

ISSUES PAPER 3

Powers to Exclude Members and Patrons

INQUIRY INTO MONEY LAUNDERING THROUGH
ELECTRONIC GAMING MACHINES IN LICENSED PREMISES IN NSW

5 August 2022



New South Wales
Crime Commission

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ISSUES PAPER 3: Powers to Exclude Members and Patrons

The purpose of this issues paper is to seek information relevant to the Inquiry into Money Laundering through Electronic Gaming Machines in Licensed Premises in New South Wales (the Inquiry). The Inquiry is being conducted by the NSW Crime Commission in conjunction with the Australian Criminal Intelligence Commission (ACIC), the Independent Liquor and Gaming Authority (ILGA) represented by Liquor & Gaming NSW, and the Australian Transaction Reports and Analysis Centre (AUSTRAC), with assistance from other law enforcement agencies.

This paper focuses on issues relating to the exclusion of individuals from licensed clubs and hotels on the basis of suspected money laundering behaviours. The Inquiry has received information suggesting that some venues may find it difficult to exclude patrons from their premises as they consider the legal position with respect to exclusions and bans based upon suspected money laundering is unclear or difficult to put into practice.

This issues paper is informed by current information, is not intended to be prescriptive or exhaustive and should be read with the Inquiry [Terms of Reference](#).¹ The questions at the end of the issues paper are intended to guide persons who wish to make submissions to the Inquiry in response to the specific issues raised.

The issues paper is seeking to elicit additional information regarding the subjects that have been raised; however, the raising of a matter in this paper does not necessarily indicate that it will be the subject of findings or recommendations in any report arising from the Inquiry. Any submissions made in response to this issues paper will be assessed in light of other material and evidence gathered during the course of the Inquiry.

¹ Terms of Reference: www.crimecommission.nsw.gov.au/inquiry-into-money-laundering-in-pubs-and-clubs

1. Background: why is this issue relevant?

All licensed clubs and hotels in NSW with one or more approved EGMs are reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (*AML/CTF Act*). This means, at a minimum, they must enrol with the Australian Transaction Reports and Analysis Centre (AUSTRAC), keep certain records and, when necessary, give reports to AUSTRAC about suspicious matters, known as Suspicious Matter Report (SMRs).² Therefore, any venue in NSW which operates an EGM is required to submit an SMR to AUSTRAC if they suspect on reasonable grounds that a person has engaged in money laundering or any other conduct triggering the reporting obligations in s. 41(1) of the *AML/CTF Act*.

Once a club or hotel forms a suspicion requiring an SMR to be given, additional legal obligations arise, including a requirement to not commit the “Offence of tipping off”.³ Section 123(1) of the *AML/CTF Act* prohibits reporting entities from disclosing to a person other than an “AUSTRAC entrusted person” that they have submitted or are required to submit an SMR; or any information from which it could reasonably be inferred that they have submitted or are required to submit an SMR. Failure to adhere to this requirement is a criminal offence.⁴

There are exceptions to the offence of tipping off in the *AML/CTF Act*. Examples of potentially relevant exceptions for clubs and hotels include when the disclosure is:

- to a legal practitioner and for the purpose of obtaining legal advice;⁵
- to a person appointed or engaged to audit or review the venue’s anti-money laundering and counter-terrorism financing program;⁶
- made by one member of a corporate group to a related body corporate, or by one member of a designated business group to a related person, for the purpose sharing information about the risks involved with the person the subject of the report;⁷ or
- in compliance with a law of the Commonwealth, a State or a Territory.⁸

Therefore, if a club or hotel suspects on reasonable grounds that a person has laundered money through an EGM, the venue cannot inform the person that they have given or are required to give an SMR to AUSTRAC. The venue also cannot provide any information to the person from which that could be reasonably inferred. If the club or hotel asked the person to leave the venue and/or banned them from re-entering, any explanation given for that decision should be carefully worded to avoid breaching the tipping off provision.

Registered clubs have raised this as a particular issue, as the majority of people attending these venues are members of the club and, under the club constitutions, have a right to be provided with reasons for, and to appeal, the revocation of their membership. The Inquiry understands that the tension between exclusion and the anti-tipping off offence

² *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (*AML/CTF Act*), s. 41.

³ *AML/CTF Act*, s. 123.

⁴ *AML/CTF Act*, s. 123(11). The offence attracts a maximum penalty of imprisonment for 2 years or 120 penalty units.

⁵ *AML/CTF Act*, s. 123(5).

⁶ *AML/CTF Act*, s. 123(5B).

⁷ *AML/CTF Act*, s. 123(7) and s. 123(7AB).

⁸ *AML/CTF Act*, s. 123(9).

has led some venues to decide to not remove or ban persons for fear that doing so may constitute a criminal offence.

The Inquiry is considering:

- how a power to exclude people for suspected money laundering through EGMs might be regulated for licensed clubs and hotels in NSW; and
- how this could be done without tipping off the member or patron in breach of s. 41 of the *AML/CTF Act*?

Feedback is sought from interested individuals and organisations who can comment on any problems or issues arising from the current landscape, and potential models for reform.

2. Existing non-voluntary exclusion powers ⁹

The Inquiry is aware of non-voluntary exclusion and banning powers in the *Liquor Act 2007* (NSW) (*Liquor Act*) and the *Casino Control Act 1992* (NSW) (*Casino Control Act*). While these powers (discussed below) are useful precedents to consider for comparative purposes, they do not expressly contemplate the matters raised in this issues paper. With respect to licensed clubs, the Inquiry also notes that club members and visitors may be excluded or banned for reasons such as violating club constitutions, rules or codes; but that, ordinarily, there would be an internal disciplinary review process of which individuals could avail themselves. Similarly, while rights to exclude a person or to refuse entry to a venue exist at common law – creating potential liabilities such as trespass – tensions can arise when club members have been conferred rights of access through membership.

a) *Liquor Act* powers

Section 77 of the *Liquor Act* empowers licensees, their employees or agents, and police officers to refuse to admit people or turn them away from the venue for up to 24 hours for certain reasons, including for being intoxicated or violent; or if they are suspected to be in possession of prohibited drugs.¹⁰ The grounds for exercising this non-voluntary exclusion power do not include when a person engages in conduct linked with using EGMs or money laundering. There is also no provision in the *Gaming Machines Act 2001* (NSW) which authorises the non-voluntary exclusion of a person on the basis of suspected money laundering through EGMs.

The *Liquor Act* also empowers ILGA to ban people from licensed premises upon receiving an application from the relevant Secretary; the Commissioner of Police; licensees who are a party to a local liquor accord; or other persons prescribed by the *Liquor Regulation 2018* (*Liquor Regulation*). A banning order made by ILGA must be in writing and it prohibits a person from entering or remaining on specified licensed premises for a period of up to six months.¹¹ A banning order can only be made if ILGA is satisfied that the person the subject of the proposed order has repeatedly been intoxicated, violent, quarrelsome or

⁹ This issues paper does not address provisions relating to self-exclusion.

¹⁰ *Liquor Act 2007* (NSW) (*Liquor Act*), s. 77.

¹¹ *Liquor Act*, s. 78(1)-(2).

disorderly on or in the immediate vicinity of licensed premises;¹² or in other circumstances which may be prescribed by the *Liquor Regulation*.¹³

A further example of a power under the liquor licensing legislation for excluding certain people from licensed venues is found in cl. 98 of the *Liquor Regulation*, which only applies to 'subject premises' in 'prescribed precincts'.¹⁴ Clause 98 provides that licensees of subject premises must not permit any person to enter or remain on the premises if they are wearing or carrying any clothing, jewellery or accessory displaying the name of specified motorcycle-related and similar organisations. At present, there are 25 organisations specified in cl. 98 of the *Liquor Regulation*.

For venues in 'prescribed precincts', additional examples of banning regimes under the *Liquor Act* are:

- the power conferred on ILGA under s. 116G to impose a long-term ban on a person (for up to 12 months) from 'high risk venues' in certain circumstances following an application being made by the Commissioner of Police; and
- the power conferred on Police officers under s. 116F to make a temporary banning order (for up to 48 hours) in certain circumstances, such as when a person refuses to follow a move-on direction given under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

b) Casino Control Act powers

Part 5 of the *Casino Control Act* contains a scheme for excluding people from casinos in NSW. ILGA, casino operators and persons in charge of casinos have a power to prohibit a person from entering or remaining in a casino by giving them a written order ("exclusion order").¹⁵ The Commissioner of Police may also direct the NSW casino operators to give a person an exclusion order.¹⁶ The Commissioner of Police must exercise that power if he or she is aware that a person is subject to exclusion from a casino outside of NSW, following the giving of a similar direction under a corresponding law.¹⁷

An exclusion order given by ILGA, or at the direction of the Commissioner of Police, may not be challenged, reviewed, quashed or called into question on any grounds before any court or tribunal in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus.¹⁸ By comparison, there is a review process for persons who are given exclusion orders by casino operators where the application for the order was made by another party who considered the person has a problem from gambling activities.¹⁹

While the Inquiry is considering whether exclusion powers akin to those in the *Liquor Act* or *Casino Control Act* should be introduced for clubs and hotels with EGMs in NSW, targeting people either proven or reasonably suspected to have been involved in money

¹² *Liquor Act*, s. 78(4).

¹³ *Liquor Act*, s. 78(5).

¹⁴ *Liquor Act*, s. 116I.

¹⁵ *Casino Control Act 1992* (NSW) (*Casino Control Act*), s. 79.

¹⁶ *Casino Control Act*, s. 81(1).

¹⁷ *Casino Control Act*, s. 81A.

¹⁸ *Casino Control Act*, s. 80(1A).

¹⁹ *Casino Control Act*, s. 80(1B)-(7).

laundering, it is also considering whether there should be an independent appeal and review process.

Written submissions are sought from interested individuals and organisations on these issues. Of particular interest to the Inquiry are the following questions:

Issues Paper 3 – Questions:

1. Should NSW legislation be amended so that people may be excluded and/or banned from licensed hotels and clubs with EGMs for the following reasons:
 - a. having a charge for a money laundering offence?
 - b. having a conviction for a money-laundering offence?
 - c. engaging in behaviour reasonably suspected to be money laundering?
2. Should the exclusion be limited to gaming areas or be extended to other areas of venues?
3. Who should be empowered to make and enforce exclusion and banning orders?
4. If licensees and employees of licensed clubs and hotels are given these powers, how can clubs and hotels exercise these powers while complying with the prohibition on tipping off under the *AML/CTF Act*?
5. Should there be an independent appeal and review process for persons issued with exclusion/banning orders?
6. Should there be a centralised register of banned/excluded persons accessible by other licensed venues with EGMs?

When providing a response to this issues paper please confirm whether you are content for your submission, or any parts of it, to be made public.

Submissions should be made by **19 August 2022** (preferably by email) to:

Email: egminquiry@crimecommission.nsw.gov.au or

Post: Electronic Gaming Machine Inquiry
NSW Crime Commission
453-463 Kent Street, Sydney NSW 2000

Michael Barnes
NSW Crime Commissioner

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