

Review of the Local Nuisance and Litter Control Act 2016

Submission

September 2019

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Summary of recommendations

The LGA recommendations to the review can be summarised as follows:

1. noting that, for many councils, their expanded role in responding to nuisance issues in the community has required significant additional resourcing, the LGA recommends that no amendments that increase the role and responsibility of local government in responding to litter and nuisance complaints should be made unless:
 - a. they are supported by a clear policy basis and information and data that justifies the need for the change; and
 - b. a commitment from the State Government to adequately compensate or appropriately resource councils to undertake the additional responsibilities;
2. in relation to nuisance risks managed under other legislation, the LGA recommends that the EPA explore whether an amendment to the Local Nuisance and Litter Control (LNLC) Act may be needed to clarify that the conditions of a development authorisation are not a defence to an offence under the LNLC Act (except in certain circumstances). Alternatively, that the EPA explore whether a policy, guideline or practice direction may be able to provide further assistance to councils;
3. in relation to noise nuisance, the LGA recommends that the EPA develop a formal policy or guideline that acknowledges and reconciles the different thresholds established by the Environment Protection Act 1993 and the LNLC Act. Alternatively, that a process chart or procedure be considered for incorporation into regulations. The LGA recommends that these options be considered in consultation with local government bodies; and
4. in relation to abandoned shopping trolleys, the LGA recommends that a number of potential improvements to the LNLC Act be considered, such as:
 - a. Clarifying that the definition of “litter” includes abandoned shopping trolleys;
 - b. Clarifying that a litter abatement notice can be issued to the owner of the trolley, ie the retailer (not just the customer who has abandoned the trolley); and
 - c. Ensuring that councils have the power to require retailers to enter into management plans for the clean-up of abandoned shopping trolleys.

Introduction and background

About the LGA

The LGA is the voice of local government in South Australia, representing all 68 individual councils across the state. Our mission is to provide leadership to councils for the benefit of the South Australian community.

The LGA is recognised in the South Australian *Local Government Act 1999* for the purpose of promoting and advancing the interests of local government and is recognised in 29 other South Australian Acts of Parliament.

The LGA provides leadership, support, representation and advocacy relevant to the needs of our member councils. We also operate specific units/entities providing:

- Public liability and professional indemnity cover for all South Australian councils;
- Workers compensation cover for all South Australian council employees and associated local government bodies;
- Asset cover for South Australian councils;
- Extensive education and training, procurement, online services, and a research and development scheme.

As a constituent member, the LGA also advocates on federal issues through the Australian Local Government Association.

This submission has been informed by consultation with our member councils.

Local government's role in local nuisance and litter control

Prior to the introduction of the *Local Nuisance and Litter Control Act 2016* (LNLC Act), local government was responsible for managing some nuisance and litter issues through specific provisions of the *Local Government Act 1999* (in particular, in relation to illegal dumping, bill posting and unsightly conditions). However, the implementation of the LNLC Act significantly expanded the role of local government in responding to nuisance issues in the community. Local government is now responsible for responding to community complaints relating to noise, smoke, dust and odour. Previously, the Environment Protection Authority (EPA) was responsible for responding to complaints of this nature. The EPA remains responsible for responding to complaints relating to EPA licensed facilities.

Given that the nuisance provisions of the LNLC Act commenced on 1 July 2017, councils' annual reports for the 2017-18 year provide a useful snapshot of councils' increased workload in this area. Councils' experiences administering the LNLC Act may vary greatly depending on the nature of the council area. For example, the City of Charles Sturt (as a high density council area) appears to receive a large number of noise complaints whereas the City of Onkaparinga (as a lower density, peri-urban area) appears to receive a much greater proportion of littering complaints. Further, Port Adelaide Enfield's annual report for the 2017-18 year indicates that it received 872 nuisance complaints and 730 littering complaints in that timeframe. This may be due to commercial and industrial areas being located in close proximity to residential areas and the redevelopment of other residential areas leading to increased infill development.

Given this wide variety of experiences, the resourcing requirements for councils will also vary greatly. However, it is clear that for some councils their expanded role in responding to nuisance issues in the community has required significant additional resourcing. The City of Mitcham has advised that the number of litter and nuisance complaints received by council has increased tenfold since the commencement of the LNLC Act. Further, some councils have advised that community expectations for how their complaint will be dealt with seem to be higher when dealing with their local council than when dealing with a State Government agency.

A number of councils have advised the LGA that they have created a new position (1.0FTE) to manage responses to litter and nuisance complaints. When administration expenses are included, this equates to approximately \$100,000 in additional costs to councils. The LGA is intending to undertake further research in the 2019-20 year to quantify the additional cost imposed on councils in this regard. If resourcing requirements are found to be significant across all councils, there may be a case for the State Government providing ongoing funding to support councils in administering the LNLC Act.

Review of the LNLC Act discussion paper

In July 2019, the EPA released the “Review of the Local Nuisance and Litter Control Act 2016 discussion paper”. The discussion paper states that “The LNLC Act provides the community with a more effective and consistent local service for the management of nuisance complaints and heightened deterrence for littering and illegal dumping”.

The discussion paper describes the scope of the review as follows:

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

The discussion paper then identifies and seeks feedback on several issues and possible amendments that could be made to the legislation to address them.

The LGA held an information session for member councils on the review on 25 July 2019. The EPA presented on the review and gained some initial verbal feedback on the possible amendments being considered through the review.

It is worth noting that the feedback provided by councils to the LGA is that, in general, they do not support amendments to the legislation that will further increase the role and responsibility of local government in responding to litter and nuisance complaints.

Councils’ view is that no amendments that increase the role and responsibility of local government should be made unless they are supported by a clear policy basis and information and data that justifies the need for the change, along with a commitment from the State Government to adequately compensate or appropriately resource councils to undertake the additional responsibilities.

LGA feedback on the specific issues and possible amendments outlined in the discussion paper is set out below.

Separately, the discussion paper notes that the EPA and LGA have entered into a Service Level Agreement (SLA) for the provision of support services for environmental nuisance matters. The feedback provided by councils to the LGA is that they are generally happy with the support provided by

the EPA in relation to nuisance matters, they believe additional training sessions for council staff may be beneficial and they will continue to require this support for some time into the future.

1 – Local nuisance

The definition of local nuisance is set out in section 17 LNLC Act and further clarified in Schedule 1 of the LNLC Act. Section 17 states:

17 – Meaning of local nuisance

(1) *For the purposes of this Act, local nuisance is:*

(a) *Any adverse effect on the amenity value of an area that-*

(i) *Is caused by-*

(A) *Noise, odour, smoke, fumes, aerosols or dust; or*

(B) *Animals, whether dead or alive; or*

(C) *Any other agent or class of agent declared by Schedule 1; and*

(ii) *Unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area; or*

(b) *Insanitary conditions on premises that unreasonably interfere with or are likely to interfere unreasonably with the enjoyment of premises occupied by persons in the vicinity; or*

(c) *Unightly conditions, of a kind declared by Schedule 1, on premises caused by human activity or a failure to act; or*

(d) *A contravention of, or failure to comply with a provision of an environment protection policy, or of any other Act or law, declared by Schedule 1; or*

(e) *Anything declared by Schedule 1 to constitute local nuisance.*

But does not include anything declared by Schedule 1 not to constitute local nuisance.

Schedule 1 provides further clarification on how an “adverse effect on amenity” will be assessed, for example, Schedule 1 states that:

“odour generated on a premises will be local nuisance if an authorised officer forms the opinion that- (i) the odour has travelled to neighbouring premises; and (ii) the nature, intensity or extent of the odour is such as to constitute an unreasonable interference with the enjoyment of the neighbouring premises by persons occupying those premises.”

Section 18 creates two separate offences of causing local nuisance (one for intentionally or recklessly causing local nuisance and one for causing local nuisance without any element of intent).

Section 19 provides councils with the ability to declare exemptions from the application of section 18 for things like construction or demolition works, concerts or events or activities using amplified sound. The process of seeking and obtaining exemptions from the LNLC Act is discussed further below.

The discussion paper identifies a number of potential additions to the definition of local nuisance.

Potential additions to the definition of local nuisance

Light and heat - the discussion paper states that:

“Light and heat were included in the definition of local nuisance when the Bill for the LNLC Act was first consulted on in 2015 but subsequently removed prior to the Bill being introduced into

Parliament due to feedback from councils that the definition in the Bill was too broad. Since the Act has commenced there have been a number of councils who have indicated that being able to deal with light nuisance under the Act would be useful.”

The LGA is not aware of any councils wishing to expand the definition of local nuisance to include light or heat. Feedback received from councils to the LGA is that no amendments that increase the role and responsibility of local government should be made unless they are supported by a clear policy basis and information and data that justifies the need for the change.

Noise from vehicles - the discussion paper asks whether the exclusion relating to noise from vehicles should be amended to ensure nuisance from vehicles that are not associated with use on roads are able to be regulated as local nuisance?

The LGA is aware that some councils have, in the past, sought additional regulation of trail bike riding on public and private land. The LGA would support further discussions with councils as to whether noise from trail bike riding should be regulated as local nuisance.

Waste transport vehicles on private property

The LGA is not aware of any problem with the current operation of the LNLC Act in this regard.

2 – Not local nuisance

Schedule 1 also provides further clarification on things that are not local nuisance. Schedule 1 clarifies that things are not local nuisance if the risk of nuisance is adequately managed under other legislation (eg licenced or approved activities under the Environment Protection Act 1993, Development Act 1993 etc.), a complaints process is provided for under other legislation (eg Strata Titles Act 1988, Liquor Licensing Act 1997) or the nuisance is considered a reasonable feature in the community.

The discussion paper identifies a number of issues with the current list of things that are not local nuisance. The discussion paper also identifies a number of potential additions to the list.

Risk is managed under other legislation (ie licensed or approved activities)

In relation to the exclusion for things where the risk of nuisance is adequately managed under other legislation, there are a number of considerations that must be met before the exclusion applies.

For example, Part 3 of Schedule 1 (s. 5(d)) states that the following does not constitute local nuisance:

“noise or other nuisance from any other activity carried on in accordance with an authorisation (including an approval, consent, licence, permit, exemption or entitlement) granted under any other Act (other than this act), provided that-

- (i) the authorisation imposes requirements to control, minimise or eliminate (as far as reasonably practicable) any noise or other forms of nuisance likely to result from the activity; and*
- (ii) those requirements are complied with...*

Therefore, noise emanating from a business that is the subject of a development authorisation will be excluded but only if the development authorisation includes conditions that effectively address noise issues and only if those conditions are complied with.

This means that when it comes to enforcement the situation becomes quite complex.

If the development authorisation does not include conditions relating to noise, or does include conditions relating to noise but they are not effective or not complied with, then (as noted in the discussion paper) “both the Development Act 1993 and the LNLC Act could be applied to gain compliance”. The discussion paper does not identify or discuss the enforcement provisions in the Development Act 1993 but it is worth noting that there are no enforcement provisions that can be used by councils to achieve compliance without having to proceed to court action. This is a slow, costly and time consuming process and is therefore not effective as a response to many complaints.

For these reasons, it will likely be more straightforward to use the LNLC Act provisions (ie to issue the operator with a nuisance abatement notice). However, feedback from councils is that the nature of development authorisations is often used by operators to defend or excuse their behaviour making it very difficult for councils to proceed with the nuisance abatement notice process.

The LGA recommends that the EPA explore whether an amendment to the LNLC Act may be needed to clarify that the conditions of a development authorisation are not a defence to an offence under the LNLC Act. Alternatively, the LGA recommends that the EPA explore whether a policy, guideline or practice direction may be able to provide further assistance to councils in this regard.

A complaints process is provided for under other legislation (liquor licenses)

Noise or other nuisance emanating from a licensed premises within the meaning of the Liquor Licensing Act 1997 (LL Act) may be excluded under subsection 5(d) as a licensed or approved activity or may be excluded under subsections 5(k) and (l), which refer to the LL Act itself.

Bricks and mortar licensed premises

The discussion paper notes that:

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

The discussion paper asks whether noise and other nuisances, other than those related to entertainment and patrons, that are common to licensed and non-licensed premises, be dealt with under the LNLC Act. It may be appropriate to limit the exclusion for noise or other nuisance emanating from a licensed premises to those nuisances related to entertainment and the service of alcohol. The discussion paper notes that, in relation to something like a noisy air conditioner, the LNLC Act process may be more timely and more efficient. The LGA notes that it may also be fairer.

Section 106 of the Liquor Licensing Act only allows complaints to be made by the Commissioner of Police, the council for the area or a person adversely affected (but only if the complainant is authorised to make the complaint by at least 10 persons who reside, work or worship in the vicinity). This situation would seem to be particularly unfair if the noisy air conditioner is only affecting the residence immediately adjacent to the licensed premises. The LGA supports further consideration of this issue.

Outdoor events with a liquor licence

Separately, the discussion paper notes that:

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

The discussion paper asks whether the LNLC Act should be amended so that outdoor events can be subject to the local nuisance provisions even though some or all of the event space also requires a liquor licence. It is clear from the above paragraph that the exclusion only applies to the area that is licensed for the supply of liquor. The LGA does not support any change to the exclusion in this regard. It would not be appropriate to require or expect councils to action complaints relating to nuisances associated with entertainment and alcohol. This is the responsibility of SA Police.

It may be appropriate to limit the exclusion of noise or other nuisance emanating from a licensed premises to those nuisances related to entertainment and the service of alcohol. In relation to an outdoor event, it appears that councils would already have the power to deal with, for example, a noisy bouncy castle under the LNLC Act. Therefore, unless councils have taken a different view of this exclusion, it would seem that no amendment in relation to outdoor events is required.

Nuisance is considered a reasonable feature in the community

Part 3 of Schedule 1 (subsection 5(f)) states that “noise or other nuisance from sporting or associated activities at sporting venues” does not constitute local nuisance. This creates a regulatory “gap” in relation to some older motorsports venues that do not have a development approval or EPA licence.

The discussion paper asks whether the exclusion for sporting venues should be amended to remove motorsports venues from the exclusion allowing such activities to be regulated under the LNLC Act (noting that these venues would continue to be excluded if they were subject to a development approval or EPA licence). The discussion paper notes that currently the Environment Protection Act 1993 may still be used to regulate such issues. The LGA recommends that motorsports venues continue to be regulated under the Environment Protection Act 1993.

Potential subtractions from the definition of local nuisance

Dust - the discussion paper asks whether dust from unsealed roads should be prescribed as “not local nuisance” for the purposes of the LNLC Act. The discussion paper notes that councils are able to assist with nuisance dust from unsealed roads by erecting signage or reducing speed limits. The LGA is not aware of any problem with the current operation of the LNLC Act in this regard.

Noise from public infrastructure – the LGA is not aware of any problem with the current operation of the LNLC Act in this regard.

Early morning concrete pours – builders that wish to undertake early morning concrete pours are able to apply for an exemption from the application of section 18 under section 19 of the LNLC Act. However, there may be some efficiencies gained by automatically allowing early morning concrete pours above a certain temperature and after a certain start time to reduce the burden associated with both applying for and processing an application for an exemption. The LGA would support further discussion with councils and the construction industry in this regard.

3 - Subjective assessment of nuisance

Noise as a nuisance

As stated above, section 17 of the LNLC Act defines a local nuisance as any adverse effect on the amenity value of an area that is caused by (amongst other things) noise. Section 18 then creates offences of causing local nuisance.

As noted in the discussion paper, section 50 of the LNLC Act provides for subjective assessment of nuisance issues by allowing authorised officers to assess the presence of nuisance using their own senses. Specifically, section 50 states that “evidence by an authorised officer that he or she formed the opinion based on his or her own senses that [a nuisance is present] constitutes proof, in the absence of proof to the contrary, of those matters”.

Schedule 1 of the LNLC Act provides further guidance on the circumstances in which noise will be assessed as constituting a nuisance. Section 4 of Schedule 1 provides, for example, that noise will constitute a local nuisance if an authorised officer forms the opinion that:

- in the case of construction noise, the noise has travelled from the location of the construction activity to neighbouring premises- on any Sunday or public holiday; or after 7pm or before 7am on any other day; and
- the level, nature or extent of the noise (including its volume, pitch, vibrational frequency, prevalence or frequency of occurrence) is such as to constitute an unreasonable interference with the enjoyment of the neighbouring premises by persons occupying those premises.

In this way, the LNLC Act only specifically provides for the subjective assessment of noise nuisance and does not provide for any objective assessment of noise nuisance.

Separate to the regulatory framework for nuisance established by the LNLC Act, is the regulatory framework for the protection of the environment under the Environment Protection Act 1993 (EP Act) (and noise as a pollutant or cause of environmental harm).

Noise as a pollutant/cause of environmental harm

Section 25 of the EP Act sets out what is known as the “general environmental duty”, being that “a person must not undertake an activity that pollutes... the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm”.

Section 27 of the EP Act provides that “environment protection policies may be made as contemplated by this Act or for any purpose directed towards securing the objects of the Act”. Section 27 also states that an environment protection policy may “set out requirements, standards, goals and guidelines”.

The Environment Protection (Noise) Policy 2007 (Noise Policy) has as its objectives “(a) to set out procedures for measuring noise to determine compliance with the Act and this policy... (b) to fix noise goals for most noise sources compliance with which will satisfy the general environmental duty under section 25 of the Act...”. (emphasis added)

Section 18 of the Noise Policy provides that:

- (1) “*the general environmental duty under section 25 of the Act is satisfied in relation to noise from a noise source, insofar as the noise affects particular noise-affected premises, if the noise complies with the noise goals; and*”

- (2) *The noise complies with the noise goals if measurements taken in relation to the noise source and the noise-affected premises show that-*
- a. *The source noise level (continuous) does not exceed the background noise level plus 5 dB(A); or*
 - b. *The source noise level (continuous) does not exceed the indicative noise level for the noise source.”*

Therefore, the Noise Policy sets objective measures for noise levels that will not breach the general environmental duty under the EP Act. The Noise Policy does not make any statement regarding objective measures for noise levels that will or will not constitute a nuisance under the LNLC Act.

Interaction between the LNLC Act and the EP Act

The discussion paper states that:

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

The reference in the discussion paper to objective measurements appears to be a reference to objective measurements against the goals set out in the Noise Policy. The LGA is not aware of any other standards or benchmarks for objective measurements of noise.

This statement in the discussion paper ignores the fact that there are different thresholds for when noise will constitute a nuisance and when noise will constitute a pollutant or cause environmental harm. A noise level may be within the noise goals established by the Noise Policy but still be of a level or duration/frequency etc. such that it constitutes a nuisance under the LNLC Act.

This statement in the discussion paper effectively says that councils should use objective measurements against the goals in the Noise Policy in order to assess claims of noise nuisance under the LNLC Act. This is a new policy position of the EPA that does not appear in any formal policies. The LGA recommends that the EPA develop a formal policy or set of guidelines that acknowledges and seeks to reconcile the different thresholds established by the different regulatory frameworks. This would help to ensure a consistent approach across councils. The discussion paper suggests that a process chart could be developed and/or procedure incorporated into the regulations. The LGA supports consideration of these options in consultation with local government bodies.

4 – Litter

Clean up costs

The LGA supports exploration of an amendment to the LNLC Act to allow councils to recover clean-up costs of urgent clean-ups.

Bill posting

It is worth noting that election signs that are displayed on a road too early prior to an election, and/or are not removed quickly enough following an election, fall within the definition of “bill posting” under the LNLC Act (this is clarified by the *Local Nuisance and Litter Control Regulations 2017*). These provisions therefore enable expiation notices to be issued in relation to election signs that are displayed outside of authorised periods. Councils may also issue by-laws regulating the display of election signs. Some councils are of the view that current provisions do not provide effective enforcement mechanisms for regulating the display of election signs. The LGA will be undertaking further consultation with its members in coming months regarding the regulation of election signs.

The LGA is not aware of any other problems with the current operation of the bill posting provisions in LNLC Act.

Illegal dumping

The LGA supports further discussion of changes or initiatives that could assist councils in addressing illegal dumping in their communities. Illegal dumping costs councils millions of dollars every year. For any illegal dumping that occurs in a council area, councils are forced to pay twice – they have to pay clean-up costs and then they have to pay the solid waste levy on disposal.

As noted above, the LGA is intending to undertake research in the 2019-20 year to quantify the additional cost to councils of administering the LNLC Act. This research project will also consider the cost to councils of managing illegal dumping, particularly in light of the recent unprecedented increase in the solid waste levy.

Councils will contribute \$42.5 million through the solid waste levy in the 2019-20 year and a portion of this funding should be used to support councils in cleaning up illegal dumping in their communities. The LGA continues to seek a commitment from the State Government to making 50% of the money councils pay by way of the solid waste levy available to councils for worthwhile waste and recycling projects. Some of this funding could be used for reimbursement of clean-up costs for illegally dumped materials and/or to enable a waiver of solid waste levy payments on illegally dumped materials.

Abandoned shopping trolleys

The LGA understands that the issue of abandoned shopping trolleys is a persistent problem for some councils and is a concern for the community from an amenity, environmental and safety perspective. The LGA attended the City of Marion Shopping Trolley Summit in July 2018 and found this event to be a good example of collaboration both across the local government sector and with the community.

As a result of work undertaken in preparation for the Summit and for the LNLC Act review, it is considered that there are a number of potential improvements that could be made to the LNLC Act as it relates to abandoned shopping trolleys, such as:

- Clarifying that the definition of “litter” includes abandoned shopping trolleys;
- Clarifying that a litter abatement notice can be issued to the owner of the trolley, ie the retailer (not just the customer who has abandoned the trolley); and
- Ensuring that councils have the power to require retailers to enter into management plans for the clean-up of abandoned shopping trolleys and have effective compliance and enforcement options available to them.

The LGA understands that a number of South Australian councils are considering introducing by-laws to address the issue of abandoned shopping trolleys specifically. The LGA believes that reform should be pursued at both State and local government level, as this will provide councils with the most flexibility to find a solution that best suits their community as a whole.

5 – General discussion points

Abatement notices - the LGA is not aware of any problem with the current operation of the LNLC Act in this regard.

Improving cost recovery - the LGA is not aware of any other mechanisms for cost recovery that should be considered for the LNLC Act.

Which court? - The LGA supports the Environment, Resources and Development Court (ERD Court) continuing to have jurisdiction in relation to LNLC Act matters.

Administrative appeals - the LGA does not have a view on whether the ERD Court or SACAT should hear administrative appeals on LNLC Act matters.

Timeframe for exemptions - the LGA is not aware of any problem with the current operation of the LNLC Act in this regard.



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