education regulations increases the right of teachers to interpret this behaviour as justification for suspension from school.

The rights of suspended school students need to be given equal consideration by the anti-swearing policy. Mechanisms that ensure students suspended for exhibiting such behaviour are able to recognise and manage the reasons for their actions need to be included as an effective part of a policy that targets violent verbal abuse. If not, such a policy will target inappropriate behaviour in order to get rid of the 'troublemakers' and will not consider the causes of or reasoning behind the verbal abuse. Trouble makers too have the right to be educated.

Addressing issues with an attitude of zero tolerance makes use of 'trendy' terminology and may even present to the public eye a stronger commitment to dealing with these issues. However such a policy needs to be handled with care in order to ensure that the rights of all parties involved are seen to be included and balanced and not ignored as a slogan like 'zero tolerance' can suggest.

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References

1. *A Current Affair*, 1 July 1999.
2. *A Current Affair*, 1 July 1999.
3. South Australian Consolidated Regulations, Education Regulations 1997 — Regulation 40, Suspension of Students.

ADMINISTRATIVE LAW

By the by!

MARY-LYNN GRIFFITH asks: is the punishment of sleeping by the Darwin City Council legitimate?

By-law 103 of the *Darwin City Council By-laws* (by-law 103) provides among other things:

> 103: CAMPING OR SLEEPING IN PUBLIC PLACE
>
> (1) A person who ... sleeps at anytime between sunset and sunrise, in a public place otherwise than in a Caravan Park ... or in accordance with a permit, commits an offence.
>
> (2) An offence under clause (1) is a regulatory offence.[1]

The front page of the *Northern Territory News* (21 June 1999) reported that 62 homeless people were gaoled between January and June of this year for sleeping on public beaches and in public areas within the Darwin municipality, and failing to pay their $50-a-pop fines issued under by-law 103.

George Brown, the Lord Mayor of Darwin, said in that article: 'The by-law regarding sleeping in public places is about public safety. We have to protect the community and that's why we have these by-laws.'

By-law 103, while potentially jeopardising the freedom of a number of public-area-dwelling groups such as backpackers, is largely enforced against Aboriginal groups, a fact acknowledged by the Lord Mayor, who said in the same article:

> I believe that most of the people gaoled for sleeping in public are Aboriginal people who come from places like Groote Eylandt. A lot of people think they don't have to pay the fines but they do have the facility to pay. It's just that when they come into town they spend all their money on grog.

Background of by-law 103

In the last few years campaigns against itinerants (also referred to as the 'homeless', 'longrassers' and 'campers') have been mounted by politicians, the business community, and pursued and supported by some sections of the media. In 1996 such a public campaign was mounted, said to have been 'to some extent orchestrated by the demands of Lord Mayor, George Brown, to "harass" itinerants (most of whom are Aboriginal people) back to their communities'.[2]

Criminalising poverty

There is something reminiscent of by-law103 in the old offence of vagrancy. In the Northern Territory, under s.56(1) of the *Police and Police Offences Ordinance* (NT) 1923 (repealed in 1973), a person could be deemed idle and disorderly and found guilty of an offence and serve up to two months in gaol for 'having no visible (or insufficient upon inquiry by the Justice) means of support ...' Other offences in the nature of 'public order' offences remain in archaic forms in the *Summary Offences Act* (NT). The current by-law 103, if not penned in the same terms, seems certainly to be enforced similarly against the poor and homeless.

At a beach meeting held in June 1999 between Aboriginal campers and a variety of community agencies and local lawyers, campers confirmed that the City Council patrolling of the beaches around Darwin and other public places had increased dramatically in the last year. According to one senior officer at the Council, the Public Places patrol officers are rostered on five days a week over a 13-hour day.

The increase in patrolling is also reflected in the number of infringement notices issued. In the same *Northern Territory News* article, reference is made to a Report to the Community Services Committee that showed that the number of infringements issued from June 1997 to May 1999 (for offences in public places including sleeping in a public place) was just over 1800. The 62 imprisonments were reported to have resulted from the issue of 108 infringement notices under by-law 103.

TINES enforcement — the greater evil

The jeopardy of imprisonment of the homeless is inevitable given the choice of the council to enforce by-law 103 by way of infringement notice under the *Justices (Territory Infringement Notices Enforcement Scheme) Regulations* (TINES), a scheme created under Regulations to the *Justices Act* (NT).

The notice does not immediately convert to a warrant for imprisonment. If payment (currently $50 for sleeping out) is not received within 14 days of the issue of the notice, the Council must issue a 'courtesy letter'. The 'courtesy letter' adds on costs and gives the recipient 28 days to pay the increased amount or to notify the Council that they wish the matter to be referred to the court.

Very few itinerant people even receive the courtesy letter. The courtesy letters go to the recipient's stated address, which may be a remote community, or care of a Post Office. As personal service is not required, much of the correspondence is never received. North Australian

Aboriginal Legal Aid has reported that, given low literacy in bush communities, many of its clients who have received TINES notices and courtesy letters simply cannot read them.

If no response to the courtesy letter is received the matter proceeds to warrant and enforcement. The entire process adds on to each offence costs of $105 prescribed under regulation 4 of the *Justices (Territory Infringement Notices Enforcement Scheme) Regulations*. Under TINES, fines cannot be converted into community service or installment orders. Default of payment must eventuate in imprisonment. The current ratio of imprisonment is one day in respect of each $50, or part thereof, of the amount remaining unpaid: regulation 5 of the Regulations. Therefore, a single offence of sleeping out exposes a person to a total fine of $155 (including costs) and, in default of payment, imprisonment of four days.

Local government legislation defences

By-law 103(2) prescribes the offence created by by-law 103 as regulatory, but defences are available and prescribed in the *Local Government Act* (NT) (LGA):

> 192 (2)(ii) It is a defence to prosecution if the defendant proves on the balance of probabilities, that the offence occurred in an emergency...

or

> 192 (b)(ii) the defendant did not intend to commit the offence and ... took all reasonable steps to ensure that it was not done ...

Given that the offence is created by 'sleeping', lack of *mens rea* or intent could also be raised as a defence.

In an ABC radio broadcast in June 1999, Alan Magill, an officer of the Darwin City Council, confirmed that no-one had to that date defended their case in the courts. It was clear from the meeting with campers in June that none were aware or had been made aware of the possibility of having their matters dealt with by a court.

Administrative law remedies: 'partial and unequal'?

The Council derives its by-law-making power from the LGA which empowers the Council to make by-laws: 'for or in relation to the performance of a function vested in it ... ' (s.182 (1)).

A function of the Council enumerated in schedule 2 of the LGA is Control of Public Places. By-law 103 is located at Part 4 of the *Darwin City Council By-laws*, headed: PUBLIC PLACES. So it would appear that the Council is relying on its designated function of 'Control of Public Places' in creating by-law 103.

But does the creation of the regulatory offence of sleeping out under by-law 103 and its subsequent TINES enforcement, go beyond the function of 'control of Public Places'. Are there no limits to the type of by-laws that a municipal council can make in exercising its prescribed functions?

The rules for determining the validity of delegated legislation, such as municipal by-laws have been canvassed in many cases.[3] Of particular interest in the case of by-law 103 is the issue of 'unreasonableness'. Courts have trod carefully in this kind of scrutiny for fear of encroaching on the arena of policymakers. In *Kruse v Johnson* [1898] 2 QB 91 at 99, Lord Russell CJ held that by-laws 'ought to be ... "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered'.

However, Lord Russell did not rule out invalidating by-laws on the grounds of unreasonableness altogether, continuing (at 100):

> If for instance they [the by-laws] were found to be *partial and unequal in their operation as between different classes*; if they *were manifestly unjust*; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires. [emphasis added]

It is clear that the effect of by-law 103 has been to operate against a majority of Aboriginal campers, including people from communities who find themselves homeless when they come to Darwin. The statements made by the Lord Mayor, George Brown, confirm that it is well known to him (and thus the Council) that Aboriginal people who are homeless are affected by this by-law more than other groups (such as backpackers and the like). This is particularly reflected in his urging that itinerants be 'harassed' back to their communities. Campers at the June meeting felt they got tickets and not the 'white long grass mob'. It also clear that the TINES enforcement operates unfairly against the homeless and the illiterate.

It is my view that the by-law *can* be seen to be 'partial and unequal in its operation as between different classes', and 'manifestly unjust' and therefore unreasonable and ultra vires.

Availability of permits?

By-law 103(1) provides that an offence occurs by sleeping '... between the hours of sunset and sunrise ... in a public place otherwise than in accordance with a permit' (emphasis added).

Darwin Community Legal Service has assisted 16 people to apply for permits under by-law 103. The Darwin City Council has refused to grant any of the permits applied for by these campers, the stated reason being: 'The overall community view expressed to Alderman [sic] is that this activity [camping or sleeping in public places within the municipality] is not wanted or accepted'.

The Council has, however, reportedly granted sleeping out permits to groups such as the Scouts.

Conclusions

Vagrancy was repealed as an offence in 1973. The creation and utilisation of by-law 103 against itinerants, and the resultant inevitable incarceration of the homeless, particularly Aboriginal homeless, is a frightening example of the use of by-law powers to control behaviour of the public and an apparent re-invoking of the criminalisation of poverty. Enforcement of such offences by way of infringement notice affords little opportunity to be heard to the illiterate and the homeless. Council has invoked the by-law in an effort to reportedly 'clean up the streets' in reaction to 'community concerns'.

The *real* concerns for our community must be the imprisonment of these other members of our community for being homeless, illiterate, poor, and ... of sleeping.

There is an urgent need to scrutinise by-law 103 both in the Courts and in our community as a whole to determine whether by-law 103 is, in *any* sense, legitimate.

Mary-Lynn Griffith is a solicitor at Darwin Community Legal Centre.

North Australian Aboriginal Legal Aid Service is currently looking at cases with a view to challenging the validity of the by-law.

References

1. The full provision is as follows:
   (1) A person who —
   (a) camps;
   (b) parks a motor vehicle or erects a tent or other shelter or places gear or equipment for the purposes of camping or sleeping; or
   (c) being an adult, sleeps at anytime between sunset and sunrise, in a public place otherwise than —
   (d) in a caravan park or camping area within the meaning of the *Caravan Parks Act*; or
   (e) in accordance with a permit, commits an offence.
   (2) An offence under clause (1) is a regulatory offence.
   (3) An authorised person may direct a person who is or who has contravened clause (1) to do one or both of the following:
   (a) leave the public place; or
   (b) remove any motor vehicle, tent, shelter, gear or equipment to a place specified by the authorised person, and the person shall comply with the direction forthwith.
   (4) a person who fails to comply with the directions of an authorised person under clause (3) commits an offence.
   (5) a person who, whether alone or together with others, obstructs or by his or her or their presence intimidates another member of the public from using a public shelter, ablution facility, water supply, barbecue or fireplace commits an offence.
2. Tyler, Jablonka and Flick, 'Making Space: A Report to the Darwin City Council on Young People, Anti-Social Behaviour and Community Response', Centre for Social Research, Northern Territory University, 1998; p.2.
3. A good summary of these cases appears in Douglas and Jones, *Administrative Law Commentary and Materials,* Federation Press, 3rd edn, chapter 8 'Delegated Legislation'.

SAME-SEX RELATIONSHIPS

Law reform happens

NSW Attorney-General JEFF SHAW QC gave this Opening Address to a Young Lawyers Seminar on the Property (Relationships) Legislation Amendment Act 1999, on 25 August 1999.

The *Property (Relationships) Legislation Amendment Act 1999* (NSW) is a significant development towards a non-discriminatory regime of property relationships.

Part of the background to this legislation lies in Australia's international human rights commitments, in particular, the International Covenant on Civil and Political Rights (the ICCPR).

The Gay and Lesbian Rights Lobby has been instrumental in drawing the attention of the general community and the government to the manifestly unfair ways in which the legal system has treated gays and lesbians in New south Wales.

A publication of the Gay and Lesbian Legal Rights Service, *The Bride Wore Pink*, in 1992, which described in systematic detail the discrimination suffered at the hands of the law by gays and lesbians, brought the issues addressed in the *Property (Relationships) Legislation Amendment Act* fully to public attention. Work by the Anti-Discrimination Board and the AIDS Council of NSW helped to keep these issues before the attention of the public and government.

Developments in the Australian Capital Territory were a further influence in the creation of the legislation. In 1994, following a Discussion Paper concerning the rights of people living in domestic relationships, the ACT government enacted a *Domestic Relationships Act* which provided for property redistribution on the breakdown of a number of domestic relationships. It defined 'domestic relationship' to mean 'a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage'. This definition incorporated a range of intimate relationships not then covered by the NSW *De Facto Relationships Act 1984* including relationships of a caring nature between relatives and same-sex couples.

Meanwhile, a number of cases were coming before the courts which reflected the facts of life for many gay and lesbian couples. Notable cases included those pursuant to the *Family Provisions Act* where gay couples were required to leap through the hoop of proving dependency to get relief from the court where other de facto couples would only be required to establish the relationship existed. In another, a gay couple and the child of one of them had to make out a claim of discrimination before their health fund was prepared to concede that they could constitute a family for the purpose of health insurance.

These issues were acknowledged by the Premier, whilst in Opposition, in correspondence with the AIDS Council of NSW, when he made the commitment reflected in the *Property (Relationships) Act* that if elected to government the Labor Party would move to end discrimination against gays and lesbians in areas relating to the death of a partner and the incapacity or hospitalisation of a partner.

In accordance with the government's general policy commitment to the ending of discriminatory laws, legislation was drafted, which comprehensively extended the rights and obligations of couples in heterosexual de facto relationships to other domestic relationships between adult persons. However, the vagaries of politics at that time, manifested in the composition of the Upper House, stymied attempts to introduce a Bill in Parliament during the government's first term.

After the 1999 election, the political climate was such as to make this important law reform viable.

This new law is at the vanguard of rights for gays and lesbians in this country and has been recognised as such by social and legal commentators. I accept that its scope may need to be expanded, and this is a topic being explored by the Legislative Council's standing committee on Law and Justice.

Justice Michael Kirby, AC, CMG, in a recent address to the London Conference on Legal Recognition of Same-Sex Partnerships organised by the Law School of King's College, London, reflected on the pressures for reform in this area and the impact of the NSW *Property (Relationships) Legislation Amendment Act.*