The new public nuisance offence provision: an issues paper

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

In this submission I will be concentrating on the affect of the enforcement of public nuisance offences on marginalised or vulnerable groups.

It is beyond doubt that the public nuisance provisions of the *Summary Offences Act 2005* (SOA) are being enforced in an unfair way. People who are black, poor or sick are bearing the brunt of prosecutions under s.6 of the SOA.

Among these marginalised groups it is the Indigenous people who tend to be the most adversely affected. There is a widespread, though erroneous, view that Indigenous people are over-represented in prosecutions for public nuisance because they are more 'deviant', more 'offensive', more 'violent', more 'disreputable', and more 'disorderly' than the general population. Simply put, Indigenous people are basically 'born' criminals.

This idea of biological causation of Indigenous crime, although totally discredited, remains a popular idea amongst large segments of the general population, and reinforces the ethnocentric notion that Indigenous people are morally and mentally undeveloped.

The 'commonsense' view is that police are simply doing what they are paid to do. If there is a problem it lies with the Indigenous people themselves.

This commonsense view that police are mere automatons and that police work is totally reactive, is wrong; but is the preferred view because it is politically convenient. It enables the real causes of Indigenous over-representation in the criminal justice system to be denied or rendered trivial.

Decades of research have clearly shown that police are not mechanical figures. Police have enormous discretion in law-enforcement decisions. Moreover, the routine exercise of police discretion is tied to the structural and cultural organisation of police work. The routine use of victimless public nuisance offences against Indigenous people cannot be defined as simply reactive policing. Discrimination is clearly a factor.

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The real causes of Indigenous over-representation in public nuisance prosecutions are the vicious intersections of:

1. the historical and structural conditions of colonisation;
2. social and economic marginalisation;
3. systemic racism;
4. negative images of Indigenous people in the mainstream media; and
5. specific practices of the central agencies of the criminal justice system.

Factors in relation to 5 include:

1. over-policing or targeting of Indigenous people;
2. adverse use of police discretion;
3. police harassment;
4. police intimidation and violence;
5. bias in judicial decision-making[1];
6. discriminatory legislation; and
7. vulnerabilities associated with cultural difference.

Here in Queensland, the most recent and relevant research[2] on the operation of the public nuisance provisions of the SOA was that carried out by Dr Tamara Walsh of The University of Queensland.

Dr Walsh's research confirms that the policing of public nuisance offences under the SOA has adversely impacted on marginalised or vulnerable groups.

Dr Walsh's research shows that a significant proportion of public nuisance defendants are extremely vulnerable. Many are homeless, poor, Indigenous, young, and suffering from mental

[1] Indigenous people in Queensland have long been aware of the cosy relationship between the Queensland Police Service and Queensland's magistrates. The latter tend to uncritically accept the police's version of events.

[2] See *'NO OFFENCE': The enforcement of offensive language and offensive behaviour offences in Queensland.* April 2006, TC Beirne School of Law, UQ. Available on website: http://www.law.uq.edu.au/index.html?page=26370

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illness. Further, many public nuisance defendants were affected by drugs or alcohol at the time the offence was committed.

Of particular concern is the fact that Indigenous people are significantly over-represented amongst those charged under the public nuisance provisions of the SOA. The rate at which Indigenous people are prosecuted for public nuisance is very troubling – as many as 30 per cent of public nuisance defendants in Brisbane and 60 per cent in Townsville are Indigenous. This amounts to an Indigenous over-representation rate of 18 times in Brisbane and almost 14 times in Townsville.[3]

Dr Walsh's analysis of public nuisance cases that came before the Brisbane and Townsville Magistrates' Courts over an 18 month period (February 2004 – July 2005) showed that in many cases people were charged with public nuisance for engaging in extremely trivial behaviours, and that a significant number of prosecutions for public nuisance are based on behaviour directed at police officers.

Clearly, a substantially number of charges and prosecutions under the SOA should never have been brought to the magistrates courts. In order to reduce the number of charges and prosecutions under the SOA the Queensland Government must consider a range of initiatives on three fronts:

- Amending the SOA and the *Penalties and Sentences Act 1992*;
- Adopt the concept of diversion of marginalised or vulnerable people from the criminal justice system rather than criminal sanctions; and
- appropriate reform of policing and judicial practices to complement legislative and policy changes and decisions in the High Court.

Dr Walsh has made a number of recommendations that should be accepted and speedily implemented by the Queensland Government.

For example, s.6 of the SOA should better reflect the High Court's definition of offensiveness. The standard of offensiveness has been laid down by the majority of the High Court in *Coleman v Power*.[4] This was a landmark case affecting the legislation and policing of public nuisance offences.

Dr Walsh has suggested that factoring the case law into s.6 could be done by adding to s.6 a

[3] See p.19 of 'NO OFFENCE' report.

[4] (2004) 209 ALR 182. See http://www.austlii.edu.au/au/cases/cth/HCA/2004/39.html In this case the majority of the High Court indicated that a relative narrow interpretation of the offence of 'offensiveness' should be preferred. Four of the seven judges agreed that to found a criminal charge, offensive conduct must amount to a serious disruption of public order, for example, by provoking or tending to provoke physical violence, or by amounting to victimisation or bullying. The majority position was that something more than the mere wounding of feelings would be necessary, but something less that the provocation of assault may suffice. Further, a majority of judges stated that mere insulting language, when directed at a police officer, would generally not, in the absence of aggravating circumstances, be sufficient to found a criminal charge.

sub-section (3A) to read:

> A police officer must not start a proceeding against a person for a public nuisance offence unless it is reasonably necessary in the interests of public safety;

Or, adding to s.6 a sub-section (3A) along the lines of:

> In determining whether to proceed against a person for a public nuisance offence, a police officer shall have regard to:
>
> (a) all the circumstances pertaining at the material time, particularly the personal circumstances of the person;
> (b) contemporary community standards;
> (c) whether the conduct is sufficiently serious to warrant the intervention of the criminal law; and
> (d) any other relevant circumstances.

Section 6 sub-section 4 should be reversed so that a complaint from a member of the public is required before a police officer may start a proceeding against a person for public nuisance.

Also, adding to s.6 a sub-section (4A) to read something like:

> If there is no evidence from a member of the public regarding the way in which the person's behaviour interfered with the member of the public's peaceful passage through, or enjoyment of, a public place, a sentencing court shall dispose of the case by releasing the defendant, either unconditionally or subject to such conditions as the court sees fit (under s.19 of the *Penalties and Sentences Act 1992*).[5]

Another necessary amendment to the Act would be to introduce a defence of reasonable excuse to counter a charge under public nuisance, or put in a 'vulnerable persons' provision. This would ensure that those who are engaging in 'offensive' conduct as a result of necessity, or for reasons associated with mental illness or homelessness, are not unjustly treated.

A 'vulnerable persons' provision might read:[6]

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[5] See pp 34-35 of the NO OFFENCE report.

[6] A 'vulnerable persons' provision was originally proposed by the Right in Public Space Action Group. See *Submission to the Minister for Police and Corrective Services on the Draft Summary Offences Bill 2004*, August 2004; available at www.rips.asn.au.

Vulnerable Persons

(1) For the purpose of this Act 'vulnerable person' includes a person who is:
   (a) Indigenous;
   (b) homeless;
   (c) young;
   (d) dependent on drugs or alcohol; and/or
   (e) of impaired capacity.

(2) Unless otherwise provided under this Act a police officer, before starting a proceeding against a vulnerable person for an offence under this Act, must first consider whether in all the circumstances it would be more appropriate to do one of the following:
   (a) take no action;
   (b) administer a caution to the person;
   (c) use their move on powers if Part 4 Chapter 2 of the *Police Powers and Responsibilities Act 2000* applies;
   (d) contact a welfare agency and request their attendance and assistance;
   (e) take a person to a place of safety if sections 210 or 371C of the *Police Powers and Responsibilities Act 2000* apply.

(3) The circumstances to which the police officer must have regard include, but are not limited to:
   (a) the circumstances of the alleged offence; and
   (b) the circumstances of the person including whether their vulnerability contributed to the alleged offence.

(4) The police officer may take the action mentioned in sub-section (2) even though:
   (a) action of that kind has been taken in relation to the person on a previous occasion; or
   (b) a proceeding against the person for another offence has already been started or has ended.

(5) If a vulnerable person appears before a court for an offence under this Act, the court may dismiss the charge if it is satisfied that the person should have been dealt with in accordance with sub-section (2).[7]

The 'vulnerable persons' provision is modelled on the diversionary scheme outlined in s.11 of the *Juvenile Justice Act 1992*.

These suggested amendments to the SOA would need to be accompanied by changes to policing practices and procedures. For example, the QPS's *Operations and Procedures*

[7] See p 36 of the NO OFFENCE report.

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Manual would have to contain a summary of the High Court's interpretation of the offence of 'offensiveness' in the *Coleman v Power* case; and advice on how to deal with vulnerable people, based on best practice principles, i.e. the preferred response when dealing with vulnerable persons is to divert them to appropriate care and treatment, not lock them up. Similarly, police should be officially reminded of their duty under s. 210 of the *Police Powers and Responsibilities Act 2000* to take intoxicated persons to a safe place for recovery rather than charging them with an offence.

Funding additional police liaison officer positions would also help to reduce the arrest rates of vulnerable persons.

Similarly, there would need to be changes to judicial practices, on the grounds that there is a need for more appropriate sentencing alternatives for petty offences. For marginalised or vulnerable persons, a magistrate should be able to sentence defendants to attend approved programs – a therapeutic approach rather than a punitive one. There is some room to move in the conditional release provisions of the *Penalties and Sentences Act 1992* (ss18-19), but it would be preferable to introduce a new sentencing alternative to allow the court to sentence defendants to attend approved programs to promote rehabilitation.

The Department of Justice and Attorney-General is currently reviewing the *Penalties and Sentences Act 1992* and one of the matters being considered is better sentencing options for minor offences. I understand the review is expected to be finalised in 2006.

As the majority of public nuisance defendants are extremely disadvantaged, it seems unfair that the most common penalty imposed for public nuisance is a fine. The average fine is about $200 with around two months to pay[8]. However, for vulnerable persons these fines are impossible to pay, and imposing fines on people who are unable to pay them appears to be a direct contravention of s.48 of the *Penalties and Sentences Act 1992*. Thus, a fairer more realistic means of fine calculation needs to be developed. A better system is the 'day fine' or 'unit fine' system which is well established in Europe, Latin America and was piloted in both the USA and UK in the late 1980s early 1990s, but has nor been tried in Australia.

There are three steps in working out 'day fines' or 'unit fines'. *Step 1*: The court assesses the gravity of the offence and allocates a unit value to that offence depending on its seriousness. For example, in Sweden judges rate the offence between 1 and 120, 1 representing the most minor of offences, and 120 representing the most grave. *Step 2*: The court determines the value of each unit according to the offender's means[9]. *Step 3*: the number of units

[8] See p.32 of NO OFFENCE report.

[9] For methods of determining a defendant's means see Dr Tamara Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People*, 2004, pp 78-80, available at www.lawandpoverty.org/tamarawalsh

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representing the gravity of the offence is multiplied by the dollar amount and this calculation yields the fine amount.

The unit fine or day fine system is a reasonable, workable and proven alternative to the imposition of flat-rate fines. Accordingly, a pilot project could be considered by the Queensland Government.

Another worrying trend is an increase in the average number of days imprisonment set in the event of fine default.[10] The concerns here are:

- Is it appropriate for a default period to be set in relation to a petty offence such as public nuisance? and
- a default period derogates from the *Penalties and Sentences Act 1992*, which says imprisonment should only be used as a last resort (s.3(f) and s.9(2)(a)(i)); and also from the *State Penalties Enforcement Act 1999*, which was intended to prevent fine defaulters from being imprisoned (s.9).

Magistrates should consider ceasing the practice of attaching default periods of imprisonment to fines imposed for public nuisance.

Further, magistrates should also consider discharging public nuisance cases where the conduct in question does not meet the *Coleman v Power* standard of offensiveness. Case analysis has shown that up to half of all public nuisance cases brought before magistrates do not meet the *Coleman v Power* standard of offensiveness. However, very few public nuisance defendants are discharged; a maximum of only 8 per cent.[11]

If a defendant is deemed a 'vulnerable person' a magistrate should have the option of referring the defendant to treatment. In doing this a magistrate can receive advice from community justice groups and other community and outreach workers on the available rehabilitative options.

In conclusion, the public nuisance provisions of the SOA as presently worded have become an instrument in the hands of the police and magistrates for criminalising and ill-treating the marginalised and disadvantaged groups, especially Indigenous people. However, the public nuisance provisions of the SOA were not enacted for this purpose; they were enacted for 'the protection of the people'.[12]

Consequently, police discretion needs to substantially limited because it seems from the

[10] See p.32 of NO OFFENCE report.
[11] See p.39 of NO OFFENCE report.
[12] *Coleman v Power* (2004) 209 ALR 182 per Kirby J at [259].

results of Dr Walsh's research that:

> 'public nuisance' was being used as something of a
> 'catch-all' offence by police; anything (and anyone)
> that could be considered a nuisance was being targeted[13]

Furthermore, the way the offences in the public nuisance provisions of the SOA are applied in lower courts is at odds with the purpose of the legislation. And, importantly, inconsistent with the interpretation of these offences by the High Court.

Accordingly, reform is urgently needed and the situation can be greatly improved if the Queensland Government adopts the amendments to the SOA recommended in Dr Walsh's research and reiterated in this submission.

Also needed are changes to the *Penalties and Sentences Act 1992* to give magistrates a greater range of sentencing alternatives, e.g. allowing the courts to sentence defendants to attend rehabilitation programs; and for putting in place a fairer means of fine calculation, e.g. the unit fine or day fine system.

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[13] See p 11 of the NO OFFENCE report

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