviours that provided some basis for the police assessment that the person was 'intoxicated and disorderly' in a public place after having been given a section 198 direction. However, we also found in the remaining cases instances where there was no reason recorded for the police decision to act on the alleged section 9 offence and/or it was unclear how the associated conduct at the time the alleged section 9 offence might have constituted disorderly behaviour. These included:

- 102 cases (23% of 447)[207] where the record showed the person had failed to comply with a section 198 direction and some conduct was noted, yet the conduct described by police does not appear to be disorderly.
- Nine cases (2%) where the person was described as intoxicated, but no other relevant conduct was noted in the narrative. This included nine matters where the main behaviour described was that the intoxicated person was drinking in public, continuing his or her intoxicated behaviour, or purchasing more alcohol.
- 11 cases where the reason noted was that person was present in a public place within six hours of the section 198 direction having been given.[208]
- Six cases where the record noted that the person's behaviour was 'disorderly', but provided no further details.[209]

Among the 102 cases where action was taken under section 9 but the conduct did not appear to be 'disorderly', were a number of intoxicated individuals who were uncooperative, but not in a way that directly confronted police or appeared to be likely to cause disorder. For example, in case study 9, the behaviour that preceded the section 9 legal action was walking slowly, then sitting down on a public bench.

Case study 9. Conduct did not appear to be disorderly

A number of intoxicated people were leaving a hotel in a rural town. Police saw one man hold a second man around the neck in the middle of the road, and stopped them. As the second man walked away, the first yelled: 'I love the man'. Police observed that he was highly intoxicated and directed him to leave the area. He complied but made his way slowly. After a few more interactions with the police, legal action was taken when the man sat down on a public bench about 100 metres from where the initial move on direction was given.

In relation to this case and most other cases in this group, it seems likely that police could have taken action under section 199 of LEPRA, which does not require evidence of continuing disorderly behaviour.

The records in these cases indicate that police officers appeared to use section 9 instead of section 199 in response to a person's failure or refusal to comply with a move on direction, even where there is no apparent 'continuation of intoxicated and disorderly behaviour' associated with the person's non-compliance.

The broad application of the section 9 offence is probably not surprising. When the amendments were introduced, there was repeated emphasis on the perceived need to widen police authority to act on non-compliance with lawful directions, and that 'the offence will not be limited to the area that is subject to the move-on direction, but will apply to any public place in which disorderly conduct takes place'.[210] In determining what kinds of disorderly conduct might warrant a section 9 penalty, the legislation 'gives police the maximum flexibility to allow the nature and gravity of the behaviour to guide and determine the appropriate process for dealing with intoxicated and disorderly behaviour'.[211]

207 Ref: 2013/064572 worksheet 57.
208 Ref: 2013/039435.
209 Ref: 2013/039435.
210 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.
211 Ibid, p. 3591.

Parliament's decision to make section 9 a criminal offence and require that it apply to 'intoxicated *and* disorderly' people indicates that there should be some evidence of disorderly conduct – additional to the intoxicated person's presence in a public place after being given a section 198 direction – before police can fine or charge a person for a breach of section 9. It did not appear to be Parliament's intention to introduce the section 9 offence to effectively make it an offence to *drink* in any public space. We note that two other jurisdictions – Queensland and Victoria – retained public drunkenness offences despite the Royal Commission into Aboriginal Deaths in Custody recommending that they be abolished, and still explicitly make it an offence to be drunk in a public place.[212] The section 9 provisions are not similar to those provisions.

However, without some legislative or policy guidance on the forms of 'disorderly' behaviour that should be subject to a sanction under section 9 instead of section 199, it is not surprising that at least some police officers may have interpreted 'disorderly' behaviour broadly to include:

- any failure or refusal to comply with a section 198 direction, even where there is no evidence of disorderly conduct, and
- continuing to consume alcohol and/or continuing to be intoxicated in public.

In our view, the legislation should define the kinds of 'disorderly' conduct that should attract a criminal sanction under section 9, to avoid the provision being applied in these situations.

As previously discussed, Parliament recently increased the penalties for the section 9 offence. In explaining the rationale for introducing higher penalties, the then Premier said:

> Alcohol-related violence and antisocial behaviour are not welcome on our streets and, frankly, will no longer be tolerated. It is therefore critical that police can fine those offenders who do behave in such a manner, and that the fine is a sufficient amount to act as a deterrent for this unacceptable behaviour.[213]

The relatively high proportion of vulnerable people being fined or charged for section 9 offences, and the use of this offence in situations where there appears to be little evidence of alcohol-related violence or anti-social behaviour, indicates that any legislation or policies developed to assist operational police should also include practical advice about the context for taking legal action for a section 9 offence.

6.2.3. Developing principles to focus the use of section 9 on more serious infractions

While there was broad support for giving police flexibility in determining how best to respond to intoxicated groups and individuals, many of the submissions to our review emphasised that the section 9 offence should focus on more serious incidents of alcohol-fuelled violence and risks of public disorder. This approach is consistent with the Government's reasons for introducing the new offence:

> This policy is ... to manage the excessive intoxicated behaviour seen in entertainment districts on weekends. People are entitled to have fun, but not to the detriment of other people's night out. Those people are the reason that police need additional enforcement tools in the form of the new intoxicated and disorderly conduct offence.[214]

There was also recognition in many submissions that the crucial elements of the offence of 'continuation of intoxicated and disorderly behaviour' can be difficult to interpret and apply.

In order to focus the use of the heavier section 9 penalties on more serious infractions, part of the solution is to make it clear that the offence at section 199 of LEPRA is an option in the overwhelming majority of cases where a person does not comply with a reasonable direction. In situations where the primary concern is the failure or refusal to comply, the likelihood that police will issue a section 199 penalty is usually enough to encourage compliance.

Care is needed to ensure that the more serious section 9 penalties are only applied to the kinds of situations that the Government intended it would be used for. There is a need for much clearer guidance on what constitutes continuing intoxicated and disorderly behaviour and when such behaviour might warrant a criminal sanction.

212 *Summary Offences Act 2005* (Qld), s. 10; *Summary Offences Act 1966* (Vic), ss. 13-14.
213 The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 30 January 2014, p. 26623.
214 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.

6.2.3.1. Current case law relating to 'disorderly' behaviour

Some guidance on defining the kinds of 'disorderly' behaviour that might be subject to the criminal law can be found in Australian case law. As early as 1939, the South Australian Supreme Court described disorderly behaviour as:

> ... any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in, or in the vicinity of, a street or public place.[215]

More recently, the High Court in 2004 cited a case from New Zealand, which:

> … pointed out that the disorderly behaviour, like the insulting behaviour, prohibited by the section had to be such as would tend to annoy or insult people sufficiently deeply or seriously to warrant the interference of the criminal law. It was not sufficient that the conduct be indecorous, ill-mannered, or in bad taste. The question, he said, was a matter of degree.[216]

According to Chief Justice Gleeson, the New Zealand case suggests:

> ... that the law had to take due account of the rights, and freedoms, of citizens … to be characterised as disorderly, conduct had to be 'likely to cause a disturbance or to annoy others considerably'.[217]

The cases indicate that disorderly behaviour is a flexible term that covers a broad array of wrongful or injurious conduct – but, when the term is used to describe when criminal sanctions are applied, the conduct must be sufficiently serious to warrant the use of such sanctions.

6.2.3.2. What should not be regarded as 'disorderly'

Our examination of the police use of section 9 penalties during the review period has found that 'disorderly' should not be applied in situations where the principal evidence of the continuing 'disorderly behaviour' is that the intoxicated person is:

- merely found to be present in a public place at some point after having been issued a section 198 direction, and
- continuing to consume alcohol and/or continuing to be intoxicated in public, despite having been directed to move on.

Our review identified a number of cases where section 9 penalties were applied in these circumstances. In cases where a person is merely found to be present in a public place after a section 198 direction has been given, he or she may still be subject to a penalty for failing or refusing to comply with the direction, but that failure or refusal should not be regarded as a criminal offence.

Nor should continuing to be intoxicated in public and/or an intoxicated person continuing to consume alcohol, or having resumed his or her drinking, be regarded of itself as 'disorderly'. If a person has failed to comply with a move on direction or failed or refused to comply with a lawful direction under the Liquor Act, the offences relating to those provisions would still apply – but the section 9 penalty should not.

Finally, questioning or disputing a police move on direction and engaging police in argument about the reasonableness of the direction given should not ordinarily be regarded as 'disorderly' behaviour. An exception would be where the argument begins to escalate and the person continues or resumes the conduct that led to the direction being given in the first place, such as continuing or resuming behaviour that is obstructive, harassing, intimidating, causes fear, is likely to cause injury or damage to property or gives rise to a risk to public safety. Again, a person who fails or refuses to comply with the direction given may still be fined or charged for a breach of section 199 of LEPRA. The section 9 offence should not be used unless there is some disorderly conduct to warrant that more serious sanction.

6.2.3.3. Defining 'disorderly' conduct that warrants a criminal sanction

When the amendment Act was introduced, Parliament was told that the new powers would provide an 'escalating response to intoxicated and disorderly conduct' in entertainment districts on weekends, and would not be used for 'targeting the homeless, the mentally ill, the Aboriginal community or the disadvantaged in our society'.[218]

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215 *Barrington v Austin* [1939] SASR 130 (Napier J).
216 *Coleman v Power* [2004] HCA 39 at 11. Chief Justice Gleeson was referring to *Melser v Police* [1967] NZCA 5; [1967] NZLR 437.
217 Ibid.
218 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.

A number of submissions recommended that police should only issue move on directions to those intoxicated persons whose behaviour poses risks to public safety, and should exercise restraint in determining when the person's behaviour warrants a penalty for not complying.[219] Similarly, others argued that it was important to distinguish threatening or disorderly behaviour from high-spirited, rowdy or boisterous behaviour.[220]

In our view, it is crucial to distinguish the 'disorderly' conduct that might lead police to consider issuing a legally enforceable move on direction and that may subsequently be the subject of a penalty for not complying, from the more serious forms of 'intoxicated and disorderly' offending that should attract a criminal sanction under section 9. The former is primarily aimed at helping police to take steps to deter or prevent potential offences, whereas section 9 is aimed at punishing 'drunken and violent hooligans' who are actually engaging in 'excessive' offending behaviours.[221]

Each year police in NSW issue tens of thousands of formal move on directions to members of the public, and the overwhelming majority of people comply. While the directions given must always be for the purpose of addressing the 'relevant conduct' specified in sections 197 and 198 of LEPRA, it is appropriate that there be some flexibility in determining when police may issue a reasonable direction.

If a person fails or refuses to comply with a lawful direction, police have the option of issuing a penalty under section 199 of LEPRA. However, the section 9 'continuing intoxicated and disorderly behaviour' offence should not ordinarily apply. In our view, the purpose of the section 9 offence is to enable police to impose a sanction for continued intoxicated and disorderly behaviour, and not simply for failure or refusal to comply with a reasonable direction. Therefore, 'disorderly' in this context should be defined in a way that focuses the use of section 9 on tackling more serious and potentially dangerous behaviours that are causing, or likely to cause, disorder serious enough to warrant a criminal sanction.

In addition to defining the kinds of disorderly behaviour that should be subject to a penalty under section 9, the legislation should also include a provision that sets out the principles or objects of the section 9 offence. The inclusion of an objects provision would help police to identify or distinguish the types of disorderly behaviours that might warrant the use of an additional criminal sanction, without being prescriptive in how those principles are applied.

Recommendations

1. **The Attorney General clarify the grounds for issuing reasonable directions to intoxicated groups or individuals by:**
   a. **repealing section 198 of LEPRA, and**
   b. **expanding the 'relevant conduct' requirements in section 197 of LEPRA to incorporate elements of the intoxicated move on power currently at section 198(1)(a) and conduct that 'is otherwise disorderly'.**
2. **The Attorney General review the offences pursuant to section 199 of LEPRA and section 9 of the Summary Offences Act in order to clarify the types of 'disorderly' conduct that might warrant use of the section 9 offence and its higher penalties.**
3. **The Attorney General review the offences pursuant to section 199 of LEPRA and section 9 of the Summary Offences Act in order to address the overlap between the two offence provisions and consider amending section 9 of the Summary Offences Act to clarify that the purpose of the provision is to enable police to impose a sanction for continued intoxicated and disorderly behaviour, and not simply for failure or refusal to comply with a reasonable direction.**
4. **In reviewing section 9 of the Summary Offences Act, the Attorney General should consider supplementing it with a provision that explains the purpose of this offence and outlines principles regarding its use – including situations that would *not* normally be regarded as disorderly behaviour in the absence of other conduct.**

219 For example, NSW Young Lawyers Criminal Law Committee, Submission, dated 15 February 2013.
220 For example, Manly Council, Submission, 18 February 2013.
221 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.

5. **NSW Police Force establish training and guidelines that provide frontline police officers with practical advice on when the offence provisions under section 199 of LEPRA and section 9 of the Summary Offences Act (and related penalties) should apply in circumstances where both may be applicable.**

6. **NSW Police Force training and policy advice for officers dealing with an intoxicated person in public should emphasise that section 9 should not be used in circumstances where a person is merely intoxicated or drinking in a public place.**

6.3. NSW Police Force views on these recommendations

As previously noted, the NSW Police Force's response to the consultation draft of this report made it clear that it does not accept our concerns about the overlap between the section 9 and section 199 offences:

> This overlap can be seen in some of the statistics provided in the draft report, however it is not clear why the overlap is an issue given that section 199 of LEPRA can be used in much broader circumstances than section 9 of the *Summary Offences Act*.[222]

The NSW Police Force response was dismissive of arguments that police should be given legislative or even procedural guidance on what situations might warrant the imposition of a fine under section 9 rather than the substantially lower section 199 fine, arguing that the ability of police to use the two provisions 'interchangeably' in a wide range of circumstances is actually one of the strengths of the current scheme. As a consequence, the police submission rejected five of the six recommendations relating to measures aimed at addressing this issue.

In our view, the NSW Police Force's arguments in favour of maintaining the status quo fail to address the following concerns:

1. Although the new provisions were intentionally drafted in a way to maximise individual police discretion in determining where and when a section 9 penalty may be imposed, Parliament was repeatedly assured that police procedures and operational policing strategies would ensure that the broader powers and harsher penalties are focused on targeting drunken hooligans engaging in violent disorder in select locations. In practice, the breadth of section 9 and the lack of police guidelines has resulted in it being used in a much wider range of circumstances, not just those involving some evidence of 'disorderly' behaviour.
2. Parliament was also told that police policies and procedures would aim to minimise any adverse impact these new provisions might have on the homeless, the mentally ill, Aboriginal people and other marginalised groups. As our analysis of police data shows that 40% (196) of all fines and charges for section 9 offences during the review period involved people with one or more of those characteristics, it is clear that the current situation disproportionately affects vulnerable and disadvantaged people who are already over-represented in the criminal justice system.
3. At present, a member of the public who fails to comply with a section 198 direction may be fined either $1,100 or $220, depending on whether the officer involved decides to use section 9 or section 199 to penalise the offending behaviour. Until operational police are provided with some form of statutory and/or policy advice to guide their discretion on when to use section 9, there is no way for officers or members of the public to know when the harsher penalty should apply. In our view, the arbitrary nature of this kind of decision-making is inherently unfair.

While we support broader NSW Police Force submissions that Parliament should avoid imposing unnecessary or overly complex caveats on the use of these provisions, we do not accept that frontline officers should be provided with no legislative or policy guidance. Until officers are provided with some information about the circumstances that might warrant the use of section 9, it is difficult to understand how the community can be confident that the broader powers and harsher penalties will be used fairly, appropriately and in a way that is consistent with government policy.

222 Correspondence from the Commissioner of Police, dated 6 June 2014.

6.3.1. Recommendation 1

In relation to our finding that there is a need to consolidate and simplify the fragmented move on provisions at sections 197 and 198 of LEPRA by repealing section 198, and expanding the 'relevant conduct' requirements in section 197 to incorporate elements of the conduct described in section 198(1)(a) and conduct that 'is otherwise disorderly' (Recommendation 1), the NSW Police Force responded:

> Not supported. Police officers should maintain their discretion to impose a penalty notice under either section to allow for circumstances to be considered on a case by case basis and therefore not disadvantaging people who may be subject to the penalty notice.
>
> Whilst there will always be areas for improvement with the implementation of new laws, during the review period the Ombudsman was not notified of any complaints about a police officer's decision to penalise someone for committing a section 9 offence, or their conduct during such an interaction. Further, there is no evidence that the use of the powers is being abused, with total number of 'move on' directions issued during the review period being fewer than during any of the preceding three years.[223]

It is not clear how a recommendation aimed at simplifying and strengthening the powers of police to issue 'reasonable directions' could impede police discretion to initiate legal action for not complying. If anything, consolidating and simplifying the requirements for issuing legally enforceable move on directions to groups or individuals, whether intoxicated or not, should enhance the ability of police to act on any non-compliance. As neither section 197 nor section 198 contain penalty provisions, it is difficult to see the relevance of police arguments that officers should 'maintain their discretion to impose a penalty notice under either section' in this context.

One possibility is that the NSW Police Force perhaps misinterpreted our recommendation to incorporate the current section 198 powers into section 197 as a back-handed way of abolishing the basis for the section 9 offence (which penalises failure to comply with a section 198 direction). However, elsewhere in the report we make clear our support for maintaining separate offence provisions – see Recommendations 2, 3, 4, 5 and 6. In our view, implementing Recommendation 1 would not necessitate any change to the offence provisions, other than minor consequential amendments such as updating the definition of 'move on direction' at section 9(2) of the Summary Offences Act to reflect the consolidation of the different move on powers.

6.3.2. Recommendation 2

The NSW Police Force also rejected our recommendation that the section 9 and section 199 offence provisions be reviewed to clarify and better define the type of 'disorderly' behaviour that might justify police decisions to issue a $1,100 on-the-spot fine for an offence under section 9 rather than issuing a $200 fine under section 199 (Recommendation 2). The police response states:

> Not supported. Operational police have indicated that these offences are used interchangeably, making it preferable not to make them mutually exclusive.
>
> The decision to utilise either section 199(1) LEPRA or section 9 SOA is dependent upon the circumstances. The creation of definitions based on factors such as immediacy of refusal (i.e. time lapsed between the initial warning and refusal), or whether any attempt was made to comply with the move on, would be complex and create unnecessary confusion for both operational police and the courts.[224]

In short, the NSW Police Force argument for maintaining the status quo seems to be that current police practice is to use the offences interchangeably, that any decision on which fine to impose 'is dependent upon the circumstances' and that any attempt to provide police with some guidance about the circumstances that might warrant the substantially higher section 9 penalty 'would be complex and create unnecessary confusion'.

In our view, giving frontline officers guidance as to the types of 'disorderly' behaviour that should attract the higher section 9 penalty would provide clarity for both police and members of the public. When the amending Act was introduced, Parliament was told that the section 9 offence was intended to fill a gap, giving police clear authority to act in situations where there might otherwise be doubts. In response to claims that the new section 9 offence was 'largely identical' to the existing offence at section 199 of LEPRA, the then Attorney General dismissed these concerns as 'nonsense'.[225] He and other MPs who spoke in support of the amendments, repeatedly assured Parliament that

223 Correspondence from the Commissioner of Police, dated 6 June 2014.
224 Correspondence from the Commissioner of Police, dated 6 June 2014.
225 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3662.

the intention was to strengthen the targeting of certain 'intoxicated and disorderly' conduct, not to simply create an additional 'fail to comply with direction' offence that police could use interchangeably with the existing LEPRA offence.

If, as the NSW Police Force claims, operational police currently use the two offence provisions interchangeably, then this would seem to be at odds with Government policy stipulating that the section 9 provision should principally be directed at helping police deal with violent incidents of 'excessive intoxicated behaviour seen in entertainment districts on weekends'.[226] In our view, this disparity between police practice and Government policy needs to be reconciled. If, as seems likely, Parliament maintains the markedly harsher penalties for breaches of section 9, then the related legislation and/or police policy must be updated and amended to provide a clear rationale to help officers determine when the higher section 9 penalty should apply.

6.3.3. Recommendation 3

In relation to our recommendation that section 9 and section 199 be reviewed to reduce the current overlap between the two offence provisions, and that consideration be given to amending section 9 to clarify that the provision is intended to enable police to impose a sanction for continued intoxicated and disorderly behaviour, and not simply for failure or refusal to comply with a reasonable direction (Recommendation 3), NSW Police Force stated:

> Not supported. It is unclear from the draft Report why the overlap is an issue. It is also noted that s 199 of LEPRA can be used in much broader circumstances than s 9 of the SOA.
>
> By increasing the penalty amount for s 9 of the SOA Parliament intended to show that drunk and disorderly behaviour is not to be tolerated and that s 9 of the SOA should be used to prevent this behaviour. There appears to be no evidence in the draft Report to suggest that police officers are 'unfairly' or 'unlawfully' imposing penalty notices under s 9 of the SOA or section 199 of LEPRA.
>
> Police officers should maintain their discretion to impose a penalty notice under either section to allow for circumstances to be considered on a case by case basis and therefore not disadvantaging people who may be subject to the penalty notice.
>
> (Refer also to recommendation 1 above).[227]

We are not persuaded by these arguments. In particular, the NSW Police Force acknowledges that the decision to take legal action under section 199 or section 9 depends on the circumstances, and perhaps that section 9 is intended to be used in more serious situations, yet it rejects any suggestion that its officers be provided with guidance on what those circumstances are. Nor has it demonstrated how its officers can make decisions consistently and in a transparent way without this advice.

As noted in section 6.2.2.2, we identified:

- 102 cases (23% of 447)[228] where the record showed the person had failed to comply with a section 198 direction, yet the conduct related to the section 9 offence did not appear to be 'disorderly'.
- Nine cases (2%) where the person was described as intoxicated, but no other relevant conduct was noted.
- 11 cases where the only reason noted was that person was present in a public place within six hours of the section 198 direction having been given.[229]
- Six cases where the record noted that the person's behaviour was 'disorderly', but provided no further details.[230]

In our view, these 128 cases (almost a third of all section 9 offences) constitute evidence that, during the review year, some officers did unfairly impose a penalty notice under section 9, in circumstances where the penalty under section 199 would have been more appropriate. If the current penalties had been in place at that time, the on-the-spot fine issued to most of these individuals would have five times the amount that applies to breaches of section 199. The NSW Police Force has not explained how this would be a fair outcome.

Parliament's decision to increase the section 9 penalty, but not the section 199 penalty, shows a clear intent that the two offences are different, and should therefore not be used interchangeably. This recommendation is aimed at providing some clarity around that difference.

226 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
227 Correspondence from the Commissioner of Police, dated 6 June 2014.
228 Ref: 2013/064572 worksheet 57.
229 Ref: 2013/039435.
230 Ref: 2013/039435.

6.3.4. Recommendation 4

In relation to our recommendation that consideration be given to supplementing section 9 with a provision that explains the purpose of the offence and outlines principles regarding its use (Recommendation 4), NSW Police Force responded:

> Supported in principle. The NSW Police Force would support addressing these issues by means of internal police communication rather than by amending section 9.
>
> (Refer also to recommendation 1 above).[231]

While the NSW Police Force indicates in-principle support for this recommendation, elsewhere in its response it rejects the premise underlying the recommendation – that there is a need to address deficiencies in the lack of statutory guidance and clarity around the purpose of section 9, and how it is distinguishable from the section 199 offence.

As the NSW Police Force has rejected our call to give frontline officers practical advice about the difference between the offences (see Recommendations 5 and 6, discussed below), it is unclear whether, in its response to Recommendation 4, the NSW Police Force has proposed that notwithstanding this view, memos and other internal police communication should be sent to explain the purpose of the section 9 offence and outline principles regarding its use.

6.3.5. Recommendations 5 and 6

In relation to our recommendation that NSW Police Force establish training and guidance that provide frontline police officers with practical advice on when to use which offence provision (Recommendation 5), and our recommendation that training and policy advice should emphasise that section 9 should not be used in circumstances where a person is merely intoxicated or drinking in a public place (Recommendation 6), NSW Police Force responded:

> Not supported. Practical procedural information regarding section 9 was made available to police in a number of formats, including the Police Handbook, a New Law article and state wide emails as well as various training materials such as Six Minute Intensive Training (SMIT) forms.
>
> The NSW Police Force provides a number of education packages through the Police Academy, Custody Courses and other general training to assist police to assess whether a person suffers from a physical, mental health or cognitive impairment. The *NSW Police Force Handbook* outlines the importance of being aware that some people who appear to be intoxicated may in fact be ill or injured.
>
> Brief Handling Managers at Commands also provide feedback to police resulting from issues that may arise through their checking of briefs of evidence and matters that go before the courts.
>
> There are also a number of Procedures documents that also may assist police including Alcohol Free Zones, Banning Orders – Licensed Premises, Code of Practice – CRIME, Criminal Infringement Notice (CINS) SOPS and Guidelines, Domestic & Family Violence Code of Practice, Protocol for Homeless People in Public Places, Licensing Aide-memoire.[232]

At various points during the debates about the proposed new provisions, Parliament was assured that the NSW Police Force would develop guidelines and procedures to assist officers in exercising their discretion. In particular, 'Police will develop appropriate standard operating procedures – SOPs – for the [section 9] offence, which will reflect the Government's policy goals'.[233] Parliament was told the police procedures would also address a number of practical issues, including concerns about the need to:

- focus uses of the new powers on anti-social behaviour at night-times in entertainment hubs, and avoid adversely impacting on vulnerable people in public spaces[234]
- minimise the number of people being unnecessarily caught up in the criminal justice system for relatively minor infractions,[235] and
- give people a 'reasonable time' to comply with a section 198 direction.[236]

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231 Correspondence from the Commissioner of Police, dated 6 June 2014.

232 Ibid.

233 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3662.

234 The Hon. Paul Lynch MP, NSWPD, (Hansard), Legislative Assembly, 3 August 2011, pp. 3558-3559; see also Jan Barham MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3622-3623.

235 As raised by David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3609-3612; see also Dr John Kaye MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3624-3625.

236 As raised by David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, pp. 3631-3632.

None of these concerns were addressed in the amending Act because, Parliament was told:

> Police will develop standard operating procedures to guide them in the appropriate use of the move on directions and the offence. It will be clear that the offence is directed at antisocial behaviour at night-times in entertainment hubs. Of course, if intoxicated and disorderly behaviour that is sufficiently serious to warrant intervention by the police occurs at other times and places, police will still be able to use the powers, if appropriate.[237]

The NSW Police Force is yet to develop procedures that directly deal with these issues. While the training materials, guidelines and other documents that the NSW Police Force lists in its response relate to the policing response to alcohol-related incidents, none contain information that specifically helps officers to determine whether to take legal action under section 9 or section 199 in circumstances where both may be applicable. Throughout its response, the NSW Police Force makes it clear that any attempts to more clearly define the factors that should guide these kinds of frontline policing decisions would create unnecessary confusion and should be avoided.[238]

Our recommendation that the NSW Police Force provide its officers with an appropriate policy framework to guide their decisions is not intended to fetter their use of discretion, but – consistent with current government policy – is intended to give members of the public confidence that this discretion will be used appropriately.

If the government intends that the section 9 offence should be used in all circumstances where legal action under section 9 or section 199 may be applicable, the legislation should be amended to make this clear. If this is not the intention, it is critical that police officers are provided with sufficient guidance to exercise their discretion in a fair and just way.

6.3.6. Ombudsman views on Recommendations 1 to 6

Having carefully considered the NSW Police Force response, our views with respect to Recommendations 1 to 6 remain unchanged for the reasons noted above.

6.4. People arrested or detained for section 9 offences

When the continuing intoxicated and disorderly offence at section 9 of the Summary Offences Act was introduced, the then Minister for Police told Parliament that it was primarily aimed at helping police to deter 'drunken and violent hooligans' from 'resuming or continuing' their 'alcohol-fuelled crime and antisocial behaviour'.[239] Given the context in which section 9 was expected to be used, it is therefore crucial that the options available to police officers when exercising their discretion include powers to arrest and detain suspected offenders.

In addition, police often deal with drunken people who are not engaged in offending but whose disorderly behaviour poses risks of injury or damage to property, or who otherwise need physical protection because of their intoxicated state. In those circumstances, police may use the protective detention powers at section 206 of LEPRA to remove the person from danger while they sober up.

This section considers the use of arrest and/or protective detention powers as part of policing strategies to reduce disorderly behaviour by intoxicated people.

6.4.1. Data on the use of arrest and detention

Our examination of the 447 matters in dataset 2 identified 255 cases (57%) where police used their arrest powers, protective detention powers, or both (that is, the person was initially apprehended under one power, then another power was used as the basis for continuing or resuming the person's detention). Of the cases where a power of arrest and/or detention was used, we found:

- 187 cases (42% of 447) where section 99 arrest powers were used
- 139 cases (31%) that involved the use of section 206 protective detention powers
- 71 cases where both powers were used.

237 The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3663.
238 Correspondence from the Commissioner of Police, dated 6 June 2014.
239 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3589.

6.4.1.1. Arrests without warrant – section 99, LEPRA

Police may arrest without warrant any person who is committing or has committed an offence. These powers are set out in section 99 of LEPRA. At the time of our review, section 99(3) provided that an officer could not arrest a person without warrant unless the arrest was reasonably necessary for the purpose of:

- ensuring the defendant's appearance at court
- preventing continued or further offending
- protecting or preserving evidence relating to the offence, or preventing the fabrication of evidence
- protecting witnesses from harassment or interference, or
- preserving the safety or welfare of the person.

Recent amendments to section 99 make it clear that the power to arrest without warrant extends to situations where the arrest is necessary to stop the person fleeing, make inquiries to establish the person's identity, or to secure property in the person's possession that is connected with the offence.[240] As soon as is reasonably practicable, the arrested person must be taken before an authorised officer – usually a magistrate – to be dealt with according to law.[241] The person may be released on bail with conditions or remanded in custody.

If an officer decides it is necessary to initiate proceedings for the section 9 offence, the officer may issue a Criminal Infringement Notice (CIN) or a Court Attendance Notice (CAN). A CIN is an 'on the spot' fine that can be issued to the recipient at any time, usually immediately after the alleged offence or later at a police station (often as the person is released from custody). As the Criminal Procedure Act allows CINs to be served by post, CINs can also effectively be served days after the alleged offence. CANs require the person to appear at court to defend the charge, and are usually issued at a police station when the person is released from custody. At any point, the arresting officer can also discontinue an arrest and take no further action, where appropriate, or give a formal caution or warning if the person concerned is under 18 years.

Our examination of the 187 cases in dataset 2 where the person had been arrested following the alleged section 9 offence looked at whether police initiated proceedings for the section 9 offence.

Table 12. Legal actions taken for section 9 offence following arrest

	No.	%
Arrested then issued a Criminal Infringement Notice	132	70
Arrested then issued a Court Attendance Notice	54	29
Arrested then issued a formal caution under Young Offenders Act	1	1
Total	**187**	**100**

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

As Table 12 shows, more than two-thirds of those arrested were subsequently given a CIN, and the remainder were given a CAN.

6.4.1.2. Protective detentions – section 206, LEPRA

Another option available to police when dealing with a suspected section 9 offender is to use the protective detention powers at section 206 of LEPRA to detain the intoxicated person. This permits protective action such as taking the person home and/or placing him or her into the care of a family member or friend. As sometimes such action might not be safe or practicable, section 206 also permits protective detention at a police station or some other 'authorised place of detention' capable of safely accommodating the person until he or she is sober enough to leave. Table 13 shows the protective action taken by police in relation to the 139 cases in dataset 2 where section 206 was used.

240 This section was subsequently replaced by amendments made by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013*, which commenced on 16 December 2013.

241 LEPRA requires the person to be taken before an 'authorised officer' which is defined as a Magistrate, Children's Magistrate, registrar of a Local Court or an authorised employee of the Attorney General's Department.

Table 13. Action following section 9 offence and section 206 LEPRA protective detention

	No.*	%
Driven to accommodation / home	55	39
Taken to a station until sober enough to leave	39	28
Released into custody of responsible person	24	17
Detained but action unclear	17	12
Taken to a station until responsible person found	2	2
Released into care of health / emergency services	2	2
Total	**139**	**100**

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

* Using comments noted in COPS Event narratives, we identified 139 cases in which the person who was fined or charged for a s. 9 offence also appeared to have been detained for their own protection under s. 206, LEPRA.

Of the 139 cases in which the alleged section 9 offender in dataset 2 was detained by police under section 206 of LEPRA, the data in Table 13 shows that 118 (85%) were then:

- driven home or to other accommodation
- taken to a police station until they were sober enough to leave, or
- released into the custody of a responsible person.

Of the 22 cases involving young people, seven had been detained using the section 206 powers. Of these, four were driven home, two were released into the custody of a responsible person and one was placed in the care of a hospital after injuring his head.

6.4.1.3. Cases involving both protective detention and arrest powers

In addition to noting what protective action was taken as a result of the section 206 detention, we examined these records for information about whether police used section 99 powers of arrest either before or after the preventive detention, and whether a CIN or a CAN was issued for the alleged section 9 offence.

Table 14 (below) shows information about all 139 of the protective custody matters in dataset 2, including what protective action was taken, how many also involved an arrest without warrant under section 99 of LEPRA for an offence, and whether a CIN or CAN was used to initiate proceedings for the alleged section 9 offence.

Table 14. Section 9 legal actions taken in relation to cases involving people detained under section 206 LEPRA for their own protection

		Driven to accomm. / home	Taken to a station until sober enough to leave	Released into custody of responsible person	Detained but action unclear	Taken to a station until responsible person found	Released into care of health / emergency services	Total*
CIN	Arrested s. 206	17	22	9	8	2	1	59
	s. 206 only	33	14	11	6	0	0	64
	All CINs	**50**	**36**	**20**	**14**	**2**	**1**	**123**
CAN	Arrested s. 206	4	2	3	3	0	0	12
	s. 206 only	1	1	1	0	0	1	4
	All CANs	**5**	**3**	**4**	**3**	**0**	**1**	**16**
Total*	Arrested s. 206	21	24	12	11	2	1	71
	s. 206 only	34	15	12	6	0	1	68
	Total	**55**	**39**	**24**	**17**	**2**	**2**	**139**

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

* Using comments noted in COPS Event narratives, we identified 139 cases in which the person who was fined or charged for a s. 9 offence also appeared to have been detained for their own protection under s. 206, LEPRA.

In 71 (51%) of the 139 protective custody cases the person was initially apprehended under one power, and another power was used as the basis for continuing or resuming the person's detention. Of the protective detention cases where an arrest power was also used, 59 received a CIN for the section 9 offence, and 12 were charged. Of the remaining 68 cases where only the protective detention power was used, 64 received a CIN for the section 9 offence, and 4 were charged.

In cases where both powers were used, the uses of arrest pursuant to section 99 of LEPRA often enabled police to stop the person's immediate offending behaviour and remove them from a potentially volatile situation. Then, after the person calmed down, the section 206 protective detention powers were typically used to transport the person home and/or place them into the care of a responsible person. But if the disorderly behaviour persisted, they might be taken to a police station until they were sober enough to leave. In the case below, the COPS record shows that police initially arrested a man to stop his offending, used protective detention powers to take him home, but then – when his disorderly behaviour resumed, making it unsafe to leave him unattended – held him at a police station until he sobered up.

Case study 10. Use of section 99 arrest powers and section 206 protective detention

An intoxicated young man was twice refused entry to a hotel in a regional town late on a Saturday night, then entered via a rear door that a friend had opened for him. After being escorted from the premises, the man remained in front of the hotel, loudly remonstrating with staff. As police arrived, he walked away. Police followed, warned him about his offensive language and about entering a hotel despite being excluded. He was formally directed to leave the CBD area but refused, and continued to abuse police. In response to further police warnings about his language and directions to leave, the man said: 'I don't fucking care, arrest me'. He was then arrested, and conveyed to a residential address. But when police tried to release him, he became aggressive. The COPS record states: 'As a result police feared he was a risk to himself and others. He was conveyed ... to [name] police station and detained as an [intoxicated person]'. The man was then issued with two $550 fines for liquor offences, a $150 CIN for offensive language and a $200 CIN for continued intoxicated behaviour.

This was one of a number of cases during the review period that involved police using Liquor Act powers and offences in conjunction with a continued intoxicated and disorderly offence under section 9 of the Summary Offences Act. As previously noted in the discussion on the legal framework for policing alcohol-related incidents in public places at chapter 3, the Liquor Act includes provisions that enable police to remove intoxicated individuals from licensed premises and direct them not return for a specified period. In interviews and focus group discussions, a number of frontline officers have told us that they find Liquor Act provisions easier to use and enforce. For example, some said it was often easier for a person to understand a Liquor Act direction requiring that he or she not return to particular bar or hotel for 24 hours.[242]

Another common scenario involving arrest powers being used in conjunction with protective detention powers, were cases where suspects were arrested and taken to a police station to be charged but who were then assessed by a custody manager as being too intoxicated to be charged. Rather than formally enter them into custody, section 206 was often used to detain the person until he or she was sober enough to leave. Most were then issued with a CIN, either as they were leaving or by post some time later.

Case study 11. Too intoxicated to be charged immediately

Police responded to a report that a man at a bus stop was threatening others with a pair of scissors. Police noted that he was extremely aggressive and argumentative, but a search located no scissors. The man left after being issued with a section 198 direction. A few hours later, police attended a medical centre where the same man was subjecting staff and patients to aggressive and violent threats. The man, who had a history of mental illness, was arrested to stop his offending, then placed into protective detention to sober up. While in custody he was issued with a court attendance notice. After he sobered up he was released. He failed to attend court because of a medical appointment and was convicted and fined $200 for the section 9 offence.

The use of the protective detention powers is questionable in circumstances where police had clear grounds to arrest and charge, and may have intended from the outset to issue a CIN or CAN for the section 9 offence. Yet the COPS record in this and a number of similar cases indicates that the officers involved were genuinely concerned about the need to address the risks that the man's behaviour posed to himself and others, while wanting to proceed by the least intrusive means necessary.

242 Focus Group, City Central LAC (Group 2), 12 July 2012.

The power enabling police to detain intoxicated people for their own safety and protection was introduced in response to concerns highlighted by the Royal Commission into Aboriginal Deaths in Custody about the excessive use of arrests for public drunkenness and the disproportionate impact this broad discretionary offence had on Aboriginal communities. The Royal Commission found that, nationally, 35% of all people brought into police custody were there for offences relating to drinking in public and that:

> Overall, some 46% of the public drunkenness cases were Aboriginal people and more than three-quarters of the female drunkenness cases (78%) were Aboriginal. Drunkenness cases made up 57% of the Aboriginal custodies compared with 27% of the non-Aboriginal custodies. These data indicate that, throughout Australia, a substantial proportion of the work of police officers involved in community policing and lockup supervision was handling public drunkenness cases. This applies in all jurisdictions regardless of the legal status of public intoxication.[243]

The Royal Commission called for the offence of public drunkenness to be abolished in all jurisdictions, and recommended a range of non-custodial measures to provide for the care and treatment of intoxicated people. Although NSW had taken steps to reduce the police use of arrest for public drunkenness in the decades prior to decriminalisation, recent historical analysis shows substantial police resources were still being devoted to arresting and detaining drunks. After excluding arrests for traffic offences, offences relating to drunkenness accounted for 32% of all NSW arrests in 1943, 48% in 1947, 54% in 1951, 39% in 1960, 32% in 1965 and 32% in 1970.[244]

In practice, the Part 16 powers give police a practical way to divert high numbers of intoxicated people from the criminal justice system by removing them from harm's way before they become involved in offending, or are injured by others. During the review period, data provided by police indicates that a total of 1,803 intoxicated people were detained under the protective detention powers at Part 16 of LEPRA.[245] Police data also shows that since 2009, between 2,000 and 4,000 people are entered into custody as an intoxicated person every year.[246]

The protective detention powers were among a suite of crucial reforms aimed at reducing the high number of Aboriginal people and other high-risk groups from entering the criminal justice system for minor offences. Discussions with frontline police officers and their supervisors indicated that in many cases, where they have the resources, they use their discretion to take intoxicated people home – particularly young or vulnerable people. This observation is reflected in the data in Table 13 and Table 14, which shows that the most common protective action is to take the person home.

By comparison, fewer people who were detained pursuant to section 206 were released into the care of a responsible person. From our review of police records and discussions with police this typically involved officers arranging for a family member, partner or friend of the intoxicated person to meet at an agreed location and take the intoxicated person home.[247]

6.4.2. Taking proceedings against people in protective detention

Police are generally not permitted to detain a person for their own protection under section 206, then initiate proceedings against them for an offence. Section 206(2) provides:

> (2) A police officer is not to detain a person under this section because of behaviour that constitutes an offence under any law.

This provision is primarily aimed at preventing the protective detention powers at Part 16 of LEPRA from being misused as an easy alternative to the conventional powers of arrest at Part 8. When police officers are confronted with intoxicated and disorderly behaviour, section 206(2) requires them to choose whether the person should be detained for their own safety and protection, or whether there is a need to arrest the person without warrant and initiate proceedings for the offending behaviour.

The amendment Act introduced an exception to this requirement in section 206(2A):

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

243 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 1*, 15 April 1991, paragraph 7.1.11.
244 The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3592.
245 Provided by NSW Police Force on 15 October 2012.
246 Provided by NSW Police Force on 20 January 2012.
247 Focus Group, City Central LAC, 12 July 2012.

That is, anyone who has committed a continuing intoxicated and disorderly behaviour offence can nonetheless still be detained using the protective detention powers if their disorderly behaviour poses risks of injury or damage to property,[248] or they are in need of physical protection because of their intoxicated state.[249]

In his second reading speech, the then Minister for Police explained that the purpose of the exception at section 206(2A) was to enable police to detain intoxicated persons for their own protection, even if they are behaving in a disorderly manner, so they can be released into the care of a responsible person if willing and available.

> In its current form, this power is not available if the behaviour constitutes the commission of an offence. To preserve the power of detention, section 206(2A) will be amended to allow a police officer to detain an intoxicated person even if the behaviour constitutes an offence under new section 9 of the Summary Offences Act if the detention is not for the purpose of taking proceedings for an offence. In other words, if police detain an intoxicated individual according to their [protective detention] powers in Part 16, **they detain them for the purpose of making sure they are safe and not for the purpose of charging them with the offence.** [emphasis added][250]

This means that even if an intoxicated person's disorderly behaviour may constitute an offence under section 9, police may still use the protective detention powers at section 206 of LEPRA to protect the person from harm.

6.4.2.1. New South Wales Police Force policy, guidelines and training

As part of our review, we considered how frontline police had applied the protective detention provisions in Part 16 of LEPRA, including the protections afforded by sections 206(2) and (2A).

Under the heading, 'Intoxicated & Disorderly', a NSW Police Force intranet bulletin explaining the changes introduced by the amendment Act notes that the Summary Offences Act was amended to 'create a new offence for a person who has been given a move on direction for being intoxicated and disorderly in a public place to be intoxicated and disorderly in that (or any other) public place at any time within six hours of the direction being given'. After noting that LEPRA was also amended 'to allow police to issue move on directions for disorderly behaviour', the article adds:

> Further, police may detain an intoxicated person under Part 16 of LEPRA otherwise than for the purposes of taking proceedings for the new offence.[251]

Similarly, the *NSW Police Force Handbook* advice about dealing with intoxicated people in public places states that when considering the use of the section 9 power, officers should:

> ... re-assess the situation to determine whether it may be more appropriate to detain the person under Part 16 of LEPRA.[252]

This seems to imply that protective detention powers in Part 16, specifically section 206, provide an *alternative* to the giving of a penalty.

In the section entitled, 'Powers relating to detention of intoxicated persons (Part 16 LEPRA)', the Handbook sets out the legislative requirements relating to protective detention. In relation to sections 206(2) and (2A), the Handbook states:

> A person cannot be detained under section 206 because of behaviour that constitutes an offence under any law. However, a police officer may detain an intoxicated person who is seriously affected, even if the behaviour constitutes an offence under section 9 of the Summary Offences Act, **if the detention is not for the purpose of taking proceedings for the offence**. [emphasis in the original][253]

This explanation is accompanied by the following footnote:

> If a person is arrested for an offence under section 9 of the Summary Offences Act and detained for the purpose of taking proceedings for the offence, Part 8 of LEPRA applies – 'powers relating to arrest'. In these circumstances, the person is arrested and detained in accordance with section 99 of LEPRA – they are not detained under section 206.[254]

Police training materials provide further guidance on using the protective detention powers (see Six Minute Intensive Training documents PA040 and PA041), including repeated explanations that the main aim of Part 16 of LEPRA is to

248 LEPRA, s. 206(1)(a).
249 LEPRA, s. 206(1)(b).
250 The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3591.
251 NSW Police Force, *Intoxicated & Disorderly*, Intranet Bulletin, 21 October 2011.
252 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 432.
253 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 433.
254 NSW Police Force, *NSW Police Force Handbook*, 7 April 2014, p. 435.

release the intoxicated person into the care of a responsible person. Yet the training on this issue makes no mention of whether section 9 offences can be used in conjunction with section 206 of LEPRA. As such, the materials appear to provide limited guidance on when to detain a person, which power to use and the circumstances that might warrant proceedings being taken against them for the alleged section 9 offence.

6.4.2.2. Interpreting the purpose of section 206(2A)

We initially formed the view that the appropriate interpretation of this provision was that if an officer detained a person for their own care and protection, the officer would be precluded from also giving the person a penalty for the same behaviour. In response to a question about the kinds of factors that police should consider when exercising their discretion about whether to detain the person under section 206 or under section 99 of LEPRA, the Law Society of NSW expressed a similar view:

> The question ought to be whether the police decide to detain a person who is intoxicated and disorderly under section 206 or prosecute the person for an offence under section 199 or under section 9 of the *Summary Offences Act 1988*. The decision whether to arrest (having regard to section 99(3) of LEPRA) only comes into play once a decision is made to prosecute the person for an offence. The Committees' preference is for detention under section 206 in most circumstances.[255]

However, the NSW Police Force has advised that it interprets section 206(2A) as allowing officers to initiate proceedings for a section 9 offence with respect to people detained using the protective detention powers of section 206, provided that the protective detention was not *solely* for the purpose of takings proceedings for the offence:

> ... there may be circumstances where police may issue a CIN for the same incident during which a person has been detained under section 206, provided that their detention under 206 was not solely for the purpose of taking proceedings for the offence.[256]

While it might be possible to read the provision in this way, such an approach raises questions about how frontline police are expected to apply the protections supposed to be afforded by sections 206(2) and (2A) of LEPRA. If the effect of subsection (2A) is to permit intoxicated persons to be fined or charged notwithstanding they have been detained for their own care and protection, then it is it difficult to see why police would not instead use their powers of arrest in relation to these cases.

In addition, there are currently no police guidelines or policies that directly address the issue of what kinds of circumstances might justify the issuing of a CIN or CAN for a section 9 offence to an intoxicated person who has been detained under section 206. Nor is there advice on when officers should not fine or charge intoxicated persons for a section 9 offence in these circumstances.

The power to detain intoxicated people for their own protection and for the safety and protection of others was central to reforms aimed at decriminalising public drunkenness and diverting intoxicated people from the criminal justice system. In introducing the reforms in 1979, Parliament was told that four key principles shaped the protective detention provisions:

> The first is that heavy drinking is neither socially acceptable nor to be encouraged. However, it is no longer appropriate to demonstrate social disapproval through the labelling of a drinker as a criminal. The second principle is that intoxication should not excuse conduct which would otherwise be criminal. The proposals are not a charter for persons to break the law with impunity. Third, community expectations require that positive action be taken to safeguard the health and well-being of the intoxicated person. The fourth principle is that involuntary confinement, even if in the public interest or for altruistic reasons, does involve an interference with individual freedoms which must be considered and protected.[257]

These reforms therefore aimed to reduce the incidence of arrests for public drunkenness while giving police broad authority to detain intoxicated people for their own protection and for the protection of the community.[258] Thus the requirement that police are not to detain a person under section 206 because of behaviour that constitutes an offence appears to prohibit protective detention from being used to detain drinkers who are to be the subject of subsequent criminal proceedings. If an intoxicated person engages in conduct that is serious enough to warrant

255 Law Society of NSW, Submission, *Summary Offences Act Review*, 13 February 2013.
256 Email from NSW Police Force, dated 15 April 2013.
257 The Hon. JR Hallam MLC, NSWPD, (Hansard), Legislative Council, 23 April 1979, p. 4828.
258 NSW Law Reform Commission, *Report 66 – Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, December 1990, paragraph 3.22.

criminal proceedings, conventional powers of arrest and charge should be used. As the then Attorney General explained in his second reading speech:

> ... the effect of this [reform] is not to authorise drunken persons to go about contravening the criminal law with impunity. If someone while intoxicated assaults a person or steals, maliciously damages property or commits some other offence against the law, he can be prosecuted for that offence.[259]

As section 206(2) makes it clear that the protective detention powers are not to be used if the behaviour is serious enough to warrant proceedings in relation to an offence, the NSW Police Force's interpretation of section 206(2A) is at odds with the purpose of giving police a broad authority to detain people for their care and protection.

A number of submissions to our review argued that the protective detention powers in Part 16 of LEPRA played a pivotal role in diverting intoxicated people from unnecessarily entering the criminal justice system, and could be used more often to help disperse drunken crowds and deal with intoxicated people who fail to comply with reasonable directions. In its submission, the Office of the Director of Public Prosecutions said:

> If a move on direction is given and not complied with or if the person is found to be continuing to behave in a disorderly manner in another place, then the police should take the person to a safe place and detain them for their own protection rather than taking proceedings.[260]

Others suggested that section 206 should be focused on dealing with situations where there was a likelihood of harm.[261]

In our view, the NSW Police Force's interpretation of section 206(2A) introduces unnecessary complexity and potential confusion to police decisions on how best to manage intoxicated people whose disorderly behaviours warrant some form of intervention. Part 8 of LEPRA already provides police officers with powers to arrest suspected offenders, including powers to stop a person from committing or repeating an offence.[262] Police may also discontinue an arrest 'at any time' if the person is no longer suspected of the offence or 'if it is more appropriate to deal with the matter in some other manner'.[263]

In our view, there continues to be uncertainty about the intended scope and purpose of section 206(2A). Therefore, the NSW Police Force should take immediate steps to either:

- make it clear that police officers are *not* to use the protective detention powers at Part 16 of LEPRA to detain an intoxicated person who is or will be the subject of legal proceedings for a section 9 offence, or
- if section 9 proceedings are allowed to be brought against people in protective detention, provide much clearer advice to frontline officers regarding the exceptional circumstances that may warrant the use of the section 9 offence provision in these situations.

Earlier in this chapter we recommended that the section 9 offence should focus on more serious and inherently more dangerous behaviours that cause disorder serious enough to warrant a criminal sanction. As it is difficult to imagine that the protective detention powers would ever be used in circumstances such as these, prohibiting the use of section 9 in conjunction with the use of the LEPRA protective detention powers should not inhibit the use of either provision.

Recommendation

7. NSW Police Force training and policy advice should either:

a. make it clear that police officers are not to use the protective detention powers at Part 16 of LEPRA to detain an intoxicated person who is or will be the subject of legal proceedings for a section 9 offence, or

b. if section 9 proceedings are allowed to be brought against people in protective detention, provide clear advice to frontline officers regarding the exceptional circumstances that may warrant the use of the section 9 offence provision in these situations.

259 The Hon. Frank Walker MP, NSWPD, (Hansard), Legislative Assembly, 23 April 1979, p. 4922.
260 Office of the Director of Public Prosecutions, Submission, 15 February 2013.
261 For example, Newcastle City Council, Submission, received 28 February 2013; Randwick City Council, Submission, received 22 February 2013.
262 LEPRA, s. 99(1)(b)(i).
263 LEPRA, s. 105(2).

6.4.2.3. NSW Police Force response to Recommendation 7

In the NSW Police Force's response to the consultation draft of this report, it supported Recommendation 7(b) in principle, observing that:

> Recommendation (a) is not supported. Section 206(2A) of LEPRA states that police may detain an intoxicated person under section 206 of LEPRA even if behaviour constitutes an offence under section 9 of the SOA if the detention is not for the purpose of taking proceedings for the offence. Recommendation (a) limits police officers' use of the legislation.
>
> Option (b) is supported in principle. In the case study provided in the Report police provided the person with every opportunity to be taken home and cared for by a responsible person but due to his aggressive behaviour police then deemed it necessary to detain him. Ideally when a person is detained under section 206 powers there would be no legal action initiated but this is dependent on the conduct/behaviour of that person, and intoxication cannot be considered an excuse for aggressive/violent/disorderly conduct.[264]

The NSW Police Force's response indicates that, as a general rule, no legal action should be initiated and that the person's behaviour *after* being taken into protective custody is the main determinant of whether legal action should be the subject of legal action for a section 9 offence. We welcome this approach.

6.4.3. Sobering up centres and the section 9 offence

The issue of using the section 9 offence in conjunction with protective detention also arises in relation to sobering up centres. A trial of these centres began on 1 July 2013[265] and ran for one year in relation to the centres in Coogee and Wollongong.[266] The trial was extended in relation to the Sydney City centre for another two years, until 1 July 2016.[267]

The Sydney City centre, which is located at the Central Local Court cell complex, provides an alternative to detaining an intoxicated person at a police station if they cannot be taken home. A police officer can detain a person in that centre for two reasons. The first is if the person:

(i) has refused or failed to comply with a move on direction, and

(ii) persists in engaging in the relevant conduct that gave rise to the direction or any other relevant conduct.[268]

This provision (section 5(1)(a) of the *Intoxicated Persons (Sobering Up Centres Trial) Act 2013*) substantially mirrors section 199 of LEPRA.

The second is if the person is:

(i) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or[269]

(ii) in need of physical protection because the person is intoxicated.

This provision (section 5(1)(b) of the Intoxicated Persons (Sobering Up Centres Trial) Act) sets out the same criteria as are specified in section 206 of LEPRA.

There is no provision in the sobering up centres legislation to prevent a police officer from fining or charging a person detained in a sobering up centre. In addition, a person admitted to the Sydney City sobering up centre under section 5(1)(a) is required to pay a 'cost recovery charge' of at least $200.[270] This means that potentially a person detained in a sobering up centre could be required to pay both a 'cost recovery charge' as well as an on-the-spot fine of $1,100 for a section 9 offence.

264 Correspondence from the Commissioner of Police, dated 6 June 2014.

265 This was the date of commencement of Part 2 of the *Intoxicated Persons (Sobering Up Centres Trial) Act 2013.*

266 Intoxicated Persons (Sobering Up Centres Trial) Regulation 2013, cl. 3A and Schedule 1.

267 The Regulation extending the trial was tabled in Parliament on 17 June 2014. See *Intoxicated Persons (Sobering Up Centres Trial) Act 2013; Intoxicated Persons (Sobering Up Centres Trial) Amendment (Extension) Regulation 2014.*

268 *Intoxicated Persons (Sobering Up Centres Trial) Act 2013*, s. 5(1)(a).

269 *Intoxicated Persons (Sobering Up Centres Trial) Act 2013*, s. 5(1)(b).

270 Intoxicated Persons (Sobering Up Centres Trial) Regulation 2013, cl. 8(1), which provides that the charge increases by $200 for each subsequent admission.

In its response to the consultation draft of this report, the NSW Police Force noted our comments about the sobering up centres (SUCs), particularly the observation that 'there is no provision to prevent a police officer from fining or charging a person detained at the centres', then said:

> I can advise that the NSW Police Force has developed a set of guidelines and training packages which have been used to provide clear advice to frontline officers when using their powers in relation to the *Intoxicated Persons (Sobering Up Centres Trial) Act*, including the circumstances relating to persons who have failed to comply with a move on direction and persisted with the relevant conduct which gave rise to the direction.
>
> Further, Section 9 of the *Summary Offences Act* is not part of the criteria for the SUC and therefore not an issue for police in relation to the comments in the Report. Police utilise section 199 under LEPRA to deal with persons who are failing to comply with a move on direction and they are then taken to the SUC. Section 9 is not part of the criteria for the SUC.[271]

It was beyond the scope of our review to research how the sobering up centres legislation interacted with the section 9 offence, as the review period ended on 30 September 2012, before the sobering up centres trial commenced. Notwithstanding the views of the NSW Police Force expressed above, it has also advised that section 9 and section 199 are used interchangeably. In light of this, and in light of the police view that other legislation permits intoxicated persons to be fined or charged notwithstanding they have been detained for their own care and protection, we remain of the view that there may be some practical interaction between the sobering up centres legislation and the section 9 offence. The relevant Ministers may therefore wish to consider the interaction of section 9 and the sobering up centres legislation when reviewing the recommendations in this report.

271 Correspondence from the Commissioner of Police, dated 6 June 2014.

Chapter 7. Practical implementation issues

An officer can only initiate proceedings against an intoxicated person for an alleged breach of section 9 of the *Summary Offences Act 1988* if that person:

- has been formally given a move on direction for being intoxicated and disorderly in a public place, under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), within the previous six hours,[272] and
- has been given the mandatory statutory warnings.[273]

Among the practical issues that officers experienced in meeting these requirements were:

- difficulties in determining whether a person has previously been directed to move on by another officer
- challenges in effectively providing intoxicated people the required warnings that their behaviour may constitute an offence if it continues.

This chapter therefore considers a number of practical challenges experienced by officers who used the new provisions and impediments that might have prevented them from making more effective use of the powers. These include issues relating to:

- cases where police had difficulty establishing the legal elements of the section 9 offence (at section 7.1)
- barriers to officers accessing information about whether a formal move on direction had been given (at section 7.2)
- the use of warnings and other statutory safeguards (at section 7.3)
- record-keeping (at section 7.4).

7.1. Establishing the legal elements of a section 9 offence

Section 9 of the Summary Offences Act provides:

> (1) A person who:
>
> (a) is given a **move on direction** for being intoxicated and disorderly in a **public place**, and
>
> (b) **at any time within 6 hours after** the move on direction is given, **is intoxicated and disorderly** in the **same or another public place**,
>
> is guilty of an offence. [emphasis added]

Our examination of whether officers used their powers reasonably and fairly included assessing how well officers addressed the technical legal requirements needed to prove a section 9 offence. This was considered as part of our examination of the 447 matters in dataset 2.

Our review of these cases found:

- 18 matters where no initial direction was given or the initial direction was not a 'move on direction' as defined in section 9
- one matter where the incident did not occur in a 'public place' but at a private residence
- 10 matters where the initial direction was for the person to stay away for more than the stipulated maximum of six hours
- 14 cases involving people aged under 18 years who were given a CIN, in contravention of the *Criminal Procedure Act 1986*, section 335(1).

In most cases, details of both the section 198 direction and the subsequent alleged breach of section 9 were set out in the same COPS event. In practice, officers use their official notebook to record contemporaneous notes about any directions given or powers used, then transfer that information to COPS some time later, often towards the end of their shift. COPS records of any section 9 offences are often created at or around the same time as the record of the earlier move on direction, even if the two powers were exercised by different officers. For this reason, the relevant COPS records often featured detailed information about the entire series of encounters that the person had with police, leading to the person being fined or charged with a section 9 offence.

272 *Summary Offences Act 1988*, ss. 9(1)-(2).
273 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), Part 15.

Overall, section 9 was primarily used in relation to intoxicated people in public places whose behaviour was a result of their intoxication. This is in keeping with its general purpose. However, we did find some matters where the fine or charge could have been open to challenge.

7.1.1. Requirement for direction to have been issued under section 198(1) of LEPRA

Section 9(2) of the Summary Offences Act defines a 'move on direction' as follows:

> a direction given to a person by a police officer, under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, to leave a public place and not return for a specified period.

We found 18 matters (4% of 447) where the related police record indicated that the direction was not given pursuant to section 198 of LEPRA.[274] In one matter, the record does not indicate that any direction was given and, in the other matters, it appears that police relied on other provisions to issue the initial direction, including:

- seven cases involving a direction given under the *Liquor Act 2007*
- eight cases where the direction appeared to be a use of the general direction provision in section 197 of LEPRA
- two cases where the directions given related to drinking in alcohol-free zones.

7.1.1.1. Liquor Act

There are provisions in the Liquor Act that enable police and a licensee (or their agent, such as a security guard) to refuse admission or to remove a person from the licensed premises if the person is 'intoxicated, violent, quarrelsome or disorderly'.[275] It is an offence for the person to:

- refuse to leave,[276]
- re-enter or attempt to re-enter the premises within 24 hours of being refused admission or being turned out,[277]
- remain in the vicinity of the premises, or[278]
- re-enter the vicinity of the premises within six hours of being refused admission or turned out.[279]

In seven matters, the power for the requirement to leave appeared to be associated with these offences under the Liquor Act. For example, see case study 12.

Case study 12. Direction given under Liquor Act

One Saturday night, licensing police inspecting a hotel were asked to speak to a man who had been asked to leave. They told him he had been asked to leave, so he should comply or would face a fine of $550 for the offence of 'excluded person fail to leave premises when required.' He walked outside but stayed on the footpath. Police gave him a direction to leave and stay outside an area 50 metres from the front of the hotel. They told him if he did not comply he would get a ticket for $550. He crossed the road and went into a phone box. The officers heard a police radio broadcast that a 000 call for assistance had been made from that phone box. They walked over to the phone box and asked the man for identification. He became argumentative and refused. After a short negotiation, he gave them his driver licence. They issued him with a CIN for 'continue intoxicated etc behaviour after move on direction.'

7.1.1.2. Section 197 of LEPRA

As discussed earlier in this report, section 197 of LEPRA gives police a general power to give a direction to any person in a public place, including an intoxicated person. This includes, for example, a direction to stop a particular behaviour or to go home. Police may give a direction under section 197 if the officer believes on reasonable grounds that the person's behaviour or presence in the public place is obstructing, harassing, intimidating or causing fear to others.[280]

In eight matters, the power for the requirement to leave appeared to be under section 197 of LEPRA. For example, see case study 13.

274 Ref: 2013/064572 worksheet 41.
275 *Liquor Act 2007*, s. 77(2).
276 *Liquor Act 2007*, s. 77(4).
277 *Liquor Act 2007*, s. 77(6).
278 *Liquor Act 2007*, s. 77(8)(a).
279 *Liquor Act 2007*, s. 77(8)(b).
280 LEPRA, s. 197(1).

Case study 13. Direction given under section 197

On a morning in a busy regional coastal town, police encountered an Aboriginal man drinking and 'causing fear and obstruction.' The records described the man as being well known for regularly loitering around the CBD (and, in particular, a central park). Police gave the man a move on direction. He complied, but two hours later police saw him again in the same park, 'causing fear and obstruction'. He was directed to move on and not return to the park for 12 hours and he complied. Another four hours later, police saw him in the same park drinking alcohol. He was issued a fine for 'continue intoxicated behaviour after move on direction' and given another move on direction for 12 hours. He left the park. Other police records about this man indicated that in the three years prior to this offence, the man had been homeless and suffered from a mental health issue.

As we canvassed in chapter 6, on one view the behaviours described in section 197 constitute 'disorderly' behaviour. However, in the absence of clear legislative or policy guidance that this is the case, any police record that refers to behaviours described in section 197 may not be sufficient to establish, for the purposes of a section 9 offence, that the required 'move on direction' (as defined in section 9(2)) has been given.

7.1.1.3. Alcohol-free zone

The *Local Government Act 1993* empowers councils to impose rules around drinking in their local public spaces by declaring certain public places (including parks, beaches and roads) alcohol-free zones,[281] or alcohol-prohibited areas.[282] These places must be clearly signposted, and prohibit drinking in the specified area. Police and council enforcement officers[283] may confiscate alcohol from any person who is drinking alcohol in any such area, as well as from any person whom they believe recently drank alcohol or is about to drink alcohol in the zone. Officers may also tip the alcohol out or otherwise dispose of it,[284] but do not have any specific power to require the person to leave the zone.

In two matters, the circumstances involved an officer directing a person who was drinking in an alcohol-free zone to leave the zone. For example, see case study 14.

Case study 14. Direction given in alcohol-free zone

Close to midnight on New Year's Eve, a man described as 'well known to police' was seen sitting at a picnic table in a reserve near the beach. He had a large quantity of alcohol in his possession and was consuming it in the presence of minors. The reserve is an alcohol-free zone from 7pm to 11am. Police approached and asked the man to collect his alcohol and leave the area immediately. Over the next few hours, police continued their patrol of the surrounding area. On a number of occasions they saw the man still consuming alcohol in the reserve and at other locations. He was given a CIN for a section 9 offence.

7.1.1.4. Observations

We are of the view that in these 18 matters the officers concerned did not issue the required 'move on direction' to support the issuing of a penalty for a section 9 offence.

In 16 of the matters, the evidence was not tested by a court, as the people were issued with a CIN and none elected to challenge it in court. For one of the two matters that were considered by a court, the person pleaded guilty, so the question of whether the person had been validly issued with the required 'move on direction' was not considered by the court.[285]

7.1.2. Requirement for the person to be in a 'public place'

We found one matter where the events did not take place in a 'public place'. Police issued a section 9 CIN to an intoxicated man who had come back to a private party (and pulled off a door to re-enter the house) after they had earlier directed him to leave the premises.

We are of the view that in this matter, the man's behaviour did not take place in a public place and therefore this element of the section 9 offence was not satisfied.

281 *Local Government Act 1993*, s. 644B.

282 *Local Government Act 1993*, s. 632A(4).

283 An enforcement officer is an employee of a council authorised in writing by the Commissioner of Police to be an enforcement officer for the purposes of s. 642 of the *Local Government Act 1993*.

284 *Local Government Act 1993*, ss. 642(3) and 632A(3).

285 In relation to the remaining matter that went to court, we were unable to obtain any details about the court proceedings.

7.1.3. Requirement that the direction was for the person to stay away for up to six hours

Section 198(3) of LEPRA stipulates that:

> (3) The period during which a person may be directed not to return to a public place is not to exceed 6 hours after the direction was given.

This requirement is contained in the note to section 9(2) of the Summary Offences Act:

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

By contrast, under the Liquor Act it is an offence for a person who has been refused admission, or turned out of, licensed premises for similar behaviour, to re-enter those premises within 24 hours,[286] or to return to the vicinity of those premises within six hours without reasonable excuse.[287]

In 308 of the 447 matters in dataset 2 (69%), the period of time stipulated was not recorded. In most of the 139 matters where the timeframe was recorded, the information recorded in the COPS Event narratives showed the person was told to stay away for six hours.

However, we did find 12 matters where the person was directed to move on and stay away for longer. In four of them, the person was directed to stay away for 24 hours; in three, for the remainder of the night; in another three, for 12 hours; and in another two, for eight hours. Case study 13 earlier in this chapter is an example of a matter where the directions given were to stay away for 12 hours.

In these 12 matters the officers concerned did not comply with this statutory requirement, leaving the issuing of penalties in these cases open to challenge.

7.1.4. Young people

Police who encounter a person they recognise as being under 18 are required to take into account the requirements of the *Young Offenders Act 1997* before commencing any proceedings, including proceedings for a section 9 offence.

This Act establishes a scheme to divert young offenders aged 10-18 years from court. The principles of the Act include applying the least restrictive form of sanction against young offenders and that criminal proceedings are not to be instituted if there is an alternative.[288] The type of police intervention will depend on a range of factors, including the seriousness of the offence, harm to the victim, degree of violence and previous offending history. Minor offences, such as summary offences, will usually attract a warning.[289] More serious offences may be dealt with by way of caution or youth justice conference.[290] Only those young people who admit guilt to certain offences are eligible for a caution or conference.[291]

Officers are not allowed to issue a penalty notice to a person under 18 years.[292] In practice, an officer may not know the exact age of the person involved. If police issue a penalty notice to a person they subsequently find is under 18, the penalty notice must be withdrawn. This means the fine amount is not payable, and any amount that was paid under the penalty notice must be refunded. Further proceedings may be taken against the person as if the penalty notice had never been served.[293] Any fingerprints taken to establish the young person's identity must be destroyed.

As discussed in chapter 5, we found 22 cases involving young people who had been dealt with for a section 9 offence. Of the 22 matters, 14 involved the issuing of a CIN.[294] In 11 of these matters it appeared that they had continued to be processed through the State Debt Recovery Office (SDRO). We wrote to the NSW Police Force to clarify this and police agreed that these CINs had been issued in error.

We also found three further matters where the person was initially issued with a CIN, but this was withdrawn at the time, or at a later time. The information we received from the SDRO indicated that one of the people paid the fine immediately and the two other matters progressed to enforcement. We wrote to the NSW Police Force if they had

286 *Liquor Act 2007*, s. 77(6).
287 *Liquor Act 2007*, s. 77(8).
288 *Young Offenders Act 1997*, s. 7.
289 *Young Offenders Act 1997*, ss. 13-14.
290 *Young Offenders Act 1997*, Part 4 and Part 5, Division 1.
291 *Young Offenders Act 1997*, ss. 19 and 36. The types of offences that may be the subject of warnings, cautions and conferencing under the Act are set out in section 8.
292 *Criminal Procedure Act 1986*, s. 335(1).
293 *Criminal Procedure Act 1986*, s. 335(2)(c).
294 These were incorrectly recorded as being Infringement Notices in the COPS Event records.

advised the SDRO of the withdrawal of these three CINs and, if so, what actions they had taken to ensure that the paid fine had been refunded, and that any enforcement action against the other two people had ceased and any associated costs refunded.

The NSW Police Force advised that action would be taken to address 12 of these matters.[295] At the time of writing, four matters had been rectified, by the Mid North Coast, New England and Northern Beaches Local Area Commands.[296] In each case, the LAC communicated with the SDRO to arrange for the fines to be withdrawn. Of the matters, the SDRO data indicated that four people had paid the fine immediately. At the time of writing, one payment was in the process of being refunded, but three had not yet been refunded.[297]

In its response to the consultation draft of this report, the NSW Police Force expressed the following view:

> This is not considered evidence of inappropriate police activity, as it is not uncommon for intoxicated 'under age' persons to provide incorrect details in order to justify their access to alcohol in an endeavour to avoid other police action.[298]

We acknowledge that some young people may, on occasion, provide incorrect details about their age to police. However, we identified the correct age of these 14 young people through police records. When an officer enters into COPS the details of an offence for which a CIN has been issued, there is an opportunity to verify information about the person that ensures the lawfulness of the legal action taken. Should a CIN recipient's actual age become known at that stage, the officer has an opportunity to take a number of other alternative legal actions to address the person's offending behaviour.

7.1.5. Conclusion

Although we identified relatively few cases where the legislative requirements were not met, the cases we did identify illustrate some of the challenges that can arise from having police powers in a number of different legislative instruments. The consolidation of police powers into LEPRA was intended to address these kinds of challenges. Our findings support concerns expressed by some members of Parliament that the introduction of a new criminal offence outside LEPRA for not complying with a LEPRA direction, would introduce unnecessary complexity.

Our findings are consistent with the concern we discussed in section 6.1.3 that having two offences in two Acts dealing with substantially the same conduct added unnecessary complexity and eroded the benefits of the 2002 LEPRA reforms, which consolidated the most commonly used police powers and related offences into one Act.

7.2. Barriers to communicating that a move on direction has been given

In our consultations with operational police, officers explained that they found the new provisions somewhat cumbersome to implement in practice. The essence of the challenge is communication between different police officers who are patrolling public spaces. The critical pre-condition for section 9 is that the person has already encountered a police officer earlier that day (six hours ago or more recently). This means that when an officer observes an intoxicated person behaving in a disorderly way, they can only consider a section 9 offence if they know, or can find out, if the person has already been moved on by another police officer for being intoxicated and disorderly.

This was a particular issue for the officers policing the Sydney CBD and inner city entertainment precincts, where the sheer volume of people makes it less likely that the one officer would encounter the same person twice.

There are three main systems that police have to communicate with each other:

- the COPS system, into which information is entered about interactions officers have had with members of the public
- individual officers' notebooks
- the police radio network.

The only contemporaneous system is the police radio network. The main problem with sharing information is that, for officers patrolling public spaces, electronic records are not made on COPS until the end of their shift or their next shift. This means that an officer's ability to share information with other officers while they are on patrol is very limited. A record of the move on direction may not be made on COPS within the six hours after it is given.

295 Email from NSW Police Force, dated 5 December 2013.
296 Emails from NSW Police Force, dated 16 and 17 January 2014.
297 Email from NSW Police Force, dated 17 January 2014.
298 Correspondence from the Commissioner of Police, dated 6 June 2014.

As one senior officer observed:

> I think one of the issues is obviously, with that piece of the legislation, is if we have our police out on the street ... they're working a 12-hour shift and they're effectively on George Street from 8 'til 6 in the morning. Sometimes they don't get that opportunity to come back and put something on the system, like they might move somebody on, ... and won't come back or they get involved in the arrest, probably still don't ... get that put on the system. So [the information] ... is not captured unless ... they're perhaps listening to the radio...[299]

Another officer commented:

> … when people get moved on, they'll leave the place, or even if they come back, it's not necessarily the same police dealing with them, so you might not know that they've been moved on.[300]

This means that in practice, the most common scenario where a person can be fined or charged with a section 9 offence is if their continuing behaviour is observed by an officer who earlier issued the person with a move on direction, or a colleague who was patrolling with that officer.

Based on our consultations and observations of police operations, the radio network does not adequately support police officers in using the section 9 offence. The way an officer would use the radio network is that if the officer encounters a person who is intoxicated and disorderly, s/he can check with a police radio operator to see if another officer has 'called in' details that the person had already been given a move on direction. The system requires two contacts with the radio network. The first is one officer giving information to a radio operator. The second is a different officer obtaining information from a radio operator.

During our observation of police on a Friday night, during Operation Rushmore,[301] we saw that officers had difficulty accessing the police radio network to record the issuing of move on directions. The radio network was too busy, so officers could not speak to a radio operator to make any record that could be shared with other officers.

Some officers we consulted, commented on the difficulties in accessing the radio network during busy periods:

> You cannot physically get on the radio on Friday and Saturday night and let the radio know if you do a check.[302]

Some officers observed that this was why penalties were more likely to be issued by the same officer that issued the initial move on direction, which is supported by our findings. As noted in Table 11 in chapter 6, in 72% of the matters in dataset 2 (321 of 447), the same officer who issued the original move on direction also fined or charged the person with the section 9 offence. In only 4% of matters (17 of 447) did a different officer issue the fine or charge.

A number of officers commented that the difficulty in communicating the move on direction to other officers made the section 9 offence difficult to use. For example, one officer commented:

> We can't get on the radio to inform them that they've been moved on and, when we had a look at our stats earlier, almost – almost 100% of those times that we've used this legislation, it's just been by sheer circumstance that the same officer that moved them on has then caught them again in a second time. It's not being used because ... it's too cumbersome to use.[303]

Some officers we consulted explained that they have also experienced difficulties trying to obtain information *from* the radio operators.

To complicate things even further, there are different police radio channels that operate in large locations, such as the Sydney CBD, corresponding to smaller geographical areas. Information about a move on direction that is communicated to the radio operators on one channel is not shared with the other radio channels. A police officer who observes an intoxicated and disorderly person will not be able to find out if the person has already been given a move on direction in a location covered by a different radio channel.

It seems to us that these difficulties could not be easily overcome. The operations of the police radio network will only support officers on patrol effectively if there are appropriate systems in place for information to be shared between those officers via the network. However, whether or not the impediments to officers in using the section 9 offence have a sufficiently significant consequence to warrant a review of that network is a matter for the NSW Police Force. As noted earlier in this report, the vast majority of move on directions are complied with, and appear to be effective in preventing escalation in many situations.

299 Focus Group, City Central LAC (Group 2), 12 July 2012.
300 Focus Group, City Central LAC (Group 1), 12 July 2012.
301 Further details in chapter 2. Method.
302 Focus Group, City Central LAC (Group 1), 12 July 2012.
303 Ibid.

7.3. Statutory warnings

During the review period, the then section 201 of LEPRA required officers who exercised the powers listed in section 201(3) to give warnings to people if they do not immediately comply with the officer's request or direction. The purpose of these warnings was to give people further opportunity to comply, rather than penalising them immediately for committing the offence of failing to comply. The warnings also served to make it clear that directions given under LEPRA are legally enforceable, and not mere requests. Sections 201(2C) and (2D), as they were during the review period, set out the warnings as follows:

(2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:

(a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and

(b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.

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

The warning in section 201(2D) was part of the new provisions introduced at the same time as the section 9 offence. In this report we refer to it as 'the new warning'. The Attorney General explained during Parliamentary debate that the purpose of this warning was to ensure that people 'will be given clear warning that their behaviour must change or face serious sanction'.[304]

Failure to give a warning can lead to a court finding that the exercise of that power has been illegitimate. This can result in evidence obtained during the illegitimate exercise of the power being deemed inadmissible because it was obtained illegally. Successful prosecutions therefore rely on officers complying with all statutory requirements.

The warnings in section 201(2C) of LEPRA apply in relation to a range of powers that police exercise.

7.3.1. Did officers give the statutory warnings to section 9 offenders?

We were limited in our ability to determine whether required warnings were given because police did not always record a statement that warnings were given, or a verbatim account of what was said. However, we did find that in almost half of the matters in dataset 2 (207 of 447), the narrative included details of the words that were spoken that gave the person a warning, or a statement that 'LEPRA safeguards' were complied with. As all of the warnings can be described as 'LEPRA safeguards', it is impossible to determine if all or only some of the required warnings were given in those cases.

Table 15. Number of matters where at least one warning was given

	No.	% of 447
s. 201(2C) warning given	137	31
s. 201(2D) warning given	17	4
Both warnings given	28	6
Warning was given, but unclear which one	25	6
Total no. of matters where at least one warning was given*	**207**	**46**

Source: NSW Police Force – COPS. n=447 (dataset 2, 1 October 2011 to 30 September 2012).

* We identified 207 matters where at least one warning was given.

304 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3137.

As Table 15 shows, we found that both warnings were recorded in COPS as having been given in only 28 matters. In an additional 137 matters, the warnings under section 201(2C) were given. In another 17 matters, the new warning was given. This means that the new warning had been recorded in COPS as having been given in only 45 matters (10% of 447).

7.3.2. Officers' views on the practical operation of the warnings requirements

In our consultations with officers, some stressed the importance of good communication in preventing the escalation of violent behaviour, particularly when people are intoxicated. Officers wanted the freedom to adapt what they communicate to each circumstance, rather than being restricted by a 'robotic' formalised response.[305] One officer said it was sad that you had to 'legislate communication'.[306] Others explained that communicating the statutory warnings could irritate the person or make them think that police were commencing some kind of legal action, thereby increasing tension and making the person less likely to be compliant.[307]

The new warning was considered by officers to be particularly onerous to communicate effectively. As the NSW Police Force explained in their submission, and as some officers we consulted expressed,[308] a complicated message can be confusing for both the officer communicating it and the person trying to understand it:

> The NSW Police Force would welcome any measures to simplify s 201 – it is our view the information and warnings provided are adequate, but complicated and onerous. There are several layers involved in the process of complying with s 201, which can be complex enough for police officers, let alone a person affected by drugs or alcohol. Using these provisions when individuals are too intoxicated to understand the direction given makes it even more difficult to achieve the desired outcomes.[309]

These practical difficulties around the new warning seemed to lead some officers to be more likely to use alternative laws, such as the Liquor Act, where the circumstances allowed. We were told by two regional LACs that Liquor Act offences, such as 'fail to quit', were the main tool used to police areas in the vicinity of licensed premises because it is easier for a person to understand that they will be arrested if they go back into a venue.[310]

These views may explain both the apparent failure to give the new warning in most section 9 cases, as well as the relatively low numbers of section 9 offences recorded during the review period. However, it is also possible that the new warning is being given in a greater number of matters, but not recorded in the COPS record.

7.3.3. Submissions about this issue

A number of submissions shared the concern that the statutory warnings are difficult for people to understand. For example, the NSW Council for Civil Liberties suggested that an intoxicated person may have a 'reduced understanding of the contents' of a warning.[311] The NSW Young Lawyers Criminal Law Committee was also concerned about the capacity of vulnerable people to understand the warnings.[312]

To address this complication, some parties put forward the view that the onus was on police officers to make sure the statutory warnings were clearly explained so the person understood what was being communicated. For example, the Inner City Legal Centre and the NSW Young Lawyers Criminal Law Committee submitted that the adequacy of the safeguards depends more upon the success of individual officers in communicating with intoxicated people than simplifying the provisions.[313] The NSW Council for Civil Liberties went further, stating that:

> [T]he NSW CCL considers that section 201(2D) of the LEPRA should be amended to ensure that a police officer must make a reasonable effort to ensure that a person to whom they provide a warning understands the nature of the warning.[314]

305 Consultation with Tweed-Byron LAC, 17 April 2013.
306 Ibid.
307 Consultation with Richmond LAC, 18 April 2013.
308 Consultation with Tweed-Byron LAC, 17 April 2013.
309 NSW Police Force, Submission, 26 February 2013.
310 Consultation with Tweed-Byron LAC, 17 April 2013; Consultation with Richmond LAC, 18 April 2013; Focus Group, City Central LAC (Group 2), 12 July 2012.
311 NSW Council for Civil Liberties, Submission, received 15 February 2013.
312 NSW Young Lawyers Criminal Law Committee, Submission, 15 February 2013.
313 Inner City Legal Centre, Submission, *Summary Offences Act Review*, 12 April 2013; NSW Young Lawyers Criminal Law Committee, Submission, *Response to Issues Paper: Summary Offences Amendment Review*, 15 February 2013.
314 NSW Council for Civil Liberties, Submission, received 15 February 2013.

7.3.4. Example of court proceedings relating to warnings

A practical risk of an officer not giving the required LEPRA warnings is that a prosecution may fail when the matter is heard in court.

We found one matter where the magistrate found that evidence pertaining to the section 9 offence was inadmissible because the required LEPRA warnings had not been given. The magistrate found that the officer did not tell the defendant that he was required by law to comply with her direction, and, when he did not comply, she did not warn him that failure to comply is an offence. As a result, the magistrate found that the officer did not have the power to arrest the defendant, and that the evidence was inadmissible because it had been obtained in contravention of a law. With no admissible evidence to establish the section 9 charge, it had to be withdrawn.

7.3.5. Legislative changes during the consultation period

During the consultation period, in May 2014, the Parliament passed the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*. This replaced Part 15 of LEPRA, which outlines the safeguards relating to the exercise of police powers. One significant effect of the changes was to remove the requirement for officers to give the second section 201(2C) warning – that the failure to comply with a request or direction is an offence. The first section 201(2C) remained in substance, but now appears in the legislation as section 203(1).

Another relevant change was moving the new warning – previously in section 201(2D) – to section 198, as a new subsection (6). However, there was no change to the substance of this warning. As there was a reference to the section 201(2D) warning in a note following section 9(2), that note was also amended to refer to section 198 instead.

7.3.6. Recommendations to improve implementation of the warnings provisions

In our issues paper, we asked if parties thought the statutory warnings should be simplified. Apart from the NSW Police, which would 'welcome any measures to simplify s. 201',[315] the other submissions we received about this issue were all of the view that the warnings were adequate and necessary.[316] For example, the Law Society of NSW stated:

> In the Committees' view the safeguards in relation to the information and warnings to be provided by police are adequate and do not require amendment or simplification.
>
> The Committees are of the view that 'simplifying' the safeguards could lead to unfairness. When a person is being issued with a direction, it is vital that they are adequately warned about the potential criminal consequences that may ensue.[317]

The main concerns officers expressed to us about implementing the current system of statutory warnings, and in particular the new warning, when dealing with intoxicated people, are that:

- people can't understand what is being communicated
- people get irritated because they feel threatened by overly formal or formulaic language
- people misunderstand that police are starting, rather than warning them about, legal action, which distresses them and makes them less likely to cooperate.

The May 2014 changes to the warning provisions in Part 15 of LEPRA appear to simplify the warning requirements to a certain extent. However, there was no change to the requirement to give the new warning. In our view, there are a number of ways to address the concerns that some officers had about that warning.

The first is to give officers practical guidance on how they could better communicate the statutory warnings to people with a limited capacity to understand. While more experienced officers are likely to have developed strong skills in this area, guidance may help less experienced officers.

The second is to support officers by educating the public about their legal responsibilities when they are in a public space. Currently, the new warning acts to inform people of the change in the law. It seems to us that this is probably not the most effective way to communicate this message. Instead, as some officers said in our consultations, the provisions could be more effective if the community was more aware of what the provisions meant, and 'if people are already aware of it, if it's already in the back of their mind before they started drinking'.[318]

315 NSW Police Force, Submission, 26 February 2013.

316 Law Society of NSW, Submission, *Summary Offences Act Review*, 13 February 2013; Police Association of NSW, Submission, *Review of Summary Offences Act 1998*, section 9, 18 February 2013; Office of the Director of Public Prosecutions, Submission, 15 February 2013; Randwick City Council, Submission, received 22 February 2013; Newcastle City Council, Submission, received 28 February 2013.

317 Law Society of NSW, Submission, *Summary Offences Act Review*, 13 February 2013.

318 Focus Group, City Central LAC (Group 1), 12 July 2012

Others observed that there was significant community awareness of some policing strategies, including alcohol-related strategies, such as Random Breath Tests for motorists and double demerits for motoring offences on public holidays. They suggested that increased community awareness, through advertising and social media, may make it easier to explain the consequences of remaining intoxicated and disorderly in a public place after being directed to move on.[319] The primary purpose of the section 9 offence is to reduce alcohol-related violence in public. In our view, the most significant benefit of increasing community awareness of the section 9 offence is that the more people know about it, the more people will be deterred from drinking so much alcohol that they behave in a disorderly way. We therefore encourage the Government to include information about the new offence in any future public campaigns[320] about responsible drinking.

Finally, we are of the view that if a person is so intoxicated that the officer cannot be sure that they have understood what they are required to do, or what they have been warned about, the officer should consider whether the person needs to be detained under section 206 for their own care and protection – see discussion in chapter 6 about using the section 206 powers in such circumstances.

We make the following recommendations to address some of the practical challenges of conveying meaningful information to intoxicated people.

Recommendations

8. **NSW Police Force training and policy advice for officers dealing with an intoxicated person in public should include practical guidance on the kind of language and other communication tools to use when communicating statutory warnings to intoxicated people.**

9. **NSW Police Force and the Government should include in any future community awareness campaigns about responsible drinking, information about the offence of continuing to be intoxicated and disorderly in any public place at any time within six hours after being given a direction to leave and not return.**

7.3.6.1. Department of Justice and NSW Police Force comments on Recommendations 8 and 9

In its response to the consultation draft of this report, the Department of Justice advised us of the important changes to the statutory warnings that section 201 of LEPRA requires police to provide (discussed in section 7.3.5):

> Reference is made in the draft report to the safeguards in LEPRA – in particular the statutory warnings to be administered by police in section 201(2C) and the additional warning when a move on direction is given as set out in section 201(2D) (see pp. 97-98). In the *Law Enforcement (Powers and Responsibilities) Amendment Bill 2014* which passed without amendment in the upper house on 18 June 2014, a number of changes are being made:
>
> - The warnings in section 201(2C) are being consolidated into one single warning that the person must comply with a direction, requirement or request (instead of a warning that the person must comply and a warning that failure to comply is an offence) and this provision is being moved to a new section 203(1).
> - The additional warning when a move on direction is given in section 201(2D) (that it, it is an offence to be intoxicated and disorderly in a public place within 6 hours after the move on direction) is being moved into section 198 LEPRA as new subsection (6).

Parliament's decision to consolidate the existing statutory warnings that police must give when issuing a direction, requirement or request that a person is required to comply with by law into a single warning, may go some way to reducing the complexity associated with the current requirements at section 201 of LEPRA. Nonetheless, to be effective in helping people to better understand the legal consequences of any failure or refusal to comply, the NSW Police Force will still need to reinforce these provisions with a range of advanced training and communication strategies.

The NSW Police Force's formal response to our consultation draft of this report noted its 'in principle' support for both recommendations. In relation to Recommendation 8, it said:

319 Ibid, p. 100.

320 We note that on 21 January 2014 the Government announced that one part of a package of reforms to tackle drug and alcohol violence was a 'Community awareness and media campaign to address the culture of binge drinking and the associated drug and alcohol related violence'; see NSW Government, *Lockouts and mandatory minimums to be introduced to tackle violence*, 21 January 2014, viewed 17 April 2014, http://www.nsw.gov.au/news/lockouts-and-mandatory-minimums-be-introduced-tackle-violence.

> Such training is already provided but can be reinforced through an internal communication strategy.[321]

In response to Recommendation 9, the NSW Police Force advised:

> Mainstream media is currently used to send clear messages about standards of behaviour prior to large scale operations. Social media may be an appropriate medium.[322]

We acknowledge that the NSW Police Force is a capable provider of advanced professional training and communication strategies, and welcome its support for using its work in this area to address the issues identified in this part of our report.

7.4. Record-keeping

Our examination of COPS records linked to proceedings for section 9 offences found deficiencies in the way that many of these incidents were recorded. Of concern were instances where the COPS event records linked to the section 9 offence did not include details of the initial section 198 move on direction, and/or they did not adequately describe the person's alleged offending behaviour or state of intoxication at the time of the section 9 offence.

In one case, the only information about the alleged section 9 offences in the narrative linked to the issuing of six CINs was the names of the six young men who were issued the CINs, a note that they were searched and nothing was found, and that:

> ALL PARTIES SPOKEN TO AND SEARCHED WERE SEEN LETTING OFF FIREWORKS WITHIN THE CARPARK. ALL WERE SUBJECT TO SEARCH AND MOVE ON.[323]

The narrative concludes with the name of the officer who issued the CINs and the location of the alleged offences. While this record provides some indication of the conduct that initially brought the group to the attention of police, it lacks basic information about the basis for the police decision to issue a section 198 intoxicated move on direction to the men, whether warnings were provided about the legal consequences of any failure to comply or the circumstances of that failure or refusal to comply. Significantly, there is nothing in the narrative about the alleged continuing intoxicated and disorderly conduct that led to the police decision to issue the section 9 CINs.

Usually when police issue a reasonable direction, the direction is complied with and no further action is taken. In those cases, an abbreviated summary of the powers exercised will suffice. In 2012, the then Minister for Police approved the adoption of a NSW Police Force Red Tape Reduction Working Group recommendation that a simplified COPS record be made in relation to move on directions *that were complied with*. In its report, the Working Group had estimated that it took officers about 30 minutes to complete each COPS record, and supervisors took about 15 minutes to complete a quality review. They expected that implementing their recommendation would reduce the time required by half.

However, in the small number of cases where the direction is not complied with and legal proceedings are initiated by police, the related COPS record must include information about what occurred, including the elements of any offence observed or detected, and a description of the actions taken by police in response to those offences. These basic record-keeping requirements are already reflected in NSW Police Force policies, such as the standard operating procedures for CINs which require officers who issue CINs to create an event on COPS, note 'details of the offence' and make a notebook entry detailing the offence.[324]

In noting that a number of the COPS records lacked basic information about the alleged section 9 offences, it is important to acknowledge that in many of these cases a more complete account of the incident, including details of the offence, might be recorded in the officer's official notebook. In those cases, the officer would still be able to provide a contemporaneous account of the incident that led to the issuing of the CIN or CAN should the alleged offender decide to dispute the allegation.

321 Correspondence from the Commissioner of Police, dated 6 June 2014.
322 Ibid.
323 NSW Police Force COPS Event records.
324 Police Prosecutions Command, NSW Police Force, *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPS) V.4*, 6 March 2012, p. 13.

Although this might satisfy the evidential requirements in the handful of cases where a CIN or CAN is challenged at court or through a request for internal review, we are concerned that the lack of adequate details in a large proportion of the COPS events we examined as part of this review effectively stymies the ability of supervisors to check that there were sufficient grounds for initiating proceedings in the first place. We therefore recommend that the NSW Police Force's strategies for monitoring and improving the quality of records created on COPS include specific strategies for improving the quality and completeness of COPS records relating to the issuing of CINs.

Recommendation

10. NSW Police Force training and policy advice for officers emphasise that COPS records of a section 9 offence must contain a sufficient description of the person's actual behaviour, that allows a supervisor to verify that all elements of the offence have been met.

In its response to the consultation draft of this report, the NSW Police Force supported this recommendation.[325]

325 Correspondence from the Commissioner of Police, dated 6 June 2014.

Part C – The issue of penalty notices in respect of section 9 offences

The amending Act included a requirement that the Ombudsman review and report on 'the issue of penalty notices in respect of offences against section 9'.[326] Part C reports on our findings from this part of our review.

In explaining why the Ombudsman was asked to 'prepare a report on the operation of section 9 and the issue of penalty notices in relation to it', the Minister for Police indicated that the review requirement would address concerns about whether disadvantaged and marginalised groups might be adversely affected by the provisions. He said a review:

> ... will ensure that the powers are being used appropriately and consistently with the Government's commitment to address problem social drinking and not the homeless and disadvantaged in our society.[327]

Another member of Parliament elaborated on these concerns, noting that an earlier Ombudsman review of Criminal Infringement Notices had found that recipients from disadvantaged or marginalised backgrounds often do not court-elect or request an internal review of the fine, even when they had strong grounds to do so, and that many of these recipients subsequently became entrenched in the fines enforcement system:

> The Ombudsman's report highlights that these pitfalls are particularly acute for Aboriginal people, with Aboriginal suspects at the time accounting for 7.4 per cent of all criminal infringement notices issued.[328]

That report was one of two that we prepared following reviews of the Criminal Infringement Notice scheme, a scheme introduced as a limited trial in 2002 and extended across NSW in 2007. It allows police to issue on-the-spot fines to adults who appear to have committed a limited range of specified offences. These types of on-the-spot fines are referred to as Criminal Infringement Notices, or CINs.

Our first report in 2005 assessed the limited use of CINs in 12 trial locations, and concluded that CINs were largely successful in providing police with an easy, additional way to deal with minor criminal offences. We recommended changes, including measures aimed at reducing the risk of 'unintended and undesirable consequences, such as net widening', especially in smaller towns and those with sizeable Aboriginal populations.[329]

When the scheme was extended statewide in late 2007, Parliament required a further CINs review, but this time focusing on the impact on Aboriginal communities. This review found that to the extent that CINs can divert petty offenders who would otherwise have been arrested, charged and brought before the courts, there are clear diversionary benefits.[330] There are also savings for police, courts and others involved in the judicial process. Yet the report also highlighted numerous risks associated with the use of CINs.

During the second review, Parliament approved important changes to the *Fines Act 1996* that aim to reduce the negative impacts of the fines system on marginalised sections of the community, including Aboriginal and Torres Strait Islander people. Many of the recommendations in our report therefore focused on encouraging the agencies with primary responsibility for administering the CINs scheme to ensure that their processes for issuing and enforcing CINs are consistent with those reforms, and with other government policies aimed at addressing the over-representation of Aboriginal people and other marginalised groups in the criminal justice system.

The requirement that the Ombudsman review the issuing of CINs for continuing intoxicated and disorderly offences under section 9 of the Summary Offences Act effectively constitutes our third review of this topic, albeit a review that is somewhat limited in scope as it only considers one of the seven offences in the current CIN scheme.[331] This part of the report examines information about the issuing of CINs for section 9 offences, subsequent measures to enforce any unpaid debts, and how many of these CINs were issued to Aboriginal people and people with an identifiable vulnerability – that is, where the related Computerised Operational Policing System (COPS) record or records from recent years indicate that the person had experienced homelessness, mental illness or cognitive impairment. We also include observations about section 9 matters that were dealt with through court proceedings rather than through the CINs scheme.

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326 *Summary Offences Act 1988*, s. 36(1)(b).

327 The Hon. Michael Gallacher MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 4 August 2011, p. 3591.

328 Jamie Parker MP, NSWPD, (Hansard), Legislative Assembly, 4 August 2011, p. 3660.

329 NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p. vi.

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

331 The other CIN offences are Stealing (less than $300), Offensive Language, Offensive Behaviour, Unlawful entry of a vehicle/boat, Obstruct Traffic, and Goods in Custody. See Criminal Procedure Regulation 2010, Schedule 3.

Chapter 8. Legal framework for penalties: fines administration and court proceedings

This chapter sets out the legal framework for actions that can be taken against a person for committing a section 9 offence. In particular, it outlines:

- the legislation under which penalty notices for criminal offences can be issued
- special rules in relation to actions taken against young people, and
- the legislative provisions that specifically relate to court proceedings for section 9 offences.

8.1. How penalties are imposed in practice

As with many other offences, police officers have a broad discretion in determining how to respond to section 9 offences. When observing behaviour that appears to constitute a section 9 offence, an officer may:

- give the alleged offender a warning about his or her behaviour
- formally caution the alleged offender
- issue a Criminal Infringement Notice (CIN) for the offence, or
- issue a Court Attendance Notice (CAN) requiring the person to appear before a court for the alleged offence.

8.2. Warnings and cautions

The ability of police to issue a CIN or a CAN does not remove the other options available to police in relation to section 9 offences. The common law power and specific statutory powers of police officers to issue warnings or cautions in appropriate circumstances are unaffected by the CINs scheme or by the police powers of arrest in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). Depending on the circumstances, police officers may informally warn a person about their behaviour or use their discretion to issue a caution where appropriate.

The NSW Police Force's *Criminal Infringement Notices Policy and Standard Operating Procedures* emphasise that the capacity to issue a CIN does not remove other options. It says that section 342 of the Criminal Procedure Act specifically provides that police discretion to exercise powers of arrest, issue a penalty notice under another Act or issue a caution, are unaffected by the CINs scheme:

> This provision specifically includes common law or statutory powers to caution. CINs simply provide another avenue that police can use to address offending behaviour. As the investigating officer, you have the discretion to decide what type of action should be taken.[332]

In deciding whether it might be appropriate to issue a caution instead of fining or charging the alleged offender, the guidelines advise:

> You should consider all of the circumstances, such as the location and time of the offence, the nature of the offending behaviour that brought the suspect under notice, **the characteristics of the suspect which may be contributing to the offending behaviour (age, record, disability or any mental health issues, intoxication, etc)** and community expectations regarding the outcome of police action. [emphasis added][333]

Generally, police officers should use the least restrictive option, but the option used must still take account of the seriousness of the offending behaviour.

> If the offending behaviour can be adequately dealt with by a caution, the issue of a CIN or by some other alternative to prosecution there will be savings both in your time and in resources expended in prosecuting offences in the court system. These savings must be balanced against any need to have an appropriate penalty imposed that reflects community expectations.[334]

332 Police Prosecutions Command, NSW Police Force, *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPS) V.4,* 6 March 2012, p. 9.

333 Ibid.

334 Ibid.

Other government officials who are empowered to issue penalty notices have a similar discretion, codified under the *Fines Act 1996*, to give the person an 'official caution' instead.[335] In making this decision, these officials must have regard to guidelines issued by the Attorney General.[336] These guidelines list matters including the person's experience of homelessness, mental illness or intellectual disability.[337]

Although the *Fines Act 1996* enables police to issue an 'official caution', section 19A(2) specifically exempts police from having to apply the Attorney General's guidelines. In the past the Government has argued that police have no need to be subject to this provision because police officers already have an 'existing power under the common law to issue cautions'.[338]

8.3. Criminal Infringement Notices

The CINs scheme enables police in NSW to issue penalty notices to any adults who appear to have committed a limited range of specified offences,[339] mostly relating to minor incidents of offensive conduct, offensive language and larceny/shoplifting. CINs give police an additional, intermediate option between cautioning offenders on the one hand, and arresting and charging on the other.

The scheme began as a trial in 12 locations in 2002, and was extended to the rest of NSW in 2007. CINs can only be issued for offences specified in Schedule 3 of the Criminal Procedure Regulation 2010. At present, those offences and the related fines are:

- Continue intoxicated behaviour after move on direction, $1,100 fine[340]
- Offensive conduct, $500
- Offensive language, $500
- Goods in custody, $350
- Larceny (property valued less than $300), $300
- Enter vehicle or boat without consent, $250
- Obstruct person/vehicle/vessel in public place, $200.

Table 16 shows the number of CINs issued in NSW during the review period, and in the three years prior to the review period.

Table 16. CINs issued in NSW, October 2008 to September 2012

CIN offence	12 months to 30/09/2009	12 months to 30/09/2010	12 months to 30/09/2011	12 months to 30/09/2012
s. 9 continue intox. behaviour	—	—	—	380
Offensive conduct	4,444	5,468	6,157	4,922
Offensive language	2,339	2,498	2,673	2,103
Larceny/shoplifting	2,774	3,513	3,805	3,868
Goods in custody	159	201	190	192
Unauth. entry of vehicle or boat	30	25	23	24
Obstructing traffic	59	109	73	82
Total	**9,805**	**11,814**	**12,921**	**11,571**

Source: NSW Police Force email dated 3 June 2013.

335 *Fines Act 1996*, s. 19A.

336 *Fines Act 1996*, s. 19A(2).

337 NSW Attorney General, *Caution Guidelines under the Fines Act 1996*, 31 March 2010, p. 5.

338 Correspondence from the Hon. Greg Smith SC, Attorney General, dated 24 June 2013.

339 *Criminal Procedure Act 1986*, ss. 332 and 333. These sections define a 'penalty notice offence' as an offence prescribed by the regulations and state that a '... police officer may serve a penalty notice on a person if it appears to the officer that the person has committed a penalty notice offence'.

340 In January 2014, the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* increased the on-the-spot fine from $200 to $1,100.

As the data in Table 16 shows, 94% of all CINs issued during the review period (1 October 2011 to 30 September 2012) were for offensive conduct, offensive language or larceny offences. Just 3.3% of CINs were for section 9 offences.

There are a number of rules regarding the use of CINs that recognise that the scheme deals with crimes, albeit minor offences. CINs can only be issued to adult offenders.[341] If police issue a CIN to a young person in error, it must be withdrawn and any fine paid must be refunded. Legal action may still be taken. For example, police could issue a warning or caution under the *Young Offenders Act 1997* or issue a CAN.[342]

In order to issue a CIN a police officer must know the identity of the alleged offender. If the CIN recipient is unable to provide proof of his or her identity, police may take fingerprints when issuing the CIN.[343] These can be used to verify the identity of the CIN recipient if the person named on the penalty notice later claims that he or she was not the person who was issued the CIN. Fingerprints taken for this purpose must be destroyed:

- on payment of the fine
- if the offence is dealt with by a court and the court dismisses the charge in relation to the CIN, or
- if the CIN is withdrawn.[344]

A person who receives a CIN can elect to have the matter heard before a court.[345]

CINs cannot be issued in relation to an industrial dispute, genuine demonstration or protest, a procession or an organised assembly. Nor can police give a section 198 direction to leave the place and not return for a specified period in these circumstances.[346]

8.3.1. The system for administering fines

The *Fines Act 1996* sets out the system for administering fines. The government agency that administers the fines system is the State Debt Recovery Office (SDRO).[347] The broad steps in the system are as follows:[348]

1. A person is issued with a penalty notice (including a CIN) that imposes a fine.[349]
2. The recipient may elect to have the matter dealt with by a court[350] or ask the agency that issued the penalty notice to conduct an internal review of its decision.[351] Depending on the issue, internal reviews of CINs may be conducted by the SDRO or the NSW Police Force, in accordance with the Memorandum of Understanding (MoU) between those parties.[352] This is discussed in greater detail below.
3. Following the SDRO or NSW Police Force review, the decision to issue the fine is either confirmed or withdrawn.
4. If the fine is not paid by the due date, and the person has not elected to go to court, the SDRO sends the person a penalty reminder notice with a new due date and a warning about the consequences of failing to pay.[353]
5. If the fine remains unpaid, and the person has not elected to go to court, the SDRO may make an enforcement order. This imposes an additional enforcement cost.[354]
6. Once an enforcement order is in place, the SDRO may take action to recover the debts, including seizing property, placing a garnishee order on the debtors' wages, or instructing the Roads and Maritime Services (RMS) to suspend a person's driver licence or cancel a vehicle registration until the debt is paid.[355]

341 *Criminal Procedure Act 1986*, s. 335.
342 Ibid.
343 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 138A(1).
344 LEPRA, s. 138A(3).
345 *Criminal Procedure Act 1986*, s. 334.
346 *Criminal Procedure Act 1986*, s. 339; LEPRA, s. 200.
347 Now the Commissioner of Fines Administration; see *Fines Amendment Act 2013*.
348 *Fines Act 1996*, s. 19, which is extracted in full in Appendix E.
349 *Fines Act 1996*, Part 3, Division 2.
350 *Fines Act 1996*, s. 35.
351 *Fines Act 1996*, Part 3, Division 2A.
352 Memorandum of Understanding between the Commissioner of Police and the State Debt Recovery Office (SDRO), *Administrative and Financial Arrangements*, 8 July 2013.
353 *Fines Act 1996*, Part 3, Division 3.
354 *Fines Act 1996*, Part 3, Division 4.
355 *Fines Act 1996*, Part 4, Divisions 3 and 4.

7. In certain circumstances, a fine recipient may apply to pay off the fine and related enforcement costs in instalments. RMS sanctions can then be lifted.[356] This and other fine mitigation arrangements are discussed below.

8. An enforcement order may be withdrawn if an error has been made.[357]

8.3.2. Seeking an internal review of a CIN

The recipient of a penalty notice may ask the agency that issued it to review the decision.[358] This is commonly referred to as an 'internal review' because it does not involve a body external to the issuing authority. The request for review must be in writing.[359]

The purpose of an internal review is to determine whether a penalty notice was correctly issued and whether any circumstances warrant withdrawal of the penalty notice.[360]

The issuing authority has the discretion to withdraw a penalty notice on any of the grounds prescribed by section 24E(3) or of its own motion (section 24H).[361] In addition, section 24E(2) provides that the penalty notice **must** be withdrawn if:

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

The NSW Police Force *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* (adopted in March 2014) set out the way the NSW Police Force will conduct internal reviews of penalty notices, including CINs. In the section explaining the 'purpose and scope of the review', the guidelines provide the following advice about vulnerable people:

> The purpose of an internal review is to determine, on the available evidence, whether a penalty notice was correctly issued and whether any circumstances warrant the withdrawal of the penalty notice ... The internal review is intended to be a quick and easy response to substantive changes in facts or circumstances and divert vulnerable groups out of the penalty notice system. It provides the NSWPF with a broad discretion to review a penalty notice, including the option to withdraw a penalty notice on practical and compassionate grounds that do not necessarily require a nexus with offending.[362]

356 *Fines Act 1996*, Part 4, Division 8.
357 *Fines Act 1996*, s. 46.
358 *Fines Act 1996*, s. 24A.
359 *Fines Act 1996*, s. 24A(2)(a).
360 NSW Attorney General, Internal Review Guidelines under the *Fines Act 1996*, 31 March 2010, p. 4.
361 This means that, although there is a time limit to seeking an internal review, the SDRO nonetheless has a broad legislative discretion to consider representations from people who seek a review after that time has elapsed.
362 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014, p. 5.

In the section explaining the 'Matters to be taken into account on review', the guidelines clarify the legal requirements at section 24E(2)(d) of the Fines Act:

> The requirement to withdraw the penalty notice on the basis of a person's intellectual disability, a mental illness, a cognitive impairment or is homeless in (d) above is based on a nexus between the person's relevant condition and their ability to understand or control their conduct. The reviewing officer is not expected to have the knowledge or expertise to establish this medical condition. The reviewing officer should require the person seeking the review to establish this nexus by providing sufficient additional information reported on official letter head from a medical practitioner, supporting agency or government department as outlined on page 11 of the SDRO guidelines.[363]

The NSW Police Force and the SDRO have established a Memorandum of Understanding in relation to internal review requests made to the SDRO.[364] The Internal Review Guidelines provide that in relation to CINs, the SDRO will refer all applications for review to the NSW Police Force to determine. The guidelines note that officers must apply the provisions of the *Fines Act 1996* when conducting an internal review.[365]

8.3.3. Fine payment options

If a person is experiencing financial hardship and is unable to pay, he or she can apply to pay off the fine and any related enforcement costs in regular instalments.[366] If enforcement action has resulted in RMS sanctions being imposed, such time-to-pay arrangements permit the sanctions to be lifted while the debt is paid off.

In certain circumstances, welfare recipients can apply to have these instalments deducted directly from their Centrelink benefits before the benefit is paid into the bank account, using the Commonwealth Government's Centrepay facility.[367] Our 2009 report, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, found that measures such as the introduction of Centrepay had given some of the SDRO's poorest clients a realistic way to access and manage time-to-pay agreements. Significantly, the default rate for clients using Centrepay to manage their repayments dropped to about 2%, compared with 40% for other time-to-pay arrangements.

These and other such fine mitigation initiatives are especially important for people who may have accumulated huge fine debts at some point in their lives and, even though they may have long since stopped offending, need practical options for eventually paying their way out of the fines enforcement system. For many, the ability to have RMS sanctions lifted enabled them to access education and employment, reduced the risks of secondary offending and increased their capacity to repay their debts.

Some people may never be able to pay and/or face the prospect of remaining on a time-to-pay agreement for the rest of their lives. In certain exceptional circumstances, they may be able to apply to the SDRO to enter into a 'work and development order' that allows them to pay the fine 'in kind' by undertaking agreed activities to address the underlying issue that led to their offending behaviour. A person who has outstanding fine and enforcement debts may apply for a Work and Development Order if he or she:

- has a mental illness
- has an intellectual disability or cognitive impairment
- is homeless
- is experiencing acute economic hardship, or
- has a serious addiction to drugs, alcohol or volatile substances.[368]

363 Ibid, p. 8.
364 Memorandum of Understanding between the Commissioner of Police and the SDRO, *Administrative and Financial Arrangements*, 8 July 2013.
365 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014.
366 *Fines Act 1996*, s. 100.
367 SDRO, *Making Payments Using Centrepay Deductions*, February 2012.
368 *Fines Act 1996*, s. 99B.

The kinds of activities that might be included on a Work and Development Order include:

- unpaid work for certain organisations
- undergoing medical or mental health treatment
- attending an educational, vocational or life skills course
- receiving financial or other counselling
- treatment for drugs or alcohol, or
- participating in a mentoring program (if the person is under 25 years old).[369]

In 2009-2010, there were 147 approved Work and Development Orders relating to all fine debts in NSW, totalling $733,438. In 2010-11, there were 727 orders for $2.5 million in debts, and in 2011-2012 there were 691 orders relating to debts totalling $2.2 million.[370]

In rare circumstances, a person can apply to have a fine written off, in whole or in part. The SDRO may do this if satisfied that the 'financial, medical or personal circumstances of the fine defaulter' mean that the person does not have sufficient means to pay the fine now or in the future.[371]

8.4. Court Attendance Notices

If police issue the person with a Court Attendance Notice, the matter must be determined by a court. CIN recipients can also elect to have the matter determined by a court. If the defendant satisfies the court he or she had a reasonable excuse for behaving in the manner alleged,[372] or that the CIN or CAN was issued in error or contrary to law, the charge must be dismissed.

In the event that the court finds that the defendant guilty, the court may convict them and:

- impose a fine (up to $660 during the review period, but now up to $1,650),[373] or
- impose no other penalty.[374]

Alternatively, the court can find a person guilty but record no criminal conviction, and make an order:

- directing that the relevant charge be dismissed[375]
- discharging the person on condition that the person enter into a good behaviour bond for a specified period (up to two years),[376] or
- discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with an intervention plan.[377]

369 See the definition of 'work and development order' in *Fines Act 1996*, s. 99A.

370 Office of State Revenue, *GIPAA Application 12/66 – Approved Work and Development Orders*, as at 17 April 2012, viewed 7 May 2013, http://www.osr.nsw.gov.au/node/1301/attachment.

371 *Fines Act 1996*, s. 101

372 *Summary Offences Act 1988*, s. 9(5).

373 *Summary Offences Act 1988*, s. 9(1).

374 *Crimes (Sentencing Procedure) Act 1999*, s. 10A.

375 *Crimes (Sentencing Procedure) Act 1999*, s. 10(1)(a).

376 *Crimes (Sentencing Procedure) Act 1999*, s. 10(1)(b).

377 *Crimes (Sentencing Procedure) Act 1999*, s. 10(1)(c).

Chapter 9. Legal actions taken for a section 9 offence

This chapter focuses on the legal actions initiated for section 9 offences during the review period, including the use of CINs for section 9 offences and any subsequent action to enforce unpaid fines, particularly in relation to homeless people, people with a cognitive impairment or mental health issue, young people and Aboriginal and Torres Strait Islander people.

In examining the CINs issued for section 9 offences, we considered data about the processing of those notices, including any enforcement action taken to recover fine-related debts. As a number of alleged offenders were charged rather than fined, we also examined data about the outcomes of matters that were heard at court either because the CIN recipient elected to have the alleged offence heard at court or because a Court Attendance Notice (CAN) was issued by police.

9.1. Summary of legal action taken

Of the 484 matters in dataset 1 involving legal action against people suspected of section 9 offences,[378] we found that:

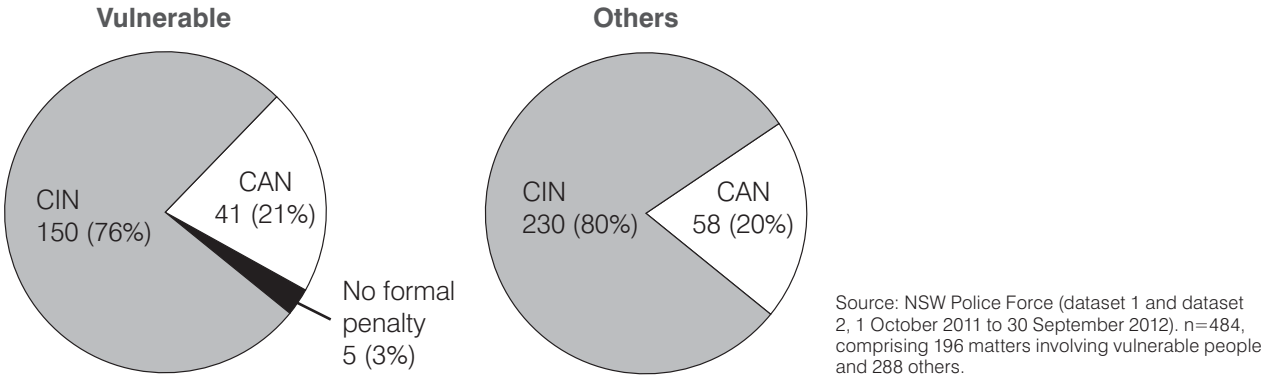
- 380 (79%) legal actions involved the issuing of CINs
- 99 (20%) involved CANs requiring the person to appear at court, and
- five involved young people who were either given a formal warning or caution under the *Young Offenders Act 1997* (two people) or no formal penalty was given (three people).

As discussed in chapter 5, we examined the police records related to individuals who had been issued CINs or CANs for section 9 offences for information about how many were issued to Aboriginal people or wrongly issued to young people, or whether the person was homeless, had mental health issues or some form of cognitive impairment, either at the time of the alleged section 9 offence or in the three years prior to the review period. This analysis identified 196 matters involving people who had at least one of these characteristics, including 51 cases where the person involved had two or more vulnerable characteristics. Of the 196 section 9 matters involving people identified has having a vulnerable characteristic:

- 150 were Aboriginal
- 61 cases involved people who had a recent history of mental illness
- 23 involved people who were homeless or who had recently experienced homelessness
- 22 involved young people, and
- three were issued to people with a cognitive impairment.

Figure 3 (below) shows the proportion of section 9 CINs and CANs issued during the review period to people with an identified vulnerability, compared with those issued to people with no identified vulnerable characteristic.

Figure 3. Legal action for section 9 offences in NSW



Source: NSW Police Force (dataset 1 and dataset 2, 1 October 2011 to 30 September 2012). n=484, comprising 196 matters involving vulnerable people and 288 others.

378 12 people were dealt with more than once during the review period (11 of them received two fines/charges and one person received three). Where this happened, each separate incident is counted.

As Figure 3 shows, the proportions of CINs and CANs issued to people who had a vulnerable characteristic was similar to those who had no identified vulnerability. Most people in both groups received a CIN – 76% of the vulnerable people, compared with 80% of others.

9.2. CINs issued for section 9 offences

Of the 380 section 9 CINs issued during the review period, 150 (39%) were issued to recipients who had one or more vulnerable characteristics:

- 113 (29%) of all section 9 CINs issued were to Aboriginal people
- 51 (13%) were issued to people with a mental health issue, including 28 to Aboriginal people
- 19 (5%) were homeless, including 13 Aboriginal people
- 13 (3%) were aged under 18 years, and
- two had a cognitive impairment.

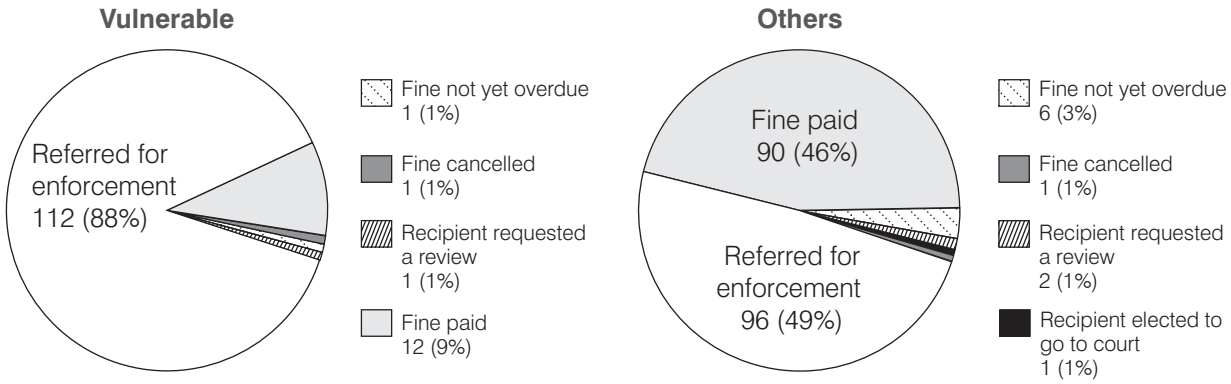
This group included 40 matters where the CIN recipient had two or more vulnerable characteristics. For example, many of the Aboriginal people also had a mental health issue or had experienced homelessness.

Requests for internal review were rare. During the review period just one vulnerable person and two people with no vulnerability noted, requested an internal review. Only one person elected to challenge a CIN in court. He had no evident vulnerability and entered a guilty plea when he appeared at court.

Using records provided by the SDRO, we were able to identify outcomes relating to 323 of the 380 CINs issued for section 9 offences during the review period. As at 30 November 2012 (eight weeks after the review period), 32% (102) of the 323 CIN recipients had paid the $200 fine within the time allowed and 64% (208) had their unpaid fine referred for enforcement action.

Figure 4 compares the outcomes for those 127 CIN recipients who were vulnerable with the outcomes for other CIN recipients.

Figure 4. Outcomes of CINs issued



Source: State Debt Recovery Office (NSW) (dataset 3, 1 October 2011 to 30 September 2012). Data received on 30 Nov 2012. n=323, comprising 127 matters involving vulnerable people and 196 others.

Compared with people with no identified vulnerable characteristic, Figure 4 shows that vulnerable people were much less likely to pay their $200 CIN fine within the time allowed. Just 9% (12) of the 127 cases involving vulnerable people paid on time, compared with 46% (90) of matters involving other CIN recipients. Consequently, SDRO debt enforcement action was much more common among vulnerable CIN recipients – 88% (112) of cases involving vulnerable people compared with 49% (96) of others.

As noted above, it was rare for any CIN recipient to dispute the CIN or elect to have the matter heard at court. People issued with a CIN can ask for an internal review in cases where, for instance, the person has been issued duplicate CINs, in cases of mistaken identity or the person has an intellectual disability, mental illness, a cognitive impairment or is homeless and were unable to control their conduct. CIN recipients who wish to dispute the CIN on other grounds may elect to have the matter heard at court.

Of the 323 CIN matters included in our analysis of SDRO outcomes:

- Three recipients (including one vulnerable person) requested an internal review of their CIN. One claimed to be suffering a medical emergency and the other two said they could not recall the event. None succeeded in having their fine cancelled or substituted with a caution. All three fines were subsequently paid.
- The one recipient who court-elected subsequently entered a guilty plea and was convicted and fined $110.

9.3. Fine-related debts accumulated by vulnerable CIN recipients

As almost nine out of every 10 vulnerable people who were issued with a CIN during the review period did not pay within the time allowed and subsequently had the CIN debt referred for enforcement, we sought further SDRO advice about the levels of fine-related debts this group of vulnerable people might have accumulated and what action was being taken at that time to recover the debts.

If an SDRO enforcement order for an unpaid CIN or some other fine remains unpaid, the SDRO may then initiate enforcement action. Initially, Roads and Maritime Services (RMS) restrictions will be imposed whereby the RMS suspends the person's licence, cancels their vehicle registration or restricts their ability to deal with the RMS until the enforcement order has been dealt with. An additional $40 fee is imposed at this point.

If a person with an outstanding enforcement order cannot afford to pay, the SDRO may approve a time-to-pay arrangement that allows him or her to repay the amount owed in instalments over an agreed period. Once an approved time-to-pay agreement is in place and regular payments have begun, the SDRO may ask the RMS to lift its restrictions.

If the enforcement order remains unpaid after RMS restrictions are applied and there is no agreement to pay over time or at a later date, the SDRO may apply civil sanctions such as obtaining an order to seize and auction property to pay the outstanding order, or to garnishee the person's wages or bank account. For each civil sanction imposed, an enforcement cost of $65 is added to the fine ($25 for juveniles). If civil sanctions are ineffective, the SDRO may have a community service order imposed requiring the debtor to perform unpaid community work to the value of his or her outstanding enforcement order or orders.

In September 2013, just over a year after the review period ended, the SDRO provided a further update about the actions taken in relation to the vulnerable people who had been issued with a CIN for a section 9 offence during the review period and whose unpaid CIN debt had been referred for enforcement – see Table 17.

Table 17. Enforcement action relating to vulnerable CIN recipients

Enforcement status as at 2 September 2013	No.	%
Enforcement order paid	16	12
Time-to-pay agreement in place	13	10
Centrepay time-to-pay agreement in place	31	24
RMS restriction	29	22
RMS other – enforcement stayed	4	3
Civil action – garnishee order	1	1
Civil action – property seizure order	4	3
Work and Development Order	8	6
In custody – enforcement stayed	3	2
Overdue – no sanction in place	18	14
Other*	3	2
Total	**130**	**100**

Source: State Debt Recovery Office (NSW), n=130 (cases involving vulnerable people who were issued a CIN for s. 9 offence between 1 October 2011 to 30 September 2012). Data received on 2 September 2013.

* Refers to matters that have been closed, including two that were paid, but information about enforcement action is not available.

The SDRO data in Table 17 shows that 16 (12%) of the 130 vulnerable people in this group had repaid the debt owed, including several people who had accumulated fine-related debts additional to the section 9 CIN. A third of the vulnerable people in this group had entered into time-to-pay agreements and were still repaying their debts to the SDRO at the time of this update. Of these, 13 people were using conventional time-to-pay arrangements which usually involve regular instalments being deducted from the person's bank account, and there were 31 matters involving Centrepay time-to-pay agreements whereby the person arranges for the SDRO instalment to be deducted from a Centrelink benefit before it is paid into his or her bank account.

As previously noted, the recent introduction of Centrepay time-to-pay agreements has significantly reduced the incidence of fine default by people with limited financial means, and has given some of the SDRO's poorest and most disadvantaged clients a practical way to start repaying their fine-related debts and have RMS and other sanctions lifted.

Table 18 shows the levels of outstanding fine-related debts still owed by this group of vulnerable CIN recipients as at 2 September 2013, a year after the review period ended.

Table 18. Debts accumulated by vulnerable CIN recipients for unpaid fines and enforcement costs

Fine debt range	No.	%
No debt	15	12
$1-$4,999	85	65
$5,000-$9,999	16	12
$10,000-$14,999	6	5
$15,000-$19,999	3	2
$20,000-$24,999	2	2
Unknown	3	2
Total	**130**	**100**

Source: State Debt Recovery Office (NSW), n=130 (vulnerable people who were issued a CIN for s. 9 offence between 1 October 2011 to 30 September 2012). Data received on 2 September 2013.

As at 2 September 2013, 15 (12%) of the vulnerable people who received a CIN for a section 9 offence during the review period had no outstanding SDRO debts. This did not include the 12 vulnerable people noted at section 9.2 who had paid the CIN within the time allowed (see Figure 4).

Of the 85 CIN recipients who still owed between $1 and $4999 for accumulated fine debts and enforcement costs, most owed less than $1500 (25 owed less than $500, 10 owed between $500 and $999, and 16 owed between $1000 and $1499).

However, the data also shows that in addition to the CIN-related debts, many of the people in this group had accumulated substantial debts from other unpaid fines and related enforcement costs. Two of the 27 CIN recipients who owed $5000 or more to the SDRO for accumulated fine debts and enforcement costs had fine debts of more than $20,000. See case studies 15 and 16.

Case study 15. Person with fine debt of $24,373

A 35 year old Aboriginal woman with a history of illicit drug use and mental health issues owed $24,373. Her section 9 CIN was issued after police received calls from residents complaining about a loud and aggressive argument taking place on the footpath of a residential street adjacent to a busy Sydney entertainment district in the early hours of a Thursday morning. She initially complied with a move on direction but less than two hours later, police were again called to the same street where they found the woman shouting and screaming. Police records showed a history of substance abuse and mental health issues and that, from the age of 17, the woman had been implicated in numerous drug, personal violence, property and other offences. Most of her outstanding SDRO debts were for court-imposed penalties following breaches of bail conditions in 2004, 2009 and 2010.

Case study 16. Person with fine debt of $21,742

A 20 year old homeless man from Newcastle owed $21,742. His section 9 CIN was issued after police saw him and seven others drinking on a footpath in a busy Sydney entertainment district. As they were in an alcohol-free zone, police asked them to tip out the alcohol. Everyone except the man complied. He became argumentative, screaming and swearing at police. The man was warned about his language and issued with a move on direction. He refused to comply, arguing with police. After refusing further requests to move on and continuing to argue, the man was arrested because of his aggressive behaviour. He calmed down after being taken to the police station and was given a CIN. The man had a history of violence, property and drug-related offences. His accumulated SDRO debts were mainly related to breaches of bail conditions, most in 2010.

In both cases, police records indicate that the section 9 CIN was issued in response to continued aggressive behaviour rather than merely failing to comply with a move on direction. In both cases, the police decision to issue a CIN appeared to be a proportionate response to those behaviours.

If at some point in the future these two recipients are able to put their drug use and offending behind them, both will still have to deal with huge fine-related debts. Reforms to the *Fines Act 1996* in recent years give people who are serious about dealing with past mistakes realistic avenues for dealing with their accumulated SDRO debts and having any related RMS restrictions lifted as they attempt to get their lives back on track.

One of the more innovative reforms is a scheme of Work and Development Orders (discussed in section 8.3.3) which allow SDRO debtors to pay their fine 'in kind' by undertaking approved activities such as participating in a drug treatment program, attending an educational, vocational or life skills course, or performing unpaid work for an organisation enrolled in the scheme. As shown in Table 17, eight of the vulnerable people who were issued with a section 9 CIN during the review period were participating in this scheme.

9.4. Court outcomes for people issued with a Court Attendance Notice

Of the 99 section 9 matters involving people who were issued with a CAN for an alleged section 9 offence during the review period, we identified 41 as vulnerable. Of these:

- 37 were Aboriginal
- 10 involved people with a mental health issue, including six Aboriginal people
- three were homeless – all were Aboriginal
- three were aged under 18 years, and
- one had a cognitive impairment.

This group included 11 people who had one or more vulnerable characteristics. For example, the person with a cognitive impairment was also Aboriginal and homeless.

Of the 99 cases where the person was issued a section 9 CAN, 79 involved charges for additional offences. In 31 of these cases, the person was charged with one additional offence, and in 48 cases the person was charged with more than one additional offence. Table 19 shows the most common additional charges.

Table 19. Most common charges in addition to the section 9 offence

Other charges	Vulnerable	Other	Total*
Resist / hinder police	15	23	38
Offensive language	14	12	26
Offensive manner	11	8	19
Fail to quit licensed premises (Liquor Act)	1	9	10
Assault	5	5	10
Fail to comply with a move on direction (s. 199 LEPRA)†	2	6	8

* There were 79 cases in which the person who was issued a CAN for the s. 9 offence was also charged with one or more additional offences.
† Refers to all s. 199 CANs issued at same time as the s. 9 CAN. In cases where police mistakenly proceed against a person for both a s. 9 offence and s. 199 offence in relation to the same conduct, this should be remedied before the matter goes to court. See discussion at section 9.4.7.

As shown in Table 19, the most common additional offences were resist/hinder police, offensive language and offensive conduct. This was the case whether or not the person was vulnerable. However, the data also indicates that fewer people with a vulnerability were charged for 'resist/hinder police' offences in conjunction with a section 9 offence.

9.4.1. Legal representation

Of the 99 cases in which the person was issued a CAN for a section 9 offence, the defendants had legal representation in 37 matters.

We identified a total of 15 cases involving vulnerable defendants who had legal representation. Of these, 14 were Aboriginal.

9.4.2. Plea

As Table 20 shows, by the time the defendants appeared in court, most had pleaded guilty to the section 9 offence. This was the case whether or not the case involved a person who had a vulnerable characteristic.

Table 20. Final plea, in relation to the section 9 charge, entered in court proceedings

	Vulnerable	Other	Total
Guilty	29	39	68
Not guilty	3	3	6
Person did not attend court	6	8	14
Unknown or no plea entered	3	8	11
Total	**41**	**58**	**99**

Source: NSW Police Force – COPS, Police Integrity Commission – PODS and Department of Justice (datasets 1, 2 and 4, 1 October 2011 to 30 September 2012). n=99 (number of s. 9 matters in which the person was issued a Court Attendance Notice).

Six people (three vulnerable, and three with no vulnerability) entered a plea of 'not guilty'. Five of them had legal representation.[379] The three vulnerable people were all Aboriginal men. One man was also homeless and had mental health issues and a second was under 18.

Initially, an additional four people had entered a plea of 'not guilty' but all changed their plea to 'guilty' prior to hearing.

9.4.3. Court finding on proof

The offence was proven in more than 80% of cases, including the majority of those involving vulnerable people – see Table 21.

Table 21. Was the offence proven?

	Proven			Not proven*			All		
Plea	Vuln.	Others	Total	Vuln.	Others	Total	Vuln.	Others	Total
Guilty	27	34	61	2	5	7	29	39	68
Not guilty	0	0	0	3	3	6	3	3	6
Person did not attend court	6	8	14	0	0	0	6	8	14
Unknown or no plea entered*	2	4	6	1	4	5	3	8	11
Total	**35**	**46**	**81**	**6**	**12**	**18**	**41**	**58**	**99**

Source: NSW Police Force – COPS and Department of Justice (datasets 1, 2 and 4, 1 October 2011 to 30 September 2012). n=99 (number of people issued a Court Attendance Notice).

* The five 'not proven' matters included two where no plea was entered because the defendants had died, and three where information about the plea entered was unknown.

379 The information we have about the sixth matter did not enable us to establish whether or not the man was legally represented.

Generally, a guilty plea will result in the offence being proven. However, occasionally procedural issues, particularly when other offences are being heard as well, have resulted in the section 9 offence not being proven. As Table 21 shows, the case was not proven in seven cases where the person pleaded guilty. Two of those were because the section 9 charge was withdrawn (and therefore counted as not proven), but the defendants were convicted of other offences.

The case was not proven for all six people who pleaded not guilty, including three vulnerable people. Five were acquitted and one matter was withdrawn prior to hearing.

9.4.4. Conviction rate

As explained in chapter 8, courts have a number of options if an offence is proven. Table 22 shows the penalties imposed in relation to the 81 CANs where the section 9 offence was found to be 'proven'.

Table 22. Court ordered action where offence was proven

	Proven and convicted			Proven and not convicted			All proven		
Penalty imposed	Vuln.	Others	Total	Vuln.	Others	Total	Vuln.	Others	Total
Fine - s. 9 Summary Offences Act	21	28	49	0	0	0	21	28	49
Conviction no further penalty - s. 10A*	8	0	8	0	0	0	8	0	8
No conviction, dismissed - s. 10(1)(a)*	0	0	0	0	6	6	0	6	6
No conviction, good behaviour bond – s. 10(1)(b)*	0	0	0	3	6	9	3	6	9
Unknown	2	4	6	1	2	3	3	6	9
Total	**31**	**32**	**63**	**4**	**14**	**18**	**35**	**46**	**81**

Source: NSW Police Force – COPS, Police Integrity Commission – PODS and Department of Justice (datasets 1, 2 and 4, 1 October 2011 to 30 September 2012). n=81 (cases involving people where offence was proven).

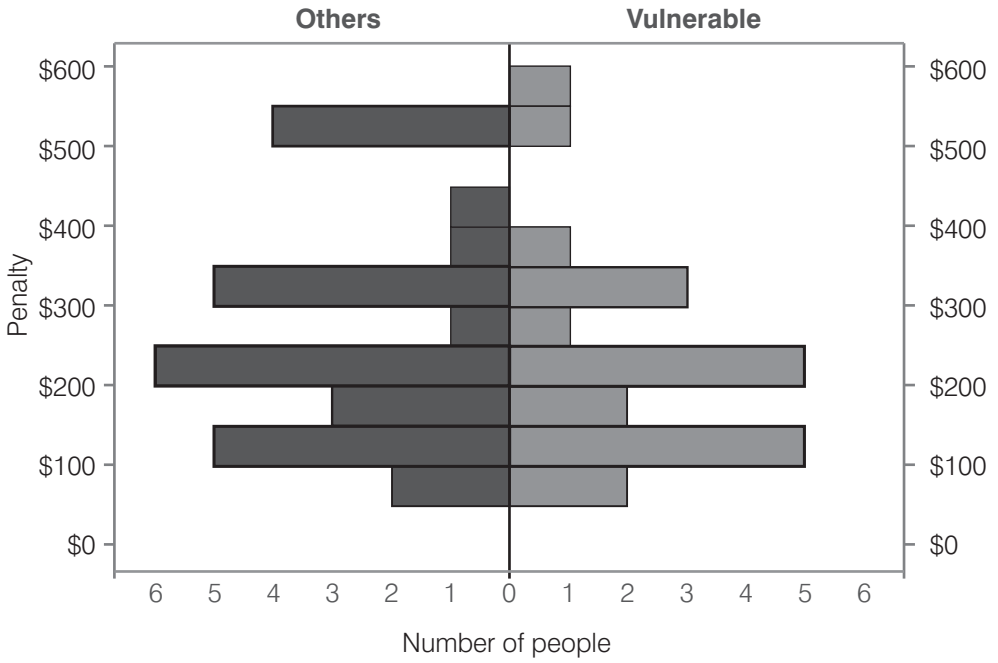
* *Crimes (Sentencing Procedure) Act 1999*.

Although 81 matters were found to be 'proven', the defendant was convicted in just 63 matters. The 35 proven cases involving vulnerable people were much more likely to result in a conviction. Of these, most (31) were also convicted. The main difference is that people with no identified vulnerability were much more likely to succeed in having the court either dismiss their matter under section 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*, or to receive a good behaviour bond under section 10(1)(b). Conversely, of the eight cases where the person was convicted but no further penalty was imposed, all involved vulnerable people.

Table 22 also shows that the vast majority of convicted defendants were fined (49 of 63). This included over half of the 41 cases involving vulnerable people, five of whom did not attend court.

In deciding an appropriate penalty judges may consider the defendant's criminal history (if any), personal circumstances that may explain or mitigate the behaviour, the seriousness of the offence and a person's contrition. Court imposed fines ranged from $50 to $550. No defendant received the maximum $660 penalty that could be imposed at that time. As figure 5 shows, the value of the fine imposed by the court to vulnerable people within the review period was similar to those convicted of a section 9 offence generally.

Figure 5. Fine amounts by the court



Source: NSW Police Force – COPS and Department of Justice (datasets 1, 2 and 4, 1 October 2011 to 30 September 2012). n=99 (cases involving people issued a Court Attendance Notice for a s. 9 offence).

9.4.5. Reasonable excuse

The current legislative framework provides for a defence of 'reasonable excuse',[380] providing a Magistrate with the discretion to determine whether or not the person's conduct was 'reasonable' under the circumstances. The then Attorney General clarified the intended purpose of this defence, explaining for example, that behaviour that resulted from unanticipated side effects of prescribed medication would amount to a reasonable excuse.[381]

None of the people charged in the review period argued that they had a 'reasonable excuse' for conducting themselves in the manner alleged.

9.4.6. Failure to meet burden of proof

In court proceedings for a section 9 offence police must prove that a move on direction was given up to six hours before the person was found intoxicated and disorderly in a public place. However, police are not required to prove that the person was intoxicated and disorderly when issued the initial move on direction.[382]

In one case, involving a young person under 18, police did not meet the burden of proof required under this provision. The defendant was not convicted. See case study 17.

Case study 17. Did not meet burden of proof required

Around 10.30pm on a Saturday night in winter, police were called to a residential street in inner Sydney where about 30 to 40 teenagers – many intoxicated – were spilling out onto the narrow street from a house party. Officers described behaviour that was 'rowdy, swearing, screaming ... carrying on, milling around.'

Officers started to disperse the crowd. Most people walked away as requested but four or five people stayed, including one young man who was talking on his mobile phone. He was described as moderately affected by alcohol. Within the space of 20 minutes, three different officers directed him to move on, and gave various warnings. He largely ignored them and continued talking on the phone. The third officer gave the young man a further warning, waited about 20 or 30 seconds and, when the young man still did not comply, arrested him. Police drove him home and gave him a CAN for a section 9 offence.

380 *Summary Offences Act 1988*, s. 9(5).
381 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3136.
382 *Summary Offences Act 1988*, s. 9(3).

The magistrate found that although a number of move on directions had been given, none complied with the statutory requirements of section 198 of LEPRA. For example, two did not stipulate a timeframe, and another directed that he stay away for 12 hours. Without a formal section 198 direction, the section 9 offence could not be established. The magistrate also questioned whether the behaviour of the group, as described in evidence, was 'disorderly'.

9.4.7. Person cannot be prosecuted under both section 9 of the Summary Offences Act and section 199 of LEPRA

Police cannot take proceedings for both a section 9 offence and an offence under section 199 of LEPRA (fail to comply with a direction) for the same conduct.[383]

We found eight cases where the records suggest that police initially charged a person with both a section 9 and a section 199 offence.

This was remedied in four matters when they proceeded to court. In two matters, the section 9 offence was withdrawn and in the other two, the section 199 offence was withdrawn.

We were unable to establish the outcomes for the other four people.

9.5. Summary of legal action taken against vulnerable people

As reported in chapter 5, of the 196 cases involving people identified as vulnerable in the course of this review, 51 (26%) had more than one vulnerability. The largest vulnerability category was Aboriginality, followed by people with a mental health issue.[384]

9.5.1. Summary of legal action taken – Homeless people

Overall, five per cent of all CINs issued in the review period were issued to people whose police records indicated they were homeless or had been within three years prior to the review period. Of the 23 homeless cases identified, 19 involved the issuing of a CIN. None requested an internal review, none paid the fine and 16 fines were referred for enforcement.

Four CANs were issued to homeless people. All were Aboriginal men. One pleaded not guilty and successfully defended the charge; one failed to attend and was fined $100; and the other two pleaded guilty. Of these, one was not convicted and placed on a good behaviour bond, and the other was imprisoned for other offences heard at the same time.

9.5.2. Summary of legal action taken – People with mental health issues

Of the seven people where the COPS record of the incident involving the section 9 offence indicated the person had mental health issues, two were required to attend court and five were given a penalty notice. It does not appear that any of them paid it.

Of the 54 cases where other police records indicated that the person had mental health problems either at the time of the section 9 offence or in the previous three years, most were given a penalty notice (46 of 54), and only four of those were paid immediately. Of the eight matters where the person was required to attend court, six were convicted and fined (one was fined $550), and two had their charges dismissed.

One of the men whose mental illness was noted in the COPS record pleaded guilty to all of the charges, which included three charges of 'assault police'. When the matter was heard in court, the lawyer advised the magistrate that the defendant had prior matters that were dealt with under section 32 of the *Mental Health Act 2007*. The defendant was convicted and fined $100 for the section 9 offence, $100 for an offensive language offence, and given a good behaviour bond for the other charges. The other man whose mental illness was noted in the COPS record did not show up to his court hearing. In his absence, he was convicted and fined $200.

383 *Summary Offences Act 1988*, s. 9(4).

384 People who experienced more than one vulnerability have been counted once in each of the respective vulnerability groups.

9.5.3. Summary of legal action taken – People with a cognitive impairment

Although concerns were raised during Parliamentary Debates about people with a cognitive impairment being unintentionally caught by the new offence provision, we found only three cases where police records for the three years prior to the review period showed that they may have had a cognitive impairment. One person, who was also homeless and Aboriginal, was required to attend court. The others were issued with a CIN, which were not paid and referred for enforcement.

9.5.4. Summary of legal action taken – Young people

Three per cent of all CINs issued in the review period were wrongly issued to young people. Of the 22 cases involving young people, 14 were issued with a CIN. None requested an internal review. Three paid the fine immediately, and seven were referred for enforcement. We do not have information about the other four. As discussed previously, police cannot issue a CIN for a section 9 offence to a young person. Action is being taken to withdraw these CINs.

Three young people were issued with CANs. One had legal representation, pleaded not guilty and successfully defended the charges – see case study 17 earlier in this chapter. Another represented himself, pleaded guilty and was fined $150. We do not have information about the third young person.

9.5.5. Summary of legal action taken – Aboriginal people

Of the 150 cases involving Aboriginal people who were the subject of legal action for a section 9 offence, 113 received a CIN and 37 received a CAN. They represented:

- 30% of the 380 CIN matters , and
- 37% of the 99 cases in which the person was issued a CAN.

No one requested an internal review. Five paid the fine immediately, 89 failed to pay within the time allowed and were referred for enforcement action, one fine was cancelled, one was not yet overdue at the time of this analysis, and information was not available for the remaining matters.

As most of the vulnerable people charged with a section 9 offence were Aboriginal (37 of 41 CANs), the observations we made in section 9.4 about the court outcomes in relation to vulnerable people all apply to the Aboriginal defendants.

Chapter 10. Safeguards relating to issuing and enforcing penalty notices

The changes introduced by the amending Act were intended to strengthen the powers of police to tackle drunken, violent behaviour in public places – particularly in crowded entertainment districts on weekends. While the new powers were broad, giving police wide discretion in determining where and when they might be used, they were intended to be accompanied by police guidelines stipulating that they would be used to target violent disorder in select locations, and not the homeless, the mentally ill, the Aboriginal community and other disadvantaged or marginalised groups.[385] Yet, as noted in chapter 5, police data shows that of the 484 instances in which people were fined or charged with a section 9 offence during the review period, 40% (196) involved people with one or more of those characteristics.

This chapter considers the adequacy of safeguards intended to divert disadvantaged and marginalised people from the criminal justice system. It also examines the schemes in place to help those who are issued a Criminal Infringement Notice (CIN) for a section 9 offence from becoming further entrenched in fines enforcement processes.

10.1. Recent reforms to the systems for issuing and enforcing fines

The issuing and enforcement of CINs for section 9 offences must be considered in the context of broader changes that seek to make the system for administering and enforcing court fines and penalty notices in NSW fairer and more effective. Although enforcement mechanisms have succeeded in recovering large sums of outstanding fine-related debts, they can also inflict hardship on people who genuinely cannot afford to pay. The recent reforms to the *Fines Act 1996*, which were introduced in 2008 and commenced in 2010, seek to mitigate the way that monetary penalties may affect poor, disadvantaged and marginalised members of our community, while strengthening the effectiveness of fines as a deterrent to offending behaviours. In particular, they introduced practical ways for people to deal with their debts rather than incur further penalties and enforcement costs.

As noted elsewhere in this report, the changes to the fines system include:[386]

- a recently-commenced trial which allows people who receive Centrelink benefits to refer a fine for enforcement at the outset, enabling them to access time-to-pay arrangements (including Centrepay) without having to first default on payment and incur additional enforcement costs, restrictions imposed by Roads and Maritime Services (RMS) or costly civil sanctions
- confirming that any officer who has the power to issue a penalty notice may instead exercise discretion to give a caution in appropriate circumstances, and clarifying when a caution should be given, especially in relation to offenders who have an intellectual disability, a mental illness, a cognitive impairment or who are homeless
- introducing a statutory system for the administrative review of penalty notices on certain specified grounds
- establishing a scheme for Work and Development Orders, enabling certain disadvantaged people to clear their fine-related debts by undertaking an agreed program of unpaid work, course or treatment, with the support of an approved organisation or registered health practitioner.

In his response to the consultation draft of this report, the Commissioner of Fines Administration gave the following advice in relation to the trial that allows people to enter into a time-to-pay arrangement without having to first default on payment:

> OSR's review of fines is a strong and robust practice. However, people with limited financial means, from time to time, do not require a review but need more time to pay their fine in full.
>
> OSR has recently commenced a trial of extending the time to pay the fine without needing to incur the $65 enforcement cost. All that is required is that a person start paying their fine before it is overdue and our practice, in general, extends the due date by up to three additional months. This practice lowers the financial burden on the fine recipient and leads to a higher level of fine resolution before extra costs are incurred.[387]

385 The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 22 June 2011, p. 3135.
386 Department of Attorney General and Justice, *A fairer fine system for disadvantaged people*, May 2011.
387 Correspondence from the Commissioner of Fines Administration, dated 6 June 2014.

Significantly, the Fines Act amendments created a legislative framework that allows a person's individual circumstances to be taken into account at key points in the issuing and enforcement of CINs and other penalty notices. When considering the NSW Police Force's responsibilities for issuing and reviewing CINs for section 9 offences, this framework has particular relevance in relation to:

- decisions by police officers on whether to issue a CIN – rather than to warn or caution the offender, or to initiate an arrest and charge, and
- determining whether, in light of any additional information, an internal review of a CIN should result in a decision to withdraw or cancel the CIN.

10.2. Amending CINs processes to comply with the Fines Act

We have previously reported our concerns that disproportionately high numbers of CINs were being issued to Aboriginal and Torres Strait Islander people and other vulnerable or marginalised groups, and that these groups were then becoming entrenched in the fines enforcement system.[388] As noted in our August 2009 report, in the first year that CINs were used across NSW, Aboriginal people, who made up approximately 2.5% of the population of NSW,[389] received 7.4% of all 8,681 CINs issued. Of particular concern was that 14.2% of the 2,034 CINs issued for offensive language were to Aboriginal people. By comparison, our current review found that 30% (113) of the 380 CINs issued for continuing intoxicated behaviour offences in the first year of that offence were to Aboriginal people.

Our 2009 report looked for ways to improve the quality of police decision-making at the point that CINs are issued to ensure that the circumstances warranted the use of this sanction. In addition, as none of the Aboriginal people who received a CIN in the first year of the statewide CINs scheme had sought a review, we also proposed changes to reduce the barriers for requesting reviews. We also recommended making the processes for issuing and enforcing CINs consistent with the broader reforms to the fines system.

This included a proposal (Recommendation 5) that police officers be given the option of issuing an 'official caution' in accordance with section 19A of the Fines Act. Section 19A(1) clarifies that any officer who has the authority to issue a penalty notice also has a discretion to instead issue a caution, where appropriate. Section 19A(2) provides that in exercising such a discretion, issuing officers (other than police officers) 'must have regard to the applicable guidelines relating to the giving of official cautions in respect of penalty notice offences'.

Although police officers may informally warn or caution an offender instead of issuing a CIN, the proposed 'official caution' was intended to provide an intermediate sanction for officers dealing with minor incidents that they determine are not serious enough to warrant fining an offender, yet where some action should still be taken other than to give an informal warning. Responding to our recommendation on behalf of the NSW Government in 2013, the then Attorney General said the proposal was unnecessary because police officers already had an 'existing power under the common law to issue cautions'.[390]

A proposal (Recommendation 6) that the NSW Police Force develop guidelines in relation to the issuing of cautions for CINs, and that the police guidelines be consistent with the general cautioning guidelines issued by the then Attorney General, was also 'not supported'. Yet in this case the recommendation had been partly implemented following NSW Police Force amendments to its CINs Standard Operating Procedures (SOPs) in March 2012. Those updates included adding a section entitled, '2.11 – Issuing CANs, CINs and cautioning – Issues to consider', which provided guidance to police with respect to the power to caution and matters to consider in deciding whether to caution, issue a CIN or issue a CAN. As the Government's 2013 response to our recommendation explained:

> ... NSWPF has updated the SOPs for CINs and has published an article, circulated to all police, to remind all police that the capacity to issue a CIN does not impact on the capacity to issue a caution, and to further highlight some matters which might be taken into account when considering the issue of a caution.[391]

388 See NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005; and NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009.

389 Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians, 2011*, cat. no. 2075.0, Canberra, 2012.

390 Correspondence from the Hon. Greg Smith SC, Attorney General, dated 24 June 2013.

391 Correspondence from the Hon. Greg Smith SC, Attorney General, dated 24 June 2013.

The effect of the new sections inserted into the SOPs in 2012 was to reduce the gap between the standards required in relevant legislation and those in previous police policies and practice. For instance, in determining whether to issue a caution, a CIN or a CAN, officers are now advised to consider:

> ... all of the circumstances, such as the location and time of the offence, the nature of the offending behaviour that brought the suspect under notice, the characteristics of the suspect which may be contributing to the offending behaviour (age, record, disability or any mental health issues, intoxication etc) and community expectations regarding the outcome of police action.[392]

The 2012 updates also provide examples of situations where CINs should not be used, noting that it would be inappropriate to issue a CIN if, for instance, 'the suspect is seriously intoxicated or drug affected (such that you believe the suspect cannot comprehend the procedure)'.[393]

Our 2009 report also recommended aligning the NSW Police Force's limited processes for reviewing CINs, with broader Fines Act requirements setting out the grounds that, if established, require that an issuing agency must withdraw a penalty notice, and when it *may* exercise its discretion to withdraw a penalty notice (Recommendation 21). The NSW Police Force had argued in 2009 that CINs were exempt from the Fines Act requirements. The Government's response to our report in 2013 confirmed that the review processes for CINs were in fact subject to the review requirements set out the Act.[394]

After receiving the Government's advice that:

- police officers were already expected to exercise appropriate discretion in relation to decisions on whether to caution an offender rather than issue a CIN, and
- police internal reviews of CINs are expected to comply with Fines Act requirements for internal reviews of penalty notices,

we asked the NSW Police Force to review its processes. In late 2013 it confirmed that its internal review policies for CINs did not comply with the Fines Act requirements, and that substantial amendments were needed.

In March 2014, the NSW Police Force introduced its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*,[395] providing officers with the first comprehensive advice about their legislative obligations since the Fines Act reforms began. The Guidelines incorporated some of the feedback we provided on earlier drafts, particularly with respect to clarifying officers' responsibilities when conducting reviews, explaining the grounds for a review and how reviews will be conducted.

Overall, the NSW Police Force's Internal Review Guidelines represent a significant improvement on earlier policies and ad hoc decision-making. The Guidelines underline the need for fairness and consistency, emphasise that police decisions must comply with the requirements of the Fines Act, and encourage police to apply the principles underpinning the reforms to the fines system. While there are still gaps in the advice provided on some issues, the Guidelines note the need for police decisions to be consistent with other aspects of the fines system. The police policy appends the Attorney General's *Internal Review Guidelines under the Fines Act 1996* and the *SDRO Review Guidelines* to provide guidance on relevant issues.[396]

The NSW Police Force said it will review the Guidelines in 2015 to address any gaps in the information provided and make further adjustments. However, we asked the NSW Police Force to consider some immediate measures, including making the Guidelines publicly available on its website, working with the State Debt Recovery Office (SDRO)[397] to update the guidance provided to SDRO staff about the revised police procedures, and for police and the SDRO to revise their Memorandum of Understanding on procedures relating to their shared responsibilities.

The NSW Police Force supported this recommendation and has now published its Internal Review Guidelines for Penalty Notices on the 'Policies, Procedures & Legislation' page of its website.[398]

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392 Police Prosecutions Command, NSW Police Force, *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPS) V.4*, 6 March 2012, p. 9.

393 Ibid.

394 Correspondence from the Hon. Greg Smith SC, Attorney General, dated 24 June 2013.

395 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014.

396 NSW Attorney General, *Internal Review Guidelines under the Fines Act 1996*, 31 March 2010; State Debt Recovery Office (SDRO), *SDRO Review Guidelines*, October 2013.

397 Now the Commissioner of Fines Administration; see *Fines Amendment Act 2013*.

398 NSW Police Force, 'Policies, Procedures & Legislation', viewed 1 July 2014, www.police.nsw.gov.au/about_us/policies__and__procedures.

10.3. Opportunities to respond to the individual circumstances of vulnerable people

The data in chapter 5 showing that 40% of all cases involving people proceeded against for a section 9 offence during the review period had a vulnerable characteristic – that is, the person was Aboriginal, and/or recent police records showed the person had experienced mental illness, homelessness or that he or she had a cognitive impairment – raises questions about whether the provision is drafted in a way that it implicitly targets these groups and should be amended or abolished.

Our recommendations to amend section 9 of the *Summary Offences Act 1988* to focus the use of this provision on more serious incidents of drunken violence in public (see section 6.2.3), should go some way to reducing the number of people (including those who are vulnerable) being fined or charged for a section 9 offence in circumstances where the principal concern is a failure or refusal to comply with the move on direction. That kind of behaviour would instead be dealt with under section 199 of LEPRA. Even if Parliament accepts our recommendations, there might still be value in reviewing the adequacy of advice provided to police and other key decision-makers regarding the issuing and enforcement of CINs for public order offences to marginalised or vulnerable people.

In looking for opportunities to identify and divert potentially disadvantaged or vulnerable people from the criminal justice and fines enforcement systems as a consequence of behaviours that may constitute a section 9 offence, the focus should be on the decisions made at several key points, notably when:

- a police officer observes the offending behaviour and must decide whether to caution the offender, or to issue a CIN or a CAN
- a senior police officer assesses a request for an internal review of a section 9 CIN, taking into account section 24E(2) of the Fines Act which requires that the CIN must be withdrawn in certain circumstances, and section 24E(3), which provides that police *may* withdraw the CIN on other discretionary grounds, or
- the NSW Police Force uses its 'own motion' powers under section 24H of the Fines Act to review the decision to issue or withdraw the section 9 CIN.

There are also opportunities to consider an individual's circumstances when a matter proceeds to court, either because a CAN was issued or because the CIN recipient elected to have the matter heard at court. At that point a magistrate can exercise discretion in determining an appropriate outcome and penalty.

At each stage, the law provides opportunities for decision-makers with responsibilities in the issuing and enforcement of CINs to consider information about a vulnerable person's individual circumstances and then to factor that information in to decisions about how to proceed and what sanctions should be imposed.

10.3.1. Issuing a caution at the time the conduct is observed

The first – and arguably most important – opportunity for decision-makers with responsibilities for issuing and enforcing CINs to apply information about an offender's individual circumstances to determine how to proceed, is when a police officer observes offending conduct and exercises discretion to issue a CIN or take some other action.

Concerns were raised during the Parliamentary Debates about the risk that the new section 9 offence could lead to more vulnerable people entering the criminal justice system instead of, for instance, police issuing cautions or using the existing protective detention powers at Part 16 of LEPRA to remove and detain an intoxicated person for his or her own protection and the protection of others.[399] The Government reasoned that giving police the option to issue a CIN for the new offence meant that a person 'does not need to get further caught up in the criminal justice system' if they pay the fine.[400]

As the data in chapter 9 and in our previous CINs reviews shows, disadvantaged and marginalised groups and those who have limited means to pay rarely court-elect, even when they have firm grounds to contest a CIN. This is especially the case for people whose offending behaviour is affected by their substance addiction, mental health issues, homelessness and other factors that contribute to their over-representation in the criminal justice system. The data shows that these groups are also much more likely to default on their fines and be subject to enforcement action.

399 See, eg, the Hon. Paul Lynch MP, NSWPD, (Hansard), Legislative Assembly, 3 August 2011, p. 3558, where he discussed a submission from the Law Society of NSW.

400 The Hon. Michael Gallacher, NSWPD, (Hansard), Legislative Council, 4 August 2011, p. 3590.

Fine enforcement action, such as the imposition of vehicle registration cancellations and other RMS restrictions, raises the risk of secondary offending, particularly if the vehicle owner or an associate borrowing the vehicle is unaware that the RMS restriction is in place. The result is that although CINs can divert minor offenders from the criminal justice system, CINs and fines enforcement processes can nevertheless adversely impact on disadvantaged and marginalised people.

Police have a general discretion at common law to give a person an informal warning about their behaviour or caution instead of penalising them for an offence. Depending on the circumstances, the use of cautioning may be a more effective way to minimise any unreasonable impact the new offence provision may have on vulnerable people. While frontline police are encouraged to caution offenders in appropriate circumstances, the lack of systemic recording of the use of this option in relation to adult offenders makes it impossible to quantify how often it is used.

As noted above, the Government did not accept our 2009 recommendation that police officers be given the option of issuing – and recording – an official caution under section 19A of the Fines Act, arguing that their common law power to issue an informal warning was sufficient and that the police uses of this option could be noted on COPS.

Following our recommendation that the NSW Police Force develop guidelines in relation to the issuing of cautions for CINs, and that the police guidelines be consistent with the Attorney General's Caution Guidelines (Recommendation 6),[401] the NSW Police Force issued a gazette[402] reminding officers of the options available to police other than a CIN, including issuing a caution, a 'move along' direction or a CAN. This advice, and the insertion of additional sections in the procedures used by police to guide the appropriate use of CINs, only partly addressed our recommendation. Significantly, in relation to CINs it provided no specific guidance to officers about the Fines Act requirements regarding when a caution should be issued, instead of a CIN or a CAN.

Currently, section 19A of the Fines Act provides that any officer who has the authority to issue a penalty notice – including police officers deciding whether to issue a CIN – has the discretion to instead issue a caution, where appropriate. Section 19A(2) provides that in exercising such a discretion, issuing officers (other than police officers) 'must have regard to' the Attorney General's Caution Guidelines. While recognising that section 19A(2) provides that police officers are not bound by the Attorney General's Caution Guidelines, our recommendation that the NSW Police Force issue guidelines in accordance with section 19A(3)(b) – which allows agencies to issue their own guidelines relating to cautions – was intended to align police policy and practice with the broader requirements of the Fines Act.

In 2012, a NSW Law Reform Commission review of penalty notices included the following observations about whether the Attorney General's Caution Guidelines under the *Fines Act 1996*[403] should apply to police officers:[404]

- Although police officers have a well-established discretion to issue warnings or cautions, the Commission found that 'the existing law, regulations and practice guidelines applying to police do not appear to provide substantive guidance for police in the specific context of the use of cautions as an alternative to penalty notices.'
- The Attorney General's Caution Guidelines do not conflict with existing police policies and practices, largely because police were instrumental in developing the Guidelines.
- The Attorney General's Caution Guidelines are 'facilitative', in that they aim to help issuing officers identify situations in which it is appropriate to issue cautions, while not fettering other discretionary options available to frontline police such as issuing CINs or CANs, or using the protective detention powers under Part 16 of LEPRA.
- Agencies may 'create their own dedicated guidelines that are tailored to their particular needs as long as these are consistent with the Attorney General's Caution Guidelines.'

The Commission concluded that the NSW Police Force should adopt the Attorney General's Caution Guidelines, or at least develop guidelines that are consistent with those issued by the Attorney General. It recommended that:

> Section 19A of the *Fines Act 1996* (NSW) should be amended to provide that, unless it develops its own consistent guidelines, the NSW Police Force is covered by the Attorney General's Caution Guidelines.[405]

Since the Commission made this recommendation, the NSW Police Force has developed and introduced its Internal Review Guidelines that effectively implement the Fines Act requirements and therefore largely reflect the Attorney General's Internal Review Guidelines.

401 NSW Ombudsman, R*eview of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, Recommendation 6.
402 NSW Police Force, 'Law Notes of 2011: 11/11 Criminal Infringement Notices', *Police Monthly*, November 2011, p. 42.
403 NSW Attorney General, *Caution Guidelines under the Fines Act 1996*, 31 March 2010.
404 NSW Law Reform Commission, *Report 132 – Penalty notices*, February 2012, p. 147.
405 Ibid, Recommendation 5.5.

Now that the NSW Police Force has accepted that the processes for reviewing and enforcing CINs are subject to the requirements of the Fines Act, the advice provided to officers about their initial decision regarding whether to issue a caution, a CIN or a CAN, should include specific guidance to help officers identify the situations in which it is appropriate to issue a caution.

10.3.1.1. Draft Recommendation 11

The consultation draft of this report recommended that the NSW Police Force develop its own guidelines under section 19A(3) of the Fines Act to provide its frontline officers with advice on when a caution should be issued rather than a penalty notice. If the NSW Police Force does not develop cautioning guidelines, we recommended that section 19A of the Fines Act be amended to provide that police officers have regard to the Attorney General's Caution Guidelines when deciding whether to issue a caution.

The NSW Police Force did not support this recommendation:

> The NSW Police Force has previously opposed the need for cautioning guidelines under section 19A, acknowledging that police officers have broad common law discretion to make decisions about commencing legal proceedings or issuing penalty notices in a range of areas, including s 9 of the SOA. The draft report provides no new information as to why the NSW Police Force requires cautioning guidelines under this section.[406]

The Commissioner of Fines Administration argued that this recommendation appeared to be 'somewhat superfluous' as:

> ... the NSW Police Force has already developed its own Guidelines in respect of Criminal Infringement Notices (CINS). Secondly under the Memorandum of Understanding between NSW Police Force and the Office of State Revenue, State Debt Recovery (OSR) the latter is the primary reviewing agency for other police issued penalty notices and the Review Guidelines are already in place and published.[407]

In relation to the issuing of cautions for CIN offences, the Commissioner of Fines Administration is right to note that the cautioning advice contained in the NSW Police Force's current CINs SOPs goes some way to addressing the need to provide frontline officers with advice on the issuing of cautions, particularly in light of the updates to those SOPs in 2012.

As previously noted in section 10.2, sections inserted into the SOPs in 2012 include advice to officers deciding whether to issue a caution instead of a CIN or a CAN to 'consider all of the circumstances', including the location and time of the offence, the nature of the offending behaviour, and the characteristics of the suspect which may be contributing to the offending behaviour (age, record, disability or any mental health issues, intoxication etc).[408] Importantly, the 2012 updates also provide examples of situations where CINs should *not* be used, noting that it would be inappropriate to issue a CIN if, for instance, 'the suspect is seriously intoxicated or drug affected'.[409]

However, it should be noted that the CINs SOPs do not yet include specific advice on the grounds that might lead the NSW Police Force to subsequently withdraw the CIN following an internal review. Until the SOPs are updated to include information about the grounds set out in the *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*,[410] there is a high risk that frontline officers may exercise their discretion to issue CINs in situations where an internal review will subsequently lead to the penalty notice being withdrawn. In our view, it would be preferable to update the CINs SOPs so that the advice to officers deciding whether to issue a caution is consistent with the standards established in the NSW Police Force's own Internal Review Guidelines, as well as the Attorney General's Caution Guidelines.

While updating the CINs SOPs will provide frontline officers with the information they need when deciding whether to issue a caution instead of a fine for a CIN offence, this would not address the lack of guidance in relation to the many penalty notice offences that are not part of the CINs scheme. The seven current CIN offences are just a few of the estimated 17,000 offences that can lead to the issuing of a penalty notice in NSW.[411] As the Internal Review Guidelines now require police to take into account certain factors when considering a request that a penalty notice be reviewed, we can see no reason why they should not be required to take into account the same factors when making the decision about whether or not to issue the penalty notice in the first place.

406 Correspondence from the Commissioner of Police, dated 6 June 2014.

407 Correspondence from the Commissioner of Fines Administration, dated 6 June 2014.

408 Police Prosecutions Command, NSW Police Force, *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPS) V.4*, 6 March 2012, p. 9.

409 Ibid.

410 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014.

411 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.

We acknowledge that the NSW Police Force has strongly and consistently advocated that its officers should not be bound by the formal cautioning requirements under section 19A of the Fines Act. However, we believe it would be unfair and ineffective for officers to continue to issue fines that the Internal Review Guidelines indicate should subsequently be withdrawn upon review. Until officers are provided with SOPs informing them of the grounds for withdrawing CINs and other penalty notices following internal review, it is difficult to see how this information can be factored into the decision-making of officers when they issue a penalty notice.

In arguing that its officers should continue to be exempt from the requirements of section 19A of the Fines Act, the NSW Police Force states that our report about the issuing of CINs for section 9 offences 'provides no new information as to why' cautioning guidelines might be required. We disagree. As previously noted (at section 9.2), 39% (150) of the 380 CINs issued by police for section 9 offences during the review period were issued to people with a vulnerable characteristic – mostly Aboriginal people and/or people who are homeless or who have a mental illness. Just one of the 150 vulnerable people sought an internal review, and none elected to contest the CIN at court. Further, our analysis in section 6.2.2.2 shows that in relation to around a quarter of all section 9 legal actions initiated by police, there are questions about the fairness of imposing a section 9 penalty in the circumstances described.

It is important to emphasise that these figures do not necessarily demonstrate that the officers involved failed to exercise appropriate discretion in relation to these particular matters. Nonetheless, in circumstances where two in every five section 9 CINs are being issued to vulnerable and marginalised groups who are already over-represented in the criminal justice system, and in light of the fact that recipients rarely request an internal review of their CIN, we believe it is crucial that police officers are provided with the information they need to exercise appropriate discretion at the point that the fine is issued. At the very least, the NSW Police Force must update its CINs SOPs to include clearer guidance on situations where an internal review will subsequently lead to the CIN being withdrawn.

Recommendation

11. That the NSW Police Force:

a. update the cautioning advice in its Criminal Infringement Notices Policy and Standard Operating Procedures to include specific guidance about the grounds on which a CIN may be withdrawn in accordance with the NSW Police Force's *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, and

b. consider developing its own general cautioning guidelines for other penalty notice offences that are consistent with its own Internal Review Guidelines.

10.3.2. Internal review processes in the fines system

After a CIN has been issued for a section 9 offence, the recipient may apply for an internal NSW Police Force review of the decision to issue the penalty notice. The internal review provides police with another avenue to respond to the individual circumstances of the CIN recipient to determine whether, in all the circumstances, a CIN was an appropriate option.

The Fines Act requires that police must withdraw the penalty notice if the internal review establishes certain grounds under section 24E(2). The following two grounds may apply to a CIN issued to a vulnerable person:

- the person was unable, because he or she has an intellectual disability, a mental illness, a cognitive impairment or is homeless, to understand that the conduct constituted an offence or was unable to control the conduct – section 24E(2)(d)
- a caution should have been given instead of a CIN at the time of the incident, having regard to the relevant guidelines – section 24E(2)(e).

Section 24E(3) of the Fines Act also provides that the NSW Police Force:

> ... may, at its discretion, also decide to withdraw a penalty notice on a ground other than those specified in subsection (2).

This provision confirms that officers who conduct internal reviews have a broad discretion allowing them to take into account any issues they consider relevant, not just those specifically listed in section 24E(2).

We received a number of submissions expressing concerns that vulnerable people might be less likely to understand when they could challenge a fine or to understand the processes for requesting a review. During the review period, only one vulnerable person requested an internal review of a section 9 CIN. None elected to challenge a CIN in court.

One impediment to requests for a review on the grounds of behaviour related to a person's intellectual disability, mental illness, cognitive impairment or homelessness is that police policy requires the recipient to provide relevant documentation and to demonstrate a causal nexus between the vulnerable characteristic and his or her lack of understanding or control over their conduct. The recently introduced NSW Police Force Internal Review Guidelines explain that:

> The reviewing officer is not expected to have the knowledge or expertise to establish this medical condition. The reviewing officer should require the person seeking the review to establish this nexus by providing sufficient additional information reported on official letter head from a medical practitioner, supporting agency or government department as outlined on page 11 of the SDRO guidelines.[412]

This is consistent with the relevant section of the SDRO Guidelines which state that the applicant is required to provide 'a detailed report on official letterhead from a medical practitioner, support agency or government department'.[413]

Even if a vulnerable CIN recipient requests a review, he or she might still have difficulty providing an expert report that establishes the required causal nexus. With respect to this requirement, the NSW Law Reform Commission found:

> The present test in s 24E(2)(d) is narrow. Its requirement to demonstrate a direct causal link between a person's disability or homelessness and his or her understanding or capacity to control offending may create difficult problems of proof for applicants, and may also require the reviewing agency to make assessments that require expert information.[414]

The Law Reform Commission recommended that the nexus be made easier to prove, recommending a more appropriate threshold would be that the condition was:

> ... a contributing factor to the commission of an offence or reduced the person's responsibility for the offending behaviour.[415]

The Law Reform Commission considered that the test would appropriately maintain the requirement for nexus between the offending and the person's vulnerability, but not be as difficult to establish and better capture a range of circumstances that might contribute to a person's offending behaviour. In addition, the Law Reform Commission encouraged agencies to utilise their discretion to withdraw a penalty notice where pursuit of the notice would be fruitless or unjust.

We agree that the strict requirements of section 24E(2)(d) may pose practical impediments to a vulnerable person's ability to challenge a penalty notice, and support the Law Reform Commission's recommendation to provide reviewing officers with greater flexibility in determining when to apply these requirements.

Recommendation

12. NSW Police Force amend its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* to provide that a penalty notice must be withdrawn if the person to whom it was issued has an intellectual disability, a mental illness, a cognitive impairment or is homeless, and it appears that this was a contributing factor to the commission of an offence or reduced the person's responsibility for the offending behaviour.

412 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014, p. 8.
413 SDRO, *SDRO Review Guidelines*, October 2013, p. 11.
414 NSW Law Reform Commission, *Report 132 – Penalty notices*, February 2012, p. 199.
415 Ibid, Recommendation 7.2.

10.3.2.1. Commissioner of Fines Administration and NSW Police Force comments on Recommendation 12

In his response to the consultation draft of this report, the Commissioner of Fines Administration expressed reservations about the mandatory nature of the requirements at section 24E(2) of the Fines Act, stating that it:

> ... is too wide in practice. It would be better if section 24E(2) was changed to read that intellectual disability, a mental illness, a cognitive impairment or homelessness should be considered if it contributed to the commission of an offence.[416]

In its response, the NSW Police Force said it did not support this recommendation as:

> Generally, there is no evidence to suggest that this legislation has adversely impacted on vulnerable groups. The priority of police remains the safety and well being of the individual and the community.
>
> The circumstances of each case should be considered when deciding whether to withdraw a penalty notice, including whether the person subject to the penalty notice has an intellectual disability, mental illness, cognitive impairment or is homeless. This is clear in the Guidelines and the NSW Police Force does not agree that an amendment to the Guidelines is required.[417]

Section 24E(2)(d) requires that a reviewing agency *must* withdraw a penalty notice if the person was unable, because he or she has an intellectual disability, a mental illness, a cognitive impairment or is homeless, to understand that the conduct constituted an offence or was unable to control the conduct. While it is mandatory for the reviewing agency to withdraw the notice, the agency must first decide whether there was the necessary causal nexus between the vulnerable characteristic and the person's lack of understanding or control over their conduct. In practice, this gives reviewing agencies broad discretion in determining which penalty notices it must withdraw.

If the Commissioner of Fines Administration is concerned about the volume of review requests that reviewing agencies must consider as a result of the section 24E(2)(d) requirements, we do not have any information that supports or contradicts that view. In any case, as Parliament required us to monitor and report on 'the issue of penalty notices in respect of offences against section 9', it is beyond the scope of our review to recommend changes to the fines system requirements generally.

The NSW Police Force's claim that 'there is no evidence to suggest that this legislation has adversely impacted on vulnerable groups' is at odds with the available evidence. It should be noted that 40% (196) of all fines and charges for section 9 offences during the review period involved people with one or more of vulnerable characteristics – mostly Aboriginal people and people with a recent history of mental illness. Almost nine out of every 10 CINs issued to a vulnerable person resulted in that person being subject to enforcement action by the SDRO, and three out of every four CANs issued to a vulnerable person resulted in the person being convicted.

In relation to the 380 CINs issued for section 9 offences during the review period, just one vulnerable person sought an internal review. As the NSW Police Force has only just introduced Internal Review Guidelines that allow people with an intellectual disability, a mental illness, a cognitive impairment or who are homeless to seek a review of their penalty notice on these grounds, it is too soon to know whether this provision might create lead to an increase in review requests from marginalised and disadvantaged people. However, in the case of CINs, the scheme was established to provide an alternative to charging offenders and bringing them before the courts for certain minor offences. Even if a small proportion of CIN recipients request internal reviews on grounds specified in the Fines Act, it should still be cheaper, fairer and more efficient for the NSW Police Force to make provision for such reviews rather than require those CIN recipients to elect to have the matter heard at court.

We are encouraged by the NSW Police Force's advice that the guidelines make it clear that the circumstances of each case, including the person's vulnerability, should be considered when deciding whether to withdraw a penalty notice. However, the causal nexus test in the guidelines (requiring applicants to demonstrate a direct causal link between their disability or homelessness and their understanding or capacity to control their offending), makes it less than clear that the reviewing officer has broader discretion when considering a person's vulnerability. We therefore remain of the view that the Internal Review Guidelines should be amended as recommended to reflect the current legislative requirements at section 24E(2)(d) of the Fines Act.

416 Letter from Commissioner of Fines Administration, dated 6 June 2014.
417 Correspondence from the Commissioner of Police, dated 6 June 2014.

10.3.2.2. Withdrawing a fine where a caution should have been given: Recommendation 13

Section 24E(2)(e) of the Fines Act requires that a reviewing agency must withdraw a penalty notice in circumstances where a caution should have been given instead of a penalty notice. Although this is noted in the NSW Police Force's Internal Review Guidelines, the Guidelines provide reviewing officers with no advice regarding circumstances where it would be appropriate to issue a caution.

Our recommendation 11 would assist officers who observe offending behaviour and those who conduct an internal review of a CIN to determine whether or not a caution is or would have been appropriate in the circumstances.

We had initially recommended that NSW Police Force amend its Internal Review Guidelines to give effect to the requirements in section 24E(2)(e) of the Fines Act. In the NSW Police Force's response to the consultation draft of this report, it did not support this recommendation and expressed the following view:

> The NSW Police Force has previously submitted that it is not required to have guidelines under section 19A of the Fines Act and therefore s 24E(2)(e) should not apply to police officers.[418]

As the requirement in section 24E(2)(e) provides that a penalty notice must be withdrawn if it was issued in circumstances where an 'official caution' should have been given, it is possible that there are no circumstances in which an 'official caution' under the Fines Act could be given by a police officer.

However, even if the NSW Police Force is not required to have guidelines for issuing official cautions under section 19A of the Fines Act, its Internal Review Guidelines can and should still reflect that, if the reviewing officer forms the view that a caution should have been given instead of a penalty notice, then the penalty notice should be withdrawn. This view could be formed having regard to the cautioning advice included in the CINs SOPs. We therefore make the following recommendation.

Recommendation

13. NSW Police Force amend its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* to provide that, in circumstances where the reviewing officer forms the view that a caution should have been given instead of a penalty notice, the penalty notice be withdrawn.

10.3.2.3. Exercise of the general discretion to withdraw a fine: Recommendation 14

Finally, as noted above, section 24E(3) of the Fines Act provides reviewing officers with a broad discretion to withdraw a penalty notice on a ground other than the mandatory withdrawal grounds specified in section 24E(2), permitting officers conducting a review to take into account any relevant information. The breadth of this discretion is reflected in the advice provided to reviewing officers in the NSW Police Force's Internal Review Guidelines:

> The internal review is intended to be a quick and easy response to substantive changes in facts or circumstances and divert vulnerable groups out of the penalty notice system. It provides ... a broad discretion to review a penalty notice, including the option to withdraw a penalty notice on practical and compassionate grounds that do not necessarily require a nexus with offending.[419]

Despite noting this discretion in the introduction, there is no specific guidance elsewhere in the document on how reviewing officers should apply section 24E(3). In the interests of fairness and transparency, some information should also be provided to reviewing officers – and made available to members of the public – regarding when and in what circumstances this discretion might be applied.

418 Correspondence from the Commissioner of Police, dated 6 June 2014.
419 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014, p. 5.

In its response to the consultation draft of this report, the NSW Police Force did not support our recommendation that specific guidance be given in relation to section 24E(3) because:

> There are a range of circumstances which police consider when deciding whether to issue a penalty notice. It is impossible for all circumstances to be captured and included in the Guidelines. Each matter is considered on a case by case basis with broad circumstances which are unable to be defined. The NSW Police Force is of the view that outlining all circumstances to reviewing officers in the Guidelines cannot be done accurately and should not be included.[420]

We have not suggested outlining all possible circumstances in the guidelines, simply that the guidelines contain some information to assist reviewing officers in determining how best to exercise what appears to be a very broad discretion. While the NSW Police Force has long argued that it retains an inherent discretion to withdraw CINs on practical or compassionate grounds, our review of section 9 offences and our two previous CINs reviews have established that in practice this discretion is not used in relation to internal reviews of CINs.

The evidence suggests that until police reviewers are provided with some guiding principles or procedural advice on the kinds of exceptional circumstances that might warrant the use of this broad general discretion, they are unlikely to ever withdraw a CIN on these grounds. In our view, providing guidance about when it might be appropriate to exercise this broad discretion should also provide some transparency in the decision-making process.

Recommendation

14. NSW Police Force amend its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* to include specific guidance to reviewing officers about the circumstances that might warrant the exercise of the general discretion under section 24E(3) of the *Fines Act 1996*.

10.3.2.4. Monitor implementation of Internal Review Guidelines: Recommendations 15 and 16

The consultation draft of this report also included a recommendation that the NSW Police Force monitor the implementation of its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* for 12 months after its introduction, and provide a report to the Ombudsman about the numbers of penalty notices that have been withdrawn and the basis of those decisions.

The NSW Police Force rejected this recommendation, explaining that:

> The NSW Police Force notes that the administration of the withdrawal of all penalty notices is managed by the State Debt Recovery Office (SDRO) who provide the applicant reasons for the decision. Therefore, this recommendation should be directed to the SDRO.[421]

While the SDRO is responsible for administering the withdrawal of penalty notices following requests for internal review, this recommendation was intended to alert the NSW Police Force to an issue relevant to its planned assessment of processes used by police reviewers. We believe there would be value in the NSW Police Force considering information about the outcomes of review decisions made by its officers under police *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* when the guidelines are assessed and updated in 2015.

The Internal Review Guidelines were developed by police to guide decisions made by police, primarily in relation to requests to withdraw CINs but also to withdraw certain other penalty notices where the SDRO has determined it will not conduct the review or the NSW Police Force has elected to conduct the review.[422] In relation to CINs, the NSW Police Force must conduct the review. As the police guidelines explain:

> The *Criminal Procedure Act 1986* requires an Inspector or above to make the decision to withdraw a CIN. For this reason the SDRO will refer all applications for the withdrawal of CINs to the NSWPF for determination as outlined in the SDRO Guidelines.[423]

The NSW Police Force has already scheduled a review of these guidelines in 2015. It is difficult to imagine how a meaningful review of the effectiveness of these new procedures can be completed without some analysis of the

420 Correspondence from the Commissioner of Police, dated 6 June 2014.
421 Ibid.
422 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014, p. 6 and 7.
423 NSW Police Force, *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*, March 2014, p. 6.

number of review requests received for each penalty notice type, how many penalty notices are subsequently withdrawn and the basis of those decisions. Whether information about decisions made pursuant to the NSW Police Force's Internal Review Guidelines is sourced directly from police records or from the SDRO is ultimately a matter for the NSW Police Force.

If, as the NSW Police Force response might suggest, police are concerned that they might have difficulty gathering this information without the assistance of the SDRO, we would be happy to endorse any police request that the SDRO provide it with relevant information. We have therefore amended our recommendations to reflect this.

Recommendations

15. NSW Police Force should ensure that:

a. it reviews its *Internal Review Guidelines for Penalty Notices under the Fines Act 1996* as scheduled in 2015

b. this review consider the numbers of review requests received for each penalty notice type, the number of penalty notices subsequently withdrawn and the basis of those decisions, and

c. information about the review of the Internal Review Guidelines, including data summarising the outcomes of review requests, be provided to the Ombudsman.

16. The Commissioner of Fines Administration should, upon request from the NSW Police Force, assist police with advice and information relevant to its review of the *Internal Review Guidelines for Penalty Notices under the Fines Act 1996*.

10.3.3. Periodic 'own motion' reviews of CINs

As part of the recent reforms to the system for administering and enforcing fines in NSW, section 24H(1) of the Fines Act clarifies that reviewing agencies, including the NSW Police Force, have a power:

> ... to review a decision to issue a penalty notice, or withdraw a penalty notice, on its own motion.

Similarly, section 340(1) of the *Criminal Procedure Act 1986* allows police to withdraw a CIN at any time. Together, these provisions provide opportunities for the NSW Police Force to actively review the quality of decisions its officers are making to issue CINs, and to remedy any obvious deficiencies.

As previously noted, just one vulnerable person sought an internal review of the police decision to issue a CIN for a section 9 offence during the review period. The recipient, a man whose police records showed that he had had mental health issues sometime during the three years prior to the review period, claimed that he was suffering a medical emergency on the night of the alleged section 9 offence.[424] However, this was not supported by the documents he provided.

As reported in chapter 5, the information about people's vulnerabilities was contained in police records about the people who were fined or charged for section 9 offences. This suggests that there may also be scope for senior officers who are responsible for verifying their officers' COPS entries to consider information about a CIN recipient's individual circumstances when checking records relating to section 9 offences, especially for CINs wrongly issued to young people, or that have been issued to people who are homeless, mentally ill or who have some form of cognitive impairment, and – depending on the circumstances – those issued to Aboriginal people.

424 Although the alleged offence occurred in a busy inner Sydney entertainment district, police records of the incident indicate that their primary concern was his refusal to obey a move on direction 'after being given multiple opportunities to comply'. After being issued with the CIN, he was detained for his own protection because police had concerns for his safety.

In our view, there would be benefit in the NSW Police Force using existing supervisory checks to establish a quality control check, or periodically audit randomly-selected records, to ensure that caution guidelines implemented by the NSW Police Force (in accordance with our recommendation above) are appropriately applied. In performing these checks, officers can access past police records about the alleged offender to determine if they have any vulnerabilities that should be considered. Information from these quality checks could also inform training on these issues.

Recommendation

17. NSW Police Force should include in its existing quality control measures an examination of the appropriate implementation of any cautioning guidelines that officers are required to follow.

In the NSW Police Force's response to the consultation draft of this report, it did not support this recommendation and referred to their response to Recommendation 11. In essence, it appears police do not support this recommendation because they do not accept the premise of our recommendation that they should adopt caution guidelines consistent with the Fines Act.

As we have explained, it is our view that the NSW Police Force should adopt caution guidelines that are consistent with its own Internal Review Guidelines to ensure transparency and consistency of decision-making in relation to the issuing of CINs, and should monitor operational compliance with such guidelines.

Chapter 11. Conclusion

Parliament required us to keep under scrutiny amendments to police powers to direct intoxicated people to leave public places under LEPRA and the operation of a new offence under section 9 of the Summary Offences Act relating to continuing intoxicated and disorderly conduct.

There is a clear public interest that police should have adequate powers to reduce the incidence and impact of alcohol-related crime occurring in public spaces and that these powers operate effectively. The amendments were intended to enhance the ability and effectiveness of police in managing and reducing drunken violence in entertainment districts, without impacting disproportionately on vulnerable groups within the community.

Our review found that the amendments did not provide police with a significant additional tool to manage or reduce alcohol-related crime during the review period. By far the majority of the incidents that resulted in legal action under section 9 could have been dealt with by police under the existing 'failure to comply with direction' offence provision at section 199 of LEPRA.

Our recommendations aim to simplify the legislative framework in LEPRA that allow police to give directions to people in public places and to address the unnecessary and confusing overlap in offences associated with failures to comply with those directions. In its current form the legislation provides police with no clear basis for determining whether action should be taken under section 9 of the Summary Offences Act or section 199 of LEPRA. Whereas previously the fines for these offences were similar, the on-the-spot fine for a section 9 offence is now $1,100 and the maximum fine is $1,650 – significantly higher than the $220 maximum fine for breaches of section 199.

During the review period many people were fined or charged for section 9 offences after having engaged in conduct that was difficult to distinguish from those who were fined or charged for breaching section 199. In light of the sizeable differences in monetary penalties that now apply, it is important that police uses of the section 9 offence be directed at more serious incidents of disorderly behaviour. For this reason we have recommended that the section 9 offence be amended so that it relates more squarely to serious instances of intoxicated and disorderly conduct, including violent or threatening conduct not already covered by section 199 LEPRA. The intent of our recommendations is to provide police with a simpler scheme that provides clarity about the options for responding to intoxicated and disorderly conduct and includes offences that correspond to the seriousness of the conduct.

Parliament also required us to examine the legal actions taken by police with respect to offences against section 9, including the issuing of Criminal Infringement Notices. Although the intent of the legislation was not to target disadvantaged, marginalised or vulnerable members of our community, we found that 40% (196) of the 484 people who were the subject of legal action under section 9 were Aboriginal, and/or had a history of mental illness, homelessness or cognitive impairment, or were aged under 18 years. Almost a third (150) of all people fined or charged with a section 9 offence during the review period were Aboriginal.

The impact of criminal infringement notices on vulnerable and marginalised groups in the community has been the subject of detailed review and recommendations in our previous reports on the police use of CINs. The intent of those recommendations is that police have adequate mechanisms to divert vulnerable people from the criminal justice system in appropriate circumstances. Importantly, the NSW Police Force has recently taken steps to implement our previous recommendation that it comply with the requirements of the *Fines Act 1996* relating to the internal review of penalty notices.

We have made further recommendations in this report to strengthen police procedures, consistent with the statutory obligations that apply to other agencies that issue penalty notices, to provide clearer guidance to frontline officers regarding when it might be appropriate to caution an individual for intoxicated and disorderly conduct, particularly if the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless, and that factor affects his or her ability to understand or control that conduct. As Parliament has now increased the on-the-spot fine for breaches of section 9 from $200 to $1100, and the evidence indicates that poor, vulnerable and marginalised people will continue to be issued a disproportionate number of CINs for this offence, it is essential that the NSW Police Force implement recommendations to divert vulnerable people from the criminal justice system, where appropriate.

Appendices

Appendix A. Section 9, *Summary Offences Act 1988*

This is the version of section 9 as it was during the review period. It does not include amendments made by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*. Those amendments simply change the reference in the note after section 9(2) to 'section 198 of LEPRA instead of 'section 201'.

9 Continuation of intoxicated and disorderly behaviour following move on direction

(1) A person who:

(a) is given a move on direction for being intoxicated and disorderly in a public place, and

(b) at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place,

is guilty of an offence.

Maximum penalty: 6 penalty units.

(2) For the purposes of this section, a *move on direction* is a direction given to a person by a police officer, under section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, to leave a public place and not return for a specified period.

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

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

(3) In proceedings for an offence against this section, it is necessary to prove that a move on direction was given within 6 hours before the person was found to be intoxicated and disorderly in a public place, but it is not necessary to prove that the person contravened the move on direction by being so intoxicated and disorderly in the public place at the time concerned.

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

(5) It is sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

(6) For the purposes of this section, a person is intoxicated if:

(a) the person's speech, balance, coordination or behaviour is noticeably affected, and

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

Appendix B. Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

This is the version of Part 14 as it was during the review period. It does not include amendments made by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014.*

Part 14 Powers to give directions

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

197 Directions generally relating to public places

(cf *Summary Offences Act 1988*, s 28F)

(1) A police officer may give a direction to a person in a public place if the police officer believes on reasonable grounds that the person's behaviour or presence in the place (referred to in this Part as ***relevant conduct***):

(a) is obstructing another person or persons or traffic, or

(b) constitutes harassment or intimidation of another person or persons, or

(c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness, or

(d) is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or

(e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.

(2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:

(a) reducing or eliminating the obstruction, harassment, intimidation or fear, or

(b) stopping the supply, or soliciting to supply, of the prohibited drug, or

(c) stopping the obtaining, procuring or purchasing of the prohibited drug.

(3) The other person or persons referred to in subsection (1) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in.

(4) For the purposes of subsection (1) (c), no person of reasonable firmness need actually be, or be likely to be, present at the scene.

198 Move on directions to intoxicated persons in public places

(1) A police officer may give a direction to an intoxicated person who is in a public place to leave the place and not return for a specified period if the police officer believes on reasonable grounds that the person's behaviour in the place as a result of the intoxication (referred to in this Part as ***relevant conduct***):

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

(b) is disorderly.

(2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:

(a) preventing injury or damage or reducing or eliminating a risk to public safety, or

(b) preventing the continuance of disorderly behaviour in a public place.

(3) The period during which a person may be directed not to return to a public place is not to exceed 6 hours after the direction was given.

(4) The other person or persons referred to in subsection (1) (a) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in.

(5) For the purposes of this section, a person is intoxicated if:

(a) the person's speech, balance, coordination or behaviour is noticeably affected, and

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

Appendix C. Sections 205 and 206, *Law Enforcement (Powers and Responsibilities) Act 2002*

Part 16 Powers relating to detention of intoxicated persons

205 Definitions

(cf *Intoxicated Persons Act 1979*, s 3)

In this Part:

authorised place of detention means:

(a) a police station, or

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

detention officer means a police officer, a correctional officer (within the meaning of the *Crimes (Administration of Sentences) Act 1999)* or a person in charge of or employed in a detention centre (within the meaning of the *Children (Detention Centres) Act 1987)*.

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

public place includes a school.

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

(a) a friend or family member, or

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

206 Detention of intoxicated persons

(cf *Intoxicated Persons Act 1979*, s 5)

(1) A police officer may detain an intoxicated person found in a public place who is:

(a) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or

(b) in need of physical protection because the person is intoxicated.

(2) A police officer is not to detain a person under this section because of behaviour that constitutes an offence under any law.

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

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

(3) An intoxicated person detained by a police officer under this Part is to be taken to, and released into the care of, a responsible person willing immediately to undertake the care of the intoxicated person.

(4) An intoxicated person detained by a police officer under this Part may be taken to and detained in an authorised place of detention if:

(a) it is necessary to do so temporarily for the purpose of finding a responsible person willing to undertake the care of the intoxicated person, or

(b) a responsible person cannot be found to take care of the intoxicated person or the intoxicated person is not willing to be released into the care of a responsible person and it is impracticable to take the intoxicated person home, or

(c) the intoxicated person is behaving or is likely to behave so violently that a responsible person would not be capable of taking care of and controlling the intoxicated person.

(5) An intoxicated person detained under this Part may be detained under such reasonable restraint as is necessary to protect the intoxicated person and other persons from injury and property from damage.

(6) This section does not authorise a responsible person into whose care an intoxicated person is released to detain the intoxicated person.

Appendix D. Frequency of section 9 offences by NSW Police Force Region and LAC

Region/LAC	No. of section 9 offences
CENTRAL METRO	**114**
Kings Cross	35
City Central	22
Surry Hills	17
Leichhardt	8
Eastern Suburbs	7
Miranda	7
St George	4
The Rocks	3
Botany Bay	3
Hurstville	2
Eastern Beaches	2
Redfern	1
Sutherland	1
Harbourside	1
Newtown	1
NORTHERN	**122**
Tweed-Byron	35
Richmond	17
Coffs-Clarence	16
Mid North Coast	14
Newcastle City	10
Lake Macquarie	9
Brisbane Water	6
Port Stephens	4
Manning-Great Lakes	4
Hunter Valley	3
Central Hunter	3
Tuggerah Lakes	1

Region/LAC	No. of section 9 offences
NORTH WEST METRO	**61**
Manly	24
Parramatta	9
Northern Beaches	7
Blue Mountains	4
Mt Druitt	3
Penrith	2
Holroyd	2
Kuring-Gai	2
Hawkesbury	2
Quakers Hill	1
Gladesville	1
The Hills	1
Eastwood	1
North Shore	1
Blacktown	1
SOUTHERN	**76**
Goulburn	16
Wollongong	9
Albury	9
Cootamundra	8
Wagga Wagga	7
Lake Illawarra	7
Deniliquin	6
Monaro	4
Griffith	4
Shoalhaven	3
Far South Coast	3

Region/LAC	No. of section 9 offences
SOUTH WEST METRO	**29**
Liverpool	12
Campbelltown	6
Fairfield	5
Rosehill	3
Bankstown	1
Green Valley	1
Flemington	1
SPECIAL SERVICES GROUP	**1**
NSW Marine Area Command	1
WESTERN	**81**
New England	22
Canobolas	17
Barrier	13
Barwon	7
Oxley	5
Castlereagh	5
Orana	4
Lachlan	4
Chifley	3
Mudgee	1
Total	484

Source: NSW Police Force – COPS. n=110,949 (number of move on directions issued between 1 October 2011 to 30 September 2012). We used Law Part Code 75587 to identify s. 9 offences.

Appendix E. Section 19, *Fines Act 1996*

19 Summary of penalty notice procedure

(1) The following is a summary of the penalty notice procedure under this Part:

(a) **Breach of statutory provision**
A person is alleged to have committed an offence under a statutory provision for which a penalty notice may be issued (see Division 2 and Schedule 1).

(a1) **Determine whether to give official caution rather than penalty notice**
The appropriate officer determines whether to issue a penalty notice or whether an official caution would be more appropriate (see Division 1A).

(b) **Issue of penalty notice**
If it is determined that it is not appropriate to give an official caution, a penalty notice is issued under the relevant statutory provision. The notice requires payment of a specified monetary penalty, unless the person alleged to have committed the offence elects to have the matter dealt with by a court (see Division 2 and Schedule 1).

(b1) **Internal review**
A reviewing agency may conduct a review of the decision to issue the penalty notice. If a review is conducted, the agency may withdraw the penalty notice or confirm the decision and issue a penalty reminder notice (see Division 2A).

(c) **Penalty reminder notice**
If the penalty is not paid, a penalty reminder notice is issued. The person who is alleged to have committed the offence may elect to have the matter dealt with by a court (see Division 3).

(d) **Enforcement order**
If payment of the specified monetary penalty is not made and the person does not elect to have the matter dealt with by a court, a penalty notice enforcement order may be made against the person (see Division 4). If the person does not pay the amount (including enforcement costs) within 28 days, enforcement action authorised by this Act may be taken in the same way as action may be taken for the enforcement of a fine imposed on a person after a court hearing for the offence (see Part 4).

(e) **Withdrawal of enforcement order**
A penalty notice enforcement order may be withdrawn if an error has been made (see Division 4).

(f) **Annulment of enforcement order**
A penalty notice enforcement order may, on application, be annulled by the State Debt Recovery Office or, if the Office refuses the application, by the Local Court. If the order is annulled, the alleged offence is to be heard and determined by the Local Court (see Division 5).

(2) This section does not affect the provisions of this Part that it summarises.

Submissions

Mr Mike Andrew

Anti-Discrimination Board NSW

Australian Hotels Association (NSW)

Central Coast Community Legal Centre

City of Sydney Council

Community Action Group (Revesby)

Mr Bryce Etheredge

Mr Neil S Hills

Homeless Persons' Legal Service

Hunter Community Legal Centre

Inner City Legal Centre

Juvenile Justice (now part of the Department of Justice)

Law Society of New South Wales

Mr Donald Low

Manly Council

Newcastle City Council

NSW Council for Civil Liberties

Ms Julie Passas

NSW Police Force

NSW Young Lawyers Criminal Law Committee

Office of the Director of Public Prosecutions

Police Association of NSW

Randwick City Council

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