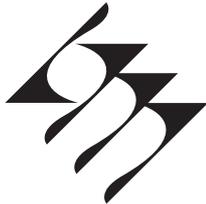


The new public nuisance offence provision: an issues paper

How is the new public nuisance offence provision being enforced and what is its impact on the Queensland public?

May 2006

CRIME AND
MISCONDUCT
COMMISSION



QUEENSLAND

Call for submissions

The Crime and Misconduct Commission (CMC) is undertaking a review of the offence of public nuisance in Queensland. This review is required by section 7 of the *Summary Offences Act 2005* and encompasses both section 7AA of the repealed *Vagrants, Gaming and Other Offences Act 1931* and section 6 of the *Summary Offences Act 2005*. A report of our review will be tabled in State Parliament.

The CMC invites individuals and agencies to comment on the issues raised in this paper. Listed at the end is a series of questions that may help you in making your submission. These questions cover the range of issues discussed in the paper and represent a core group of issues that the CMC seeks to investigate more fully.

The list is not exclusive. We are interested in hearing about any other relevant matters that you feel are important and would be useful to our review.

In particular, we encourage you to provide any details of actual experiences that you or your clients have had with regard to the enforcement of the public nuisance offence provision between 1 April 2004 and 1 October 2005.

Your submission will be displayed on the CMC's website <www.cmc.qld.gov.au>, unless you ask for it not to be displayed. Your identity may be suppressed if you request it.

How to make a submission

Please post your written submission to:

CMC Review of Public Nuisance
Attention: Mr Derran Moss
GPO Box 3123, Brisbane Qld 4001

Or email it to: Derran.Moss@cmc.qld.gov.au

Or fax it to: 07 3360 6333

Your submission must reach the CMC by 16 June 2006.

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Abbreviations

CMC	Crime and Misconduct Commission
SOA	<i>Summary Offences Act 2005</i>
VG00A	<i>Vagrants, Gaming and Other Offences Act 1931</i>

Legislation

<i>Summary Offences Act 2005</i>
Summary Offences Bill 2004
<i>Vagrant Act 1851</i>
<i>Vagrants, Gaming and Other Offences Act 1931</i>

Background

The regulation of public spaces has a long history. The criminal law in particular has always sought to prevent or deter activity that would interfere with the public right to use and enjoy public spaces. Commonly referred to as acts of ‘public nuisance’, such activity is usually described as involving a breach of the peace. Traditionally, for such acts to constitute an offence at law, there must be a member of the public present at the time of the offence and there must be either an intention to breach the peace or an actual breach of the peace. For example, the first Act dealing with public nuisance offences in Queensland — the now repealed *Vagrant Act 1851* — contained section 6 that prohibited the use of threatening, abusive or insulting words or behaviour in any public street, thoroughfare or place with intent to provoke a breach of the peace, or whereby a breach of the peace could be occasioned.

Legislation creating offences commonly known as ‘public order offences’ or ‘police offences’ has existed in the United Kingdom, all Australian jurisdictions and New Zealand from as early as the 18th century. Changes to these legislative regimes over time have, however, often reduced in importance or removed elements of the public nuisance offence, such as the intention to create a breach of the peace, or the requirement that a member of the public be present. For example, the immediate precursor to the existing public nuisance offence (s. 7 of the repealed *Vagrants, Gaming and Other Offences Act 1931*) omitted the requirement for a breach of the peace and expanded the prohibition to include disorderly, indecent or offensive behaviour.

Section 7 read as follows:

7. Obscene, abusive language etc.

(1) Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear—

- (a) sings any obscene song or ballad;
- (b) writes or draws any indecent or obscene word, figure, or representation;
- (c) uses any profane, indecent, or obscene language;
- (d) uses any threatening, abusive, or insulting words to any person;
- (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;

shall be liable to a penalty of \$100 or to imprisonment for 6 months, and may, in addition thereto or in substitution therefore, be required by the court to enter into a recognisance, with or without sureties, to be of good behaviour for any period not exceeding 12 months, and, in default of entering into such recognisance forthwith, may be imprisoned for any period not exceeding 6 months, unless such recognisance is sooner entered into.

(2) However, the maximum period for which a defendant may be imprisoned in respect of any offence against and also in respect of failing to enter into any recognisance under this section shall not in the aggregate exceed 6 months.

It is the repeal of this offence provision in Queensland and the enactment and use of the existing ‘public nuisance’ provision that is the focus of this issues paper. In short, if the offence of public nuisance can be most readily understood as an offence aimed at stopping forms of behaviour in public spaces that interfere with or disrupt the use of that public space by other members of the public, how then is that offence being enforced in Queensland and what impact is it having on the Queensland public?

The new ‘public nuisance’ offence

In 2003 the Queensland Government amended the *Vagrants, Gaming and Other Offences Act 1931* (VGOOA) to include a new section, section 7AA, entitled ‘Public nuisance’. This provision replaced the previous section 7 offence in the 1931 Act and came into effect on 1 April 2004. The new provision made it an offence to behave in a disorderly, offensive, threatening or violent manner where such behaviour interfered with or was likely to interfere with the public’s passage through, or enjoyment of, a public place.

The Queensland Government introduced section 7AA in response to community concerns about disruptive behaviour in public spaces, and to allow people to enjoy public spaces free of such behaviour.¹ At the time, most attention was paid to drunkenness in the streets resulting in disturbance to members of the public.² The objective of the legislation was to ensure ‘that members of the public may lawfully use and pass through public places without interference from unlawful acts of nuisance committed by others’ (s. 7).

Section 7AA read as follows:

7AA. Public nuisance

- (1) A person must not commit a public nuisance offence.
Maximum penalty—10 penalty units or 6 months imprisonment.
- (2) A person commits a public nuisance offence if—
 - (a) the person behaves in—
 - (i) a disorderly way; or
 - (ii) an offensive way; or
 - (iii) a threatening way; or
 - (iv) a violent way; and
 - (b) the person’s behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.
- (3) Without limiting subsection (2)—
 - (a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and
 - (b) a person behaves in a threatening way if the person uses threatening language.
- (4) It is not necessary for a person to make a complaint about the behaviour of another person before a police officer may start a proceeding against the person for a public nuisance offence.
- (5) Also, in a proceeding for a public nuisance offence, more than 1 matter mentioned in subsection (2)(a) may be relied on to prove a single public nuisance offence.

In 2005 the VGOOA was repealed and largely replaced by the *Summary Offences Act 2005* (SOA). The section 7AA offence provision, as noted above, was transferred to section 6 of the new Act and came into effect on 21 March 2005.

¹ See Second Reading Speech, Hon. T McGrady, Hansard, 28 October 2003, pp. 4361–4365.

² See Second Reading Speeches, Hansard, 13 November 2003, pp. 4990–4991 and 25 November 2003, p. 5065.

The CMC review of the new offence provision

The CMC is required by law to review the use of the public nuisance offence provision, both the old section 7AA and the new section 6, and report publicly on the review. Owing to the nature of these offences and the fact that they have the potential to affect all Queenslanders, we are calling for submissions to assist in the preparation of our final report.

The review will cover the period from 1 April 2004 to 1 October 2005 and will focus on the impact of the change from the repealed section 7 VGOOA to section 7AA VGOOA and section 6 of the SOA. While general concerns over the role of public nuisance offences may provide useful background information to the review, we are specifically concerned with changes brought about on 1 April 2004 as a result of the new offence. Hence, while submissions commenting upon general matters will be considered, we will pay particular attention to those submissions that focus on issues arising from the operation of the new section 7AA/section 6 offence.

To help you when preparing your submission to focus on the issues that are of most interest to us, we have compiled a series of questions at the end of this paper. These questions are not intended to be an exclusive list, but rather are designed to help you consider those issues that are directly relevant to the impact of the change in the public nuisance legislation and on the manner in which the provision is being used in Queensland.

Purpose of the new provision

The public nuisance provision is intended to ensure that members of the public are able to lawfully use and pass through public places without interference from acts of nuisance by other people. It is intended to target behaviour such as:

- ▶ the use of offensive language in some public places
- ▶ encouraging another person to participate in a fight
- ▶ running over car roof-tops
- ▶ engaging in sexual acts in public
- ▶ urinating in public
- ▶ interfering with another person's food
- ▶ seeking money or property from someone in a manner likely to cause them to feel threatened (see Summary Offences Bill 2004, Explanatory Notes).

Behaviour not directed at any person

The old, repealed public nuisance provision included a requirement that 'threatening, abusive, or insulting words' be used 'to any person'. This language implies that the conduct targeted by this part of the old offence was directed at a person and not simply at the world in general. The existing public nuisance provision no longer includes a requirement that threatening, abusive or insulting language be directed 'to any person'. The wording of the existing public nuisance provision implies that an offence may take place even where there is no intention to create a public nuisance, nor any actual public nuisance.

The CMC is interested in the impact that this change may have had on the way in which public nuisance is enforced in Queensland and any changes in the types of behaviour that are now being classed as public nuisance that might not have been so considered previously.

Complaint unnecessary

Section 6(4) of the SOA provides that it is not necessary for a person to make a complaint about the behaviour of another person before a police officer may start a proceeding against the person for a public nuisance offence. This does not differ substantially from the spirit of repealed section 7, where a person could commit an offence 'whether any person is therein or not'. It does, however, make the issue of a complainant's presence or otherwise explicit in the Act.

Given that the stated aim of the public nuisance provision is to ensure that 'members of the public may lawfully use and pass through public places without interference from acts of nuisance committed by others', the CMC is interested in how acts that cause no interference or complaint from a member of the public may be considered 'public nuisance'.

Public nuisance in its current context

Public nuisance and other offences

The public nuisance offence is only one of a number of summary public order offences existing in Queensland, primarily housed under the SOA. The use of the current public nuisance provision must therefore be considered in relation to these other offences, including begging in a public place, wilful exposure, and being drunk in a public place. Of particular interest to the CMC review is whether there is any overlap between the existing public nuisance offence and other offences.

It would appear that certain behaviours that could be covered by the public nuisance offence could also be the subject of other offences. The Explanatory Notes to the Act list a series of behaviours that may constitute a 'public nuisance', including urinating in view of another in a public place or seeking money or property from another in a manner that causes a person to be intimidated. These behaviours may overlap significantly with other summary offences.

It is unclear, for example, where the line between wilful exposure and public nuisance exists and how that differs from previous practice. A person urinating in public or exposing their genitals in public, even if accidentally or incidentally, may be engaging in behaviour that is sufficient to satisfy both public nuisance and section 9 of the SOA (wilful exposure). Similarly, it is unclear where the line exists between begging and public nuisance. The Explanatory Notes to the SOA list 'seeking money or property from another in a manner likely to cause a person to be intimidated' as a ground for public nuisance. The same Explanatory Notes discuss the offence of begging as being typified by a person loitering in a public space and asking for money in circumstances that may intimidate some passers-by.

The CMC is interested in what impact the potential overlap between these public space offences may have upon enforcement of the public nuisance offence and also what impact it has had upon activities in public spaces.

Public nuisance and repealed offences

A number of summary offences under the VGOOA were not transferred to the SOA and were repealed completely as of 21 March 2005. These included having no visible means of support [s. 4(1)(a)] and printing or publishing threatening, abusive or insulting words (s. 7A).

The CMC review is interested in whether the new public nuisance provision is being applied to these forms of behaviour.

Public nuisance and social identity

During the period in which the current public nuisance offence was being considered by government, concerns were raised as to the impact that such an offence might have on various groups within Queensland society. Specifically, concerns were raised that public nuisance offences in general might have an adverse impact on groups who are already disadvantaged or vulnerable. These groups include young people, Indigenous people, the homeless and those suffering from a mental illness.

The possibility of any adverse or disproportionate impact of the new public nuisance provision on specific social groups is central to the CMC review. This issue relates not only to the four groups noted above, but to any individual or group of individuals in Queensland who have been unfairly or disproportionately targeted by the offence of public nuisance.

Lack of defences

The issue of defences to a charge of public nuisance has also been raised with the CMC. In some jurisdictions the concept of ‘without reasonable excuse’ forms a part of the offence. A defence of reasonable excuse may mitigate the impact of the offence on a person involved in unwitting or emergency behaviour, particularly in situations where there may be no complainant and no actual nuisance caused to a member of the public. This does not exist, however, under the Queensland legislation.

The CMC is interested in the impact that the absence of this defence or other relevant defences has had upon public nuisance charges in Queensland.

Public nuisance and safety or quality of use of public spaces

Given the stated goal of the public nuisance provision – to ensure that the public may lawfully use and pass through public spaces — the CMC is interested in what impact the public nuisance provision has had upon safety and quality of use of public spaces since its inception on 1 April 2004.

The CMC is interested in whether or not the perception of safety or quality of use concerning public spaces has changed and, if so, has it been a result of the public nuisance offence being more rigorously enforced, or has such safety come about for other reasons?

Public nuisance offences and police responses

The CMC is interested in perceived changes in police behaviour when dealing with incidents of alleged public nuisance. Because the offence covers such a potentially broad range of behaviour and as a result allows for broad police discretion, the manner in which police are responding to public nuisance matters is important in assessing the operation of the offence provision.

The CMC is interested in public perceptions of police responses to public nuisance, such as:

- ▶ changes to the manner in which police are called to attend or arrive at incidents of public nuisance
- ▶ what response police are taking to public nuisance behaviour
- ▶ where police are encountering or charging people with public nuisance
- ▶ what level of discretion police possess in dealing with public nuisance behaviour
- ▶ what charges are resulting from behaviour that involves public nuisance.

Questions to consider when making your submission

Based on your experience, the experience of your clients, or the experience of your agency, please consider the following questions:

- 1. What range of behaviour or specific behaviour has resulted in a charge of public nuisance? Also, what language has resulted in a charge of public nuisance?**
 - a. Is this behaviour of a character that you, your clients or your agency would consider is 'disorderly', 'offensive', 'threatening' or 'violent'? If so, why? If not, why not?
 - b. Is this language of a character that you, your clients or your agency would consider 'offensive', 'obscene', 'indecent', 'abusive' or 'threatening'? If so, why? If not, why not?
 - c. Since 1 April 2004 have you, your clients or your agency recognised any change in the range of behaviour or language that results in a charge of 'public nuisance'?
- 2. What proportion of public nuisance charges have been the result of a complaint by a member of the public?**
 - a. Since 1 April 2004 have you, your clients or your agency recognised a change in the proportion of public nuisance charges resulting from complaints by members of the public?
 - b. In your opinion, or that of your clients or agency, what public interest has been served where there is no complainant to a public nuisance charge?
- 3. Have vulnerable groups in society been disproportionately charged or otherwise disproportionately affected by public nuisance charges? If so, in what way have groups been disproportionately charged or individuals disadvantaged?**
 - a. What impact has the public nuisance provision had on people identified, or identifying, as young, Indigenous, homeless and/or suffering from a mental illness?
 - b. What impact has the public nuisance provision had on other people in the community?
- 4. Does the Summary Offences Act provide adequate defences for a person charged with an offence of public nuisance? If so, why? If not, why not?**
 - a. Since 1 April 2004 have you, your clients or your agency recognised a change in the range of available defences to a charge of 'public nuisance'?
- 5. What impact, if any, has the public nuisance provision had upon the safety or community use of public spaces?**
- 6. Does the current public nuisance offence overlap with other existing offences? If so, what other offences and in what way?**
 - a. For example, what is the relationship between public nuisance arising (s. 6) from urination in public and wilful exposure (s. 9) arising from the same conduct? What is the relationship between public nuisance (s. 6) arising from a person seeking money from another person in a manner that causes that person to be intimidated or concerned, and begging (s. 8) arising from the same conduct?
 - b. If there is an overlap between public nuisance and other offences, is this problematic? If so, in what way? If not, why not?

- 7. Has a charge of public nuisance ever been used as an alternative to another offence? If so, what was the alternative charge?**
 - a. In your experience, was a charge of public nuisance used as a less severe or more severe charge?
- 8. Have charges of public nuisance typically been accompanied by other charges? If so, what charges and in what circumstances?**
 - a. Are charges that accompanied public nuisance charges the result of behaviour that occurred before or after police intervention in a situation?
 - b. In your experience, was there a change in charges accompanying public nuisance charges after 1 April 2004?
- 9. Where have most charged incidents of public nuisance taken place? (e.g. mall, school, road, outside licensed premises, park)**
 - a. Have public nuisance charges taken place in areas that were not public spaces? If so, where did they take place?
 - b. Has there been an increase in public nuisance charges in any particular location since 1 April 2004?
- 10. Do police exercise their discretion appropriately with respect to public nuisance incidents? If so, why? If not, why not?**
- 11. What has been the most common police response to a public nuisance incident? (e.g. arrest, issue a notice to appear, caution)**
 - a. In your experience, have there been common factors dictating the nature of the police response? (e.g. location of offence, social identity of the offender)
 - b. Has there been any perceived change in police response since 1 April 2004?