Legal Aid
NEW SOUTH WALES

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The Director
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir or Madam

Re: Inquiry into the *Inebriates Act 1912*

Introduction

I refer to your letter dated 30 September 2003 inviting the Legal Aid Commission to make a submission on the issues raised by the terms of reference of your current inquiry into the *Inebriates Act 1912.*

The treatment of persons with severe alcohol or drug dependence is a matter of interest to this Commission, which provides legal services to socially and economically disadvantaged people, including people with drug and alcohol problems. The services we provide include representation in criminal law matters and, within our civil program, a specialist mental health advocacy service representing persons in proceedings under the *Mental Health Act 1990,* the *Mental Health (Criminal Procedure) Act 1990,* the *Guardianship Act 1987* and the *Protected Estates Act 1983.*

The *Inebriates Act*

The *Inebriates Act* gives the Supreme Court, District Court or Local Court the power to make a range of orders in respect of "inebriates". An order may be made that the inebriate:

- enter into a recognizance that he or she will abstain from alcohol or drugs for a specified period of at least 12 months
- be placed for a period of up to 28 days under the care and control of a named person
- be placed in an institution for a period of up to 12 months, or
- be placed under the care of a guardian for a period of up to 12 months.

The legislation also provides that an inebriate convicted of an offence of which drunkenness is an ingredient may

- be sentenced according to law
- be discharged conditionally upon entering into a recognizance to be of good behaviour and refrain from taking drugs or alcohol, or
- be placed in a State institution for a period of 12 months.

In the Commission's experience applications under the *Inebriates Act* are brought in the Local Court and the only orders generally made under the legislation are for the inebriate to be placed in a State institution.

The *Inebriates Act* is a little used piece of legislation which gives Magistrates a means of imposing a period of enforced abstinence on a person who is in imminent danger of drinking themselves to death. Legal Aid solicitors with many years experience appearing in Local Courts report only a handful of *Inebriates Act* matters in which they have been involved. This low level of use reflects the deficiencies in the legislation; the fact that it is used at all indicates the desperate need for some way of intervening to prevent the deaths of the comparatively small number of alcoholics whose drinking is at a crisis point.

The Guardianship Tribunal

When faced with some one at imminent risk of death from alcohol abuse, notwithstanding the deficiencies of the legislation, the only option for a relative or other concerned person is an application for an *Inebriates Act* order.

The *Guardianship Act 1987* gives the Guardianship Tribunal the power to make orders for the care and treatment of people with disabilities. However, the Tribunal does not regard alcoholism or other addictions as disabilities within the meaning of the Act, and will not make an order solely on this basis.

Alcohol related brain damage and similar illness may be disabilities as defined in the Act, giving the Tribunal jurisdiction to make orders about the placement and treatment of the person. However, even if the Guardianship Tribunal is able to make an order for treatment of an inebriate, there are no suitable places where inebriates can be involuntarily detained and appropriately treated.

Limitations of the current legislation

The *Inebriates Act* has a number of problems which limit its effectiveness in helping chronic alcoholics. However, the legislation can be used to save the lives of people near death from alcohol abuse, when no other course of action is available. The Commission's view, therefore, is that the legislation should not simply be repealed but should be replaced with new legislation which provide a more effective regime for the involuntary treatment of alcoholics and, possibly, drug addicts.

Some of the shortcomings of the current legislation, which should be addressed in any amended legislative scheme, are discussed below.

Definition of inebriate

An inebriate is defined in the Act to mean "a person who habitually uses intoxicating liquor or intoxicating or narcotic drugs to excess." This definition is overly simplistic, and does not recognise that there are different forms of alcohol abuse, including binge drinking, chronic heavy drinking and drinking by people who are dependant or addicted. The appropriate form of treatment for an inebriate would depend on which category their drinking fell into.

Despite the wide definition of "inebriate", in the Commission's experience, orders are generally sought and made in respect of persons who are addicted and in imminent danger of death from alcohol abuse. It is recommended that any new legislative scheme of involuntary treatment should be limited to this category of persons.

Suitable treatment facilities

A major practical difficulty in using the legislation is finding a hospital willing to take an inebriate pursuant to an order.

The current Act provides for the establishment of institutions for "the reception, control, and treatment of inebriates." It is not known whether such institutions were ever established; there are none operating at the present time. Inebriates who are ordered to be placed in an institution are detained in psychiatric hospitals whose programs are designed for mentally ill people. Psychiatric hospitals are not able to provide suitable treatment for inebriates, and are often reluctant to accept them, because the inebriates are disruptive and the hospitals do not have any suitable treatment to offer for them. Inebriates often end up placed in a locked ward to prevent them absconding and obtaining alcohol. This is the least appropriate place in the hospital for these patients.

The initial stage of treatment for an alcoholic is detoxification. This can be a dangerous process and should occur in a medical ward, not a psychiatric hospital.

There are specialist drug and alcohol rehabilitation programs, for example, the William Booth Program, which are probably far more effective in treating an alcoholic or drug addict than a state run institution. However, these facilities are not set up to take involuntary patients. Although there is power to order an inebriate to enter into a recognizance, or be placed under the care of a guardian, it has not proved practical to use these types of orders to place inebriates in drug or alcohol treatment facilities. The structure of these orders is probably not sufficiently flexible and is out of step with modern approaches to treatment of drug and alcohol addiction.

Any scheme to replace the current legislation should include the establishment of suitable facilities for the short term involuntary treatment of alcoholics, and make provision for longer term follow up treatment in residential rehabilitation facilities.

Lack of flexibility

One of the major limitations of the Act is the lack of flexibility. An order placing an inebriate in hospital is made by a Magistrate. The order will typically be for 12 months. In the case of a person convicted of an offence, the Magistrate has no discretion; if he or she chooses to make an order placing the inebriate in an institution, the order must be for 12 months. This offends the modern view of treatment for addiction which requires that treatment be given in the least restrictive environment consistent with proper care. There may be some justification for short term emergency intervention, but not a 12 month enforced abstinence.

In accordance with current practice, hospitals usually wish to discharge inebriates within a few weeks when they have withdrawn from alcohol, and any related mental states have settled. The approval of the committing Magistrate is needed, and will often not be given except with conditions which are impossible to fulfil as they will often relate to placement in a suitable residential program. Being detained in the psychiatric hospital may prevent an inebriate having access to more appropriate treatment in the community.

Any new scheme to replace the *Inebriates Act* should have no mandatory fixed term for an involuntary treatment order for persons convicted of criminal offences. Courts should have the discretion to make the order that is most appropriate.

The scheme should include clearly stated guiding principles, including: when there are a range of possible orders or treatment regimes available, the least restrictive alternative consistent with proper care should be chosen.

Scope of an order

It is unclear what powers an order gives to the institution in which the inebriate is placed. The legislation is unclear about whether an order gives the hospital the power to treat. There is no mention of treatment in the Act. It is also unclear what is meant by detention and what level of security the hospital is required to provide. There is no mention of leave, so it is unclear whether this is permissible. Any replacement scheme should clearly set out the powers an institution has in dealing with an inebriate placed in its care.

Establishing that the person is an inebriate

Another matter of concern is the ease of establishing that a person is an inebriate as defined by the Act. All that is required is a certificate of a medical practitioner that the person is an inebriate, together with the corroborative evidence of one other person, and personal inspection of the inebriate by the

Magistrate. There is no requirement that the medical practitioner have any specialist qualifications, and very little guidance is provided to the medical practitioner by the definition of inebriate in the Act. There in no requirement for the medical practitioner to certify that the inebriate will benefit from an order being made.

Drug addiction

Orders under the *Inebriates Act* are usually made in situations where a person is in a life-threatening situation as a result of alcohol abuse. However, *Inebriates Act* orders can be made in respect of people who are drug addicted, and some of the Commission's solicitors are aware of Magistrates attempting to use the legislation in these circumstances. With the availability of many diversionary schemes and drug specific treatment facilities, an *Inebriates Act* order is not an appropriate option for drug addiction.

If the current legislation were replaced with a more flexible regime which provided for a person in life threatening circumstances to be stabilised and then released into community based programs, it may be appropriate for the scheme to be available for users of drugs other than alcohol.

Young people

The Commission is not aware of any examples of the *Inebriates Act* being applied to young persons. However, an order *could* be made in respect of a young person. In any replacement scheme, it would be appropriate to make it clear that different considerations to apply to juveniles and adult inberiates.

The Australian Law Reform Commission in its Report No 84, *Seen and heard: priority for children in the legal process,* recommended that police should avoid detaining intoxicated juveniles in police cells (Recommendation 222). Instead facilities should be established where intoxicated children can be monitored medically, kept from harming themselves and have their health needs met. Similar considerations should apply to facilities established for the placement and treatment of inebriates. Facilities for young people should be separate from facilities established for adults, and have programs designed to meet the particular needs of young people.

Case studies

The experiences of Robert and Craig, clients of the Commission's Mental Health Advocacy Service, and Andrew, a client of one of the Commission's regional offices, which are described in the case studies below, demonstrate some of the shortcomings of the legislation.

Case study 1 – Robert

Robert was a man in his 40s with a long history of excessive alcohol and other drug use. On a number of occasions Robert had entered his mother's house and collapsed. On each of these occasions she had him admitted to the local hospital. Robert was also found collapsed at a boarding house. There was a significant concern that during one of these episodes Robert would die by drowning in his own vomit.

Robert was, at this time, also on a high dose of methadone. He had broken his wrist in a bad fall while intoxicated and required further surgery. The doctors were unwilling to perform this surgery due to his constant intoxication.

In 1995 a 12 month *Inebriates Act* order was made at the request of his mother. Initially Robert was detained in an acute ward in a psychiatric hospital. The hospital felt that this was clearly inappropriate as he had no mental illness and they had no treatment to offer him.

Arrangements were made for Robert to be accepted into a residential therapeutic community. An application was made to the Magistrate who had made the initial order for discharge to allow this to take place. The Magistrate did not revoke the order but amended it to allow Robert to conditionally reside in the community. Any breaches of the community's rules or use of alcohol was to be reported to him and the release would be revoked. It is doubtful whether the Magistrate in fact had the power to amend the order in this way. Robert broke a condition of his release almost immediately and was quickly returned to hospital for the balance of the order.

Robert made an application to the Supreme Court for the order to be revoked. The Court declined to do this, but amended the order to allow Robert to be detained in hospital or a suitable residential rehabilitation service approved by the medical superintendent. As no suitable alternative was found, Robert spent the balance of the 12 months in locked wards of the psychiatric hospital. There was no suitable program for Robert, and he was discharged to private accommodation at the end of the period.

Robert has also been the subject of a guardianship order (later revoked) and an ongoing financial management order. On at least one occasion since his release from hospital Robert was unable to attend Guardianship Tribunal hearings because he was so intoxicated he could not get out of his mother's car. He has also been extremely intoxicated on occasions when he has telephoned his Mental Health Advocacy Service solicitor. As against that, he has also had periods when he claimed to be alcohol free for six months or more.

The Commission is unaware of Robert's long term progress.

It is probable that Robert's life was saved by the initial *Inebriates Act* order. However, once the crisis had passed Robert received no appropriate treatment and was detained in a locked ward with severely psychotic people. This provided no benefit for Robert, but he did occupy a badly needed hospital bed.

Case study 2 – Craig

Craig, a man in his 30s, came into hospital under an *Inebriates Act* order. He appeared to be suffering a manic episode as well. He was initially detained in a locked psychiatric rehabilitation ward. The hospital did not believe it had the authority to give him medication for his mental illness, as the *Inebriates Act* makes no mention of this. Craig attempted to escape from the hospital by digging and climbing under a fence, and in doing so severely lacerated his arm.

Craig was subsequently scheduled under the *Mental Health Act 1990* and a temporary patient order obtained. Once this was in place, a letter was written to the Magistrate requesting that the *Inebriates Act* order be revoked. This was agreed to.

Craig was treated for his mental illness and subsequently discharged from hospital.

The Commission has heard that Craig has since died, but we are not aware of the circumstances.

Case study 3 – Andrew

Andrew, a young man in his early 20s, was a client of one of the Legal Aid Commission's criminal law solicitors based in one of our offices in a regional centre. Andrew had been taken to Emergency a number of times following overdoses. He had been a violent and difficult patient. The local hospital staff made an application under the *Inebriates Act* and an order for 12 months was made. Andrew's family, who were opposed to the making of the order, instructed the Legal Aid solicitor to lodge an all grounds appeal. When the appeal was lodged, the order was stayed, but Andrew was granted bail subject to a condition that he reside at the hospital. When the medical superintendent was advised that the order was stayed, he discharged Andrew, contrary to the bail order. Andrew overdosed a week after being discharged.

The medical superintendent commented to the Legal Aid solicitor that persons subject to *Inebriates Act* orders disrupt the running of the hospital, and voluntary psychiatric patients discharge themselves because of the disruption. In his opinion, gaol was a better place for people like Andrew.

Need for replacement legislation

There are a small number of people whose alcoholism is so out of control that they are in imminent danger of dying. In these situations people feel a need to intervene, and Magistrates will take what measures are available to them to prevent those people's deaths. Unfortunately, the remedy currently available is far less effective and more restrictive than it could be.

There is a justification for some form of short term detention in an appropriate facility to deal with situations where a person is at imminent risk of dying from alcohol abuse. This detention should be for a short time only. Two weeks would be sufficient to stabilise the person. The detention should be in an

appropriate medical detoxification unit. Proper longer term follow up, including residential rehabilitation, would need to be available to make the process meaningful. It may be appropriate for any scheme for the treatment of inebriates to include a limit on the number of admissions.

If a scheme incorporating the features discussed in this submission was implemented, the *Inebriates Act* could be repealed. Until then it should be retained to provide a safety net for alcoholics whose drinking is bringing them close to death.

Further information

Thank you for the opportunity to comment on this legislation. If you require any further information please contact Sally McAtee of the Commission's Legal Policy Unit by telephone on (02) 9219 5034, or e-mail Sally.Mcatee@legalaid.nsw.gov.au.

Yours faithfully

Steve O'Connor
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