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T.C. Beirne School of Law

The University of Queensland
Law School
Brisbane Qld 4072 Australia
Telephone +61 7 3365 2206
Facsimile +61 7 3365 1454
CRICOS PROVIDER NUMBER 00025B

WK

5 May 2006

Dr Tamara Walsh
TC Beirne School of Law
University of Queensland
Brisbane Qld 4072

Derran Moss
Crime and Misconduct Commission
GPO Box 3123
Brisbane Qld 4001

Dear Derran,

Please find enclosed the recently released report of mine, *No Offence*, on the subject of public nuisance. I hope you will accept it as a submission to your current inquiry.

Please don't hesitate to contact me with any queries.

Yours sincerely,

Tamara

no OFFENCE

THE ENFORCEMENT OF OFFENSIVE LANGUAGE AND BEHAVIOUR OFFENCES IN QUEENSLAND

by Dr Tamara Walsh

'NO OFFENCE':

The enforcement of offensive language and offensive behaviour offences in Queensland

April 2006

Dr Tamara Walsh

TC Beirne School of Law
University of Queensland

t.walsh@uq.edu.au

www.lawandpoverty.org/tamarawalsh

Table of Contents

List of recommendations

Recommendation 1: Amend section 6 of the *Summary Offences Act* to better reflect the High Court's definition of offensiveness

Recommendation 2: Introduce a defence of reasonable excuse or insert a 'vulnerable persons' provision into the *Summary Offences Act*

Recommendation 3: Increase the range and appropriateness of sentencing alternatives for petty offences, by:

(a) extending the definition of community service to include attendance at treatment or other rehabilitative programs
(b) introducing a fairer system of fine calculation
(c) establishing a court diversion program

Recommendation 4: Provide continuing education to police officers on:

(a) the implications of the *Coleman v Power* decision on the scope of the public nuisance offence
(b) the impacts of the criminal justice system on vulnerable people

Recommendation 5: Include instructions in the Queensland Police Service *Operations and Procedures Manual* to the effect that:

(a) a police officer should not interfere with individuals' peaceful enjoyment of public space unless this is necessary to protect the public
(b) a police officer should ordinarily take vulnerable people acting 'offensively' to a treatment or welfare service instead of arresting them
(c) a police officer should not ordinarily arrest a vulnerable person unless this is necessary to protect the public

Recommendation 6: Police officers should receive an official reminder of their duty under section 210 of the *Police Powers and Responsibilities Act 2000* (Qld) to take an intoxicated person to a safe place rather than charging them, where appropriate

Recommendation 7: Magistrates should discharge public nuisance cases where the conduct in question does not meet the *Coleman v Power* standard of offensiveness

Recommendation 8: Magistrates should make use of the alternative sentences that are available to deal with petty offenders (eg. conditional releases, bonds/recognisances)

Recommendation 9: If a magistrate does decide to fine a public nuisance defendant, he/she should inquire into the means of the defendant, and should impose a realistic fine, based on the likely burden a fine would have on the defendant

Recommendation 10: Magistrates should stop attaching default periods of imprisonment to fines imposed for public nuisance

Foreword

In Queensland, as in all Australian States and Territories, it is an offence to be offensive. But in a contemporary society which is pluralistic, individualistic and combative in nature, what can reasonably be said to cause offence?

People may consider, or desire, public places to be an extension of their backyard,[1] but in reality, public places are just that – *public.* All manner of people, sights and behaviours may be, and must be, observed in public space. Some people will find certain things offensive that other people do not. That is what comes with being part of a diverse nation. Furthermore, times have changed. Language that would previously have been considered 'obscene' is now commonplace – heard on every street corner, at every workplace and in every school around the country. Also, social problems such as homelessness, income inequality and social exclusion are escalating. As a result, certain behaviours that might reasonably be considered offensive, like urinating, defecating or vomiting, will necessarily be committed in public by society's most vulnerable people, simply because they have no private space to retreat to. In a society that itself offends – evidenced through its words and deeds, but also its omissions and those it neglects – how do we determine when someone's behaviour is so offensive that the criminal law must intervene?

This document reports on the results of research into offensiveness that has been conducted over an 18 month period, involving court observation, literature reviews, national and international policy analyses, numerous discussions and protracted thought.

The research shows that many homeless, Indigenous, impaired and young people in Queensland are prosecuted for being 'offensive' when they are really just living out their lives. They may be engaging in conduct that many of us choose not to engage in, but these laws are not there to 'ensure punishment of those who differ from the majority'[2] rather, they exist for 'the protection of the people'.[3]

Further, these vulnerable people commonly receive the penalty they are most unable to comply with – a fine. For those trying to survive on around $100 a week, a fine of $200 is impossible to pay if life's necessities are also to be had.

The conclusion that must surely be reached is that in order for us to justifiably punish people for offending against society, we must create a society that is not in itself offensive.

Tamara Walsh
April 2006

[1] My thanks to Jonathon Crowe for framing the issue to me in this way.
[2] *Ball v McIntyre* [1966] 9 FLR 237 per Kerr J.
[3] *Coleman v Power* (2004) 209 ALR 182 per Kirby J at [259].

1. Introduction

1.1 Offensiveness

1.1.1 What is offensive? Pre-*Coleman* definitions of offensiveness

It is an offence to act 'offensively' in all States and Territories in Australia.[1] Yet, the extent to which such laws are necessary in our modern society is a debatable issue. It might be argued that since members of the community are protected from indecent exposure,[2] conduct that amounts to harassment, contempt and ridicule based on certain personal characteristics,[3] nuisance behaviour that threatens public safety or health,[4] riotous conduct,[5] public fights or affray,[6] threatening conduct and assault[7] through other laws, little room is left for a law against 'offensiveness'. Further, it may be questioned whether an offence of 'offensiveness' accords with modern community standards; contemporary individuals do not exhibit the 'elegant or dainty modes or habits'[8] that were once commonplace.

In recognition of this fact, higher courts throughout Australia have construed the offence of 'offensiveness' narrowly. Judges agree that the standard of 'offensiveness' applied should be that of a person who is 'fair-minded' with 'plain sober and simple notions'; one who is not easily shocked, but rather is tolerant (if not permissive), understanding and secular in his/her reactions.[9]

The courts have concluded that to be legally unacceptable, 'offensive' behaviour must arouse a 'significant emotional reaction', rather than indifference or mere annoyance; it must be serious enough to warrant the attention of the criminal law, rather than simply being 'hurtful, blameworthy or improper', 'foolish or misguided' or a 'breach of the rules of courtesy and good manners'.[10]

Judges have stated explicitly that the offence of 'offensiveness' should not be applied in a manner that punishes 'deviance'. In *Ball v McIntyre*, Kerr J stated that the offence should not be used to 'ensure punishment of those who differ from the majority',[11] and in *Bryant v Stone*, the court stated that it should not be used to penalise those of

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[1] See *Summary Offences Act 2005* (Qld) s6; *Summary Offences Act 1988* (NSW) ss4, 4A; *Summary Offences Act 1966* (Vic) s17; *Police Act 1892* (WA) ss54, 59; *Police Offences Act 1935* (Tas) ss12, 13; *Summary Offences Act 1953* (SA) s7, 22, 23; *Summary Offences Act 1923* (NT) s47; *Crimes Act 1900* (ACT) s392.
[2] *Summary Offences Act 2005* (Qld) s9.
[3] Eg. sexual harassment: *Anti-Discrimination Act 1991* (Qld) ss118, 119; vilification on the grounds of race, religion, sexuality or gender identity: *Anti-Discrimination Act 1991* (Qld) s124A.
[4] *Criminal Code 1899* (Qld) s230.
[5] *Criminal Code 1899* (Qld) s63
[6] *Criminal Code 1899* (Qld) s72.
[7] *Criminal Code 1899* (Qld) ss 246, 247.
[8] *Norley v Malthouse* [1924] SASR 268 at 269-70.
[9] *Norley v Malthouse* [1924] SASR 268; *Ball v McIntyre* [1966] 9 FLR 237; *Pell v Council of the Trustee of the National Gallery* [1998] 2 VR 391.
[10] *Ball v McIntyre* [1966] 9 FLR 237; *Dillon v Byrne* (1972) 66 QJPR 112; *Police v Couchy*, Unreported, Brisbane Magistrates' Court, 13 August 2004.
[11] [1966] 9 FLR 237.

limited vocabulary in circumstances where a more 'studied', less emotive response might have escaped the law's notice.[12]

Further, a number of Australian courts have held that mere swearing should no longer be considered offensive. For example, in the case of *Police v Dunn*, New South Wales Magistrate David Heilpern said:

> 'The word "fuck" is extremely common place now and has lost much of its punch… In court, I am regularly confronted by witnesses who seem physically unable to speak without using the word in every sentence – it has become as common in their language as any other word and they use it without intent to offend, or without any knowledge that others would find it other than completely normal.'[13]

1.1.2 *Coleman v Power* and offensiveness

Despite higher court commentary in relation to offensiveness, many people are prosecuted for acting 'offensively' in Queensland; up to 10,000 a year, in fact.[14] This number, as well as the fact scenarios coming out of the courts themselves,[15] suggest that many people are charged and brought before the court for acting 'offensively', even though their conduct could not reasonably be considered legally unacceptable.

It was hoped that this would cease to be the case if a High Court precedent was available to solidify the balance of judicial opinion regarding offensiveness. In September 2004, such a case was handed down. In *Coleman v Power*,[16] a man had been charged with using 'insulting words', a sub-section of the offensive language/ behaviour provision under section 7 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld),[17] for publicly accusing a police officer of corruption. His conviction was overturned by a majority of the High Court (McHugh, Gummow, Hayne and Kirby JJ). Much of the court's attention was occupied with the constitutional issue in the case, that is, whether or not the law in question was invalid for contravening the implied freedom of political communication. However some important reflections on the nature of the offence of 'offensiveness' were also offered.

A majority of the court interpreted the offence narrowly. Gummow, Hayne and Kirby JJ, for example, noted that read as a whole, the provision was mainly aimed at regulating violent behaviour. On this basis, they concluded that for behaviour to be legally unacceptable, it must be intended, or reasonably likely, to provoke unlawful physical retaliation.[18]

Gleeson CJ found against the defendant, but still interpreted the offence relatively narrowly. His Honour stated that in order for behaviour to come within the provision,

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[12] Unreported, Townsville District Court, 26 October 1990 (Wylie DCJ).
[13] See David Heilpern, 'Judgement: *Police v Shannon Thomas Dunn*' (1999) 24(5) *Alternative Law Journal* 238.
[14] Office of Economic and Statistical Research, *Crime and Justice Statistics Queensland, 1999/2000*.
[15] The case of *Police v Couchy* (Unreported, Brisbane Magistrates' Court, 13 August 2004) is a good example. In that case, the defendant swore at police, calling then 'fucking cunts' and telling them to 'fuck off'. Immediately prior to these interactions with police, she had been sexually assaulted.
[16] (2004) 209 ALR 182.
[17] Since repealed, see Part 1.2 below.
[18] Gummow and Hayne JJ at [180], [183], [193]; Kirby at [224], [226].

it must be sufficiently serious to 'justify the imposition of a criminal sanction.'[19] His Honour was of the view that something less than the provocation of physical retaliation could suffice, but it would have to involve something like the deliberate infliction of offence or humiliation, or intimidation or bullying; the mere infliction of personal offence, he said, would not be enough.[20]

Consistent with this interpretation of the offence, Gleeson CJ, Gummow, Hayne and Kirby JJ remarked that in most circumstances, offensive conduct directed at police officers would not come within the scope of the offence. Gummow, Hayne and Kirby JJ suggested that bearing the brunt of offensive comments was something of an 'occupational hazard' for police officers. Gummow and Hayne JJ said that by virtue of their 'training and temperament', police officers must be expected to 'resist the sting of insults directed to them.'[21] Similarly, Kirby J stated that police officers are expected to be 'thick skinned and broad shouldered in the performance of their duties.'[22] He went on to say:

> 'The powers under the Act were entrusted to police officers by the Parliament of Queensland for the protection of the people of the State. They were not given to police officers to sanction, or suppress, the public expression of opinions about themselves or their colleagues…'[23]

While Gleeson CJ said that police officers are not expected to be 'completely impervious to insult', he conceded that a criminal charge would be more difficult to justify in circumstances where the conduct was directed at a police officer because a context of victimisation or breach of the peace would most likely be absent.[24]

Thus, in *Coleman v Power*, a majority of the High Court indicated that a relatively 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 than 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.

[19] At [11].
[20] At [14-15].
[21] At [200].
[22] At [258].
[23] At [259].
[24] At [16].

1.2 The offence of public nuisance

Section 7 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), at issue in *Coleman v Power*, read:

> **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

Prior to the handing down of the High Court's decision, and presumably in response to the dissenting comments of McMurdo P of the Court of Appeal in *Power v Coleman* which suggested that parts of the offence might be unconstitutional,[25] the Queensland Government repealed section 7 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) and replaced it with the new offence of 'committing a public nuisance'. It reads:

> **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.

[25] [2002] 2 Qd R 620.

On the face of it, the new offence seemed only to update the wording of the old offensive language/behaviour offence.[26] The 'insulting words' element of the old offence was removed, but since words such as 'offensive', 'obscene' and 'insulting' tend to be defined similarly by the courts,[27] this was not expected to bring about any real changes to the rate or nature of prosecutions. One substantial change that the new offence made, however, was to the penalty: the maximum fine amount was increased from $100 to $750.

The new offence of 'public nuisance' came into effect in Queensland in April 2004.[28] It initially became the new section 7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), however this Act was repealed in March 2005, and replaced with the *Summary Offences Act 2005* (Qld). While some other offences were abolished or at least reworded before being transferred into the new Act, the offence of public nuisance remained untouched. It is now at section 6 of the new Act.

The stated intention of the 'Offences' division of the *Summary Offences Act 2005* (Qld) is to ensure the 'quality of community use of public spaces.' Of course, all manner of community members access Queensland's public spaces. However, vulnerable groups such as homeless people, Indigenous people, young people and people with cognitive, behavioural and psychological impairments tend to frequent public spaces more than most. Homeless people and people with impairment often have no where else to go; many Indigenous people have a cultural and/or spiritual connection to certain places; and young people seek privacy, test boundaries and enjoy leisure time in public space. Thus, when seeking to ensure the 'quality use' of *public* space, these vulnerable groups must be kept in mind, and their protection as 'community members' must remain a paramount consideration.

Official commentary regarding the offence of public nuisance supports this contention. According to the Explanatory Note,[29] Parliament intended that the offence of public nuisance be enforced in such a way that takes account of context; the Note acknowledges that certain conduct may be offensive in some circumstances but not others. Consistent with this, it might be contended that, for example, blatant and purposeful public urination may be distinguished from the situation of a homeless person who urinates in a public place out of necessity, due to his/her inability to access public amenities.

Further, The Hon Rod Welford MP, Attorney-General at the time the offence of public nuisance was introduced, stated publicly that the offence was aimed at ensuring the safety and security of members of the public, and that laws of such nature were aimed 'only' at protecting people 'whose security is threatened.'[30] As will be seen, much of the conduct engaged in by disadvantaged people in public spaces that may, on one definition, be considered 'offensive' does not place the public at risk, and thus

[26] Tamara Walsh, 'Reforms to the Vagrants, Gaming and Other Offences Act – What do they achieve?' (2004) February *Proctor* 23
[27] For detailed commentary on this point, see Tamara Walsh, 'Offensive behaviour, offensive language and public nuisance: Empirical and theoretical analyses' (2005) 24(1) *University of Queensland Law Journal* 123
[28] Via the *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld).
[29] Explanatory Note to the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2003* (Qld), Part 12.
[30] The Hon Rod Welford MP, cited in Rights in Public Space Action Group (eds), *Legislated Intolerance? Public Order Law in Queensland*, 2004 at 8.

should not be prosecuted under the section if the words of the former Attorney-General are to be heeded.

Thus, it seems that the legislative intention was that the offence of public nuisance not be enforced in a manner that resulted in the targeting of vulnerable groups. Unfortunately, the research reported on here suggests that this intention has not been realised.

1.3 The studies

This report presents the combined results of court observation research conducted over an 18 month period on the manner in which 'offensiveness' is prosecuted, defended and disposed of in Queensland. It combines the results of three separate court observation studies which have been reported on elsewhere.[31] The first was conducted in February 2004 at the Brisbane Magistrates' Court; the second was conducted in July 2004 at the Brisbane and Townsville Magistrates' Courts; and the third was conducted in July 2005 at the Brisbane and Townsville Magistrates' Courts.

In each study, law students attended court on every sitting day during the relevant month and recorded detailed information on each case of 'offensiveness' (prosecuted under the old offensive language/behaviour offence and the new public nuisance offence) that came before the court. Information collected on each case included the facts of the case, the charge, whether the defendant was represented by counsel, the exact penalty imposed, any mitigating factors in sentencing and whether alternative penalties were considered. In addition, certain demographic information on those charged was recorded including age, gender, Indigenous status, housing status (ie. whether they were homeless or at risk of homelessness), socio-economic status (ie. whether they were in receipt of income support benefits), and whether the defendant was noted in court to be cognitively, behaviourally or psychologically impaired.

1.3.1 Study 1 – February 2004[32]

The first study was undertaken at the Brisbane Magistrates' Court in February 2004, two months before the offence of public nuisance was introduced. The subject of this study was therefore on the manner in which the old offence of offensive language/behaviour was being enforced; in particular, the kinds of people prosecuted for this offence and the kinds of penalties imposed.

Every case of offensive language and offensive behaviour that was brought before the Brisbane Magistrates' Court during the month of February 2004 was recorded. The results demonstrated that members of certain vulnerable groups were much more likely to be charged with offensive language or offensive behaviour than members of

[31] See Tamara Walsh, 'Won't pay or can't pay? Exploring the use of fines as a sentencing alternative for public nuisance type offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217; Tamara Walsh, 'Offensive behaviour, offensive language and public nuisance: Empirical and theoretical analyses' (2005) 24(1) *University of Queensland Law Journal* 123; Tamara Walsh, 'The impact of *Coleman v Power* on the policing, defence and sentencing of public nuisance cases in Queensland' (2006) *Melbourne University Law Review* forthcoming.

[32] For a detailed account of the results of this study, see Tamara Walsh, 'Won't pay or can't pay? Exploring the use of fines as a sentencing alternative for public nuisance type offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217.

the general population; homeless people and Indigenous people in particular were overrepresented. Half of those charged received a fine, while 25% received a bond/recognisance and 8% were discharged.

1.3.2 Study 2 – July 2004[33]

The second study was undertaken in July 2004 at the Brisbane and Townsville Magistrates' Courts. This study was aimed at comparing prosecutions under the old offensive language/behaviour offence with those under the new offence of 'public nuisance' which had just been introduced.

The results suggested that this legislative change sparked a massive increase in the number of cases of 'offensiveness' coming before the Brisbane Magistrates' Court. Indeed, in July 2004, three times the number of people that came before Brisbane Magistrates' Court for offensive language/behaviour in February 2004 were prosecuted for public nuisance.

Many of those who were brought before the Brisbane and Townsville Magistrates' Courts for public nuisance during July 2004 were charged for engaging in extremely trivial 'nuisance' behaviour. Some were charged because they were yelling or swearing in a public place; others were charged because the group they were gathering with was behaving too loudly; and a few were even charged because they had vomited in public. Thus, it seemed from the results of this study 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.

Further, the average fine amount imposed for offensiveness increased significantly after the offence of public nuisance was introduced (predictable in view of the legislative increase in the maximum fine amount). In addition, magistrates began setting default periods of imprisonment more often.

1.3.3 Study 3 – July 2005[34]

The July 2005 study was aimed at further monitoring the enforcement of the offence of public nuisance at the Brisbane and Townsville Magistrates' Courts. In particular, this study was concerned with the extent to which the High Court's construction of 'offensiveness' in *Coleman v Power* had impacted on the prosecution, defence and disposal of public nuisance cases.

The results of that study suggest that the rate of prosecution for public nuisance is still on the increase. Between July 2004 and July 2005, the number of people coming before the court for public nuisance increased by 44% in Brisbane and 38% in Townsville. The selective enforcement of vulnerable groups appeared to continue. Indeed, the representation of Indigenous people amongst those charged increased dramatically between July 2004 and July 2005; in July 2005, 27% of public nuisance

[33] For a detailed account of the results of this study, see Tamara Walsh, 'Offensive behaviour, offensive language and public nuisance: Empirical and theoretical analyses' (2005) 24(1) *University of Queensland Law Journal* 123.
[34] For a detailed account of the results of this study, see Tamara Walsh, 'The impact of *Coleman v Power* on the policing, defence and sentencing of public nuisance cases in Queensland' (2006) *Melbourne University Law Review* forthcoming.

defendants in Brisbane and 68% of public nuisance defendants in Townsville were Indigenous.

Further, many charges were still based on trivial nuisance behaviours, despite the high standard of offensiveness set in *Coleman v Power*. It was expected that this judgement would result in significant changes to the way public nuisance was enforced. Yet, the results did not support this hypothesis.

The kinds of penalties imposed on public nuisance defendants remained fairly constant between the 2004 and 2005 studies. The average fine amount increased only marginally. One notable difference, however, was the marked increase in the proportion of defendants who opted to defend their charge: 18% of public nuisance defendants in Brisbane and 19% in Townsville pleaded not guilty.

1.4 This report

The results of each of these studies are explored in detail throughout this report. As will be seen, the offence of public nuisance, its prosecution and its enforcement, are the source of many injustices, particularly as regards disadvantaged people. Further, the manner in which the offence of public nuisance is enforced does not accord with higher court commentary regarding the definition of 'offensiveness' or the manner in which the offence should be policed. Reforms are necessary if vulnerable groups are to be protected; to this end, 10 recommendations based on the research are outlined in Part 7.

2. The prosecution of public nuisance in Queensland

2.1 Overall number of prosecutions

Over the 18 month study period, the rate of prosecution for 'offensiveness' substantially increased.

In February 2004, only 26 offensive language/behaviour cases came before the Brisbane Magistrates' Court. This increased significantly after the introduction of the offence of public nuisance in April 2004. In July 2004, 77 people came before the Brisbane Magistrates' Court for public nuisance, a 200% increase in only five months.

In the year from July 2004 to July 2005, the rate of prosecution for public nuisance increased even further. In July 2005, 111 public nuisance cases came before the Brisbane Magistrates' Court; this represents a 44% increase over that 12 month period.

Prosecutions for public nuisance also increased in Townsville over the 2004-05 period. In July 2004, 42 people came before the Townsville Magistrates' Court for public nuisance; by July 2005, this had risen to 58. This represents an increase of 38%.

Graph 2.1: Total number of offensive language/behaviour and public nuisance cases that came before Brisbane and Townsville Magistrates' Courts during the study period

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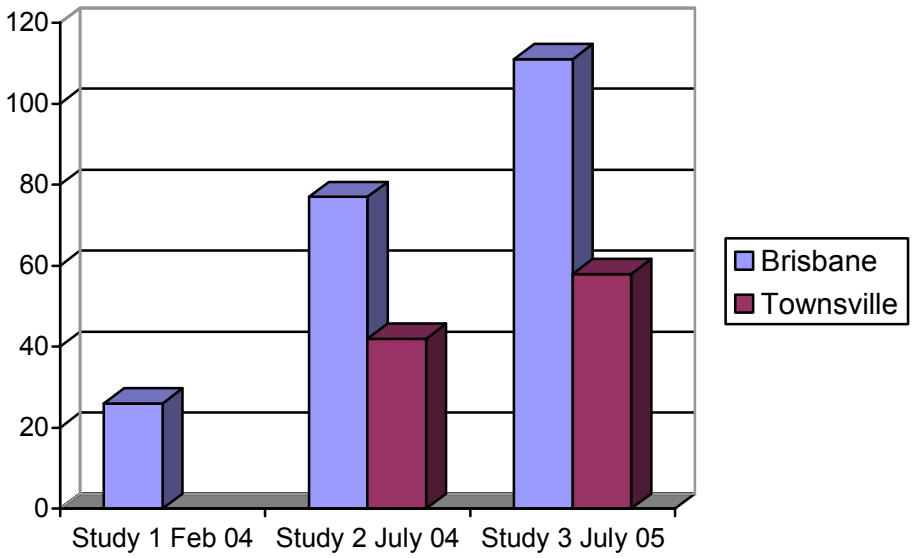


2.2 Not guilty pleas

Very few public nuisance defendants plead not guilty. There are two likely reasons for this. First, they may be unaware of their 'rights' – that is, they may not be aware of the statutory defences that are available to them, or that it is open for them to argue that their behaviour was not 'offensive' within the meaning of the section. Alternatively, they may not feel that they have sufficient advocacy skills to enable them to make such an argument before the court. Pleading guilty may be perceived by defendants as the easy option. Defendants may prefer the idea of receiving a 'slap on the wrists' and a small fine to enduring a trial. Unfortunately, this is based on something of a misconception: fines imposed for public nuisance are not always 'small' and indeed, for disadvantaged people, they may be virtually unpayable in relative terms (see Part 6).

Having said this, the number of defendants opting to contest their public nuisance charge increased over the study period. In February 2004, not one offensive language/behaviour defendant pleaded not guilty. In July 2004, 4% of public nuisance defendants in Brisbane and 8% in Townsville pleaded not guilty. And in July 2005, 18% of public nuisance defendants in Brisbane and 19% of public nuisance defendants in Townsville pleaded not guilty.

The reasons for this increase cannot be ascertained from the data collected here. However, anecdotal evidence suggests, at least in the case of Townsville, that the precedent set in *Coleman v Power* has prompted the increase in not guilty pleas. Notably, in July 2005, 82% of contested public nuisance charges in Townsville were handled by the Aboriginal legal service. This may, in part, be reflective of the high proportion of public nuisance defendants who are Indigenous (see Part 2 below). However it also suggests that the Townsville Aboriginal legal service is 'cracking down' on unwarranted police interference in the lives of Indigenous people, and that many of the public nuisance charges brought against Indigenous people in Townsville are at least arguably unlawful.

2.3 Public nuisance and obstruct/assault police

It is well-established that offences such as public nuisance often act as 'gateway' offences, that is, as a result of the interaction between police and 'offenders' arising out of the precipitating 'nuisance' behaviour, further charges are ultimately laid. Such charges generally include obstruct or assault police, resist arrest, or failure to follow a police direction.[35]

The results of this study demonstrate that both the old offensive language/behaviour offence and the offence of public nuisance have acted and continue to act as gateway offences in Queensland. In February 2004, 23% of offensive language/behaviour charges brought before the Brisbane Magistrates' Court were accompanied by an obstruct and/or assault police charge. In July 2004, 25% of public nuisance charges

[35] Commissioner J H Wootten, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of the Inquiry into New South Wales, Victoria and Tasmania*, 1991; Commissioner J H Wootten, *Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of James Archibald Moore*; Rick Sarre and Syd Sparrow, 'Race relations' in Tim Prezler and Janet Ransley (eds), *Police Reform: Building Integrity*, 2002; Mark Dennis, 'Is this the death of the trifecta?' (2002) 40(3) *Law Society Journal* 66.

brought before the Brisbane Magistrates' Court were accompanied by an obstruct and/or assault police charge. And in July 2005, 26% of public nuisance charges brought before the Brisbane Magistrates' Court were accompanied by an obstruct and/or assault police charge.[36] The results for Townsville are not as striking statistically (see Graph 2.2 below).[37]

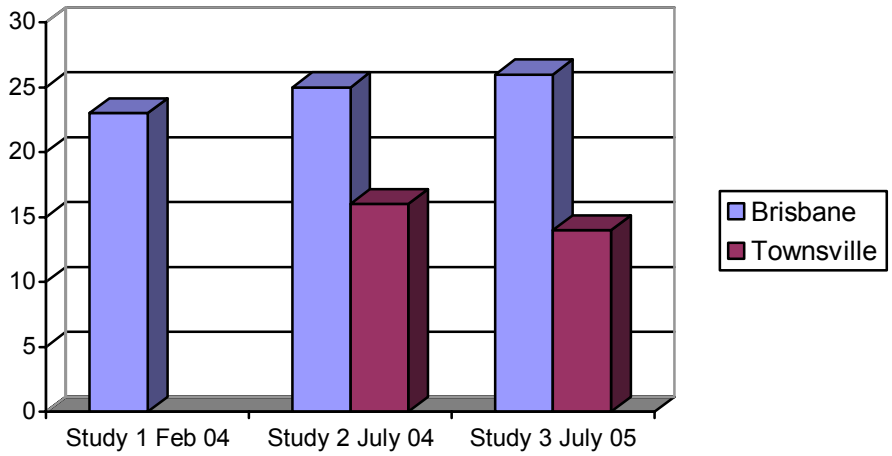
Case study

The defendant, who was cognitively impaired, was behaving 'abusively' towards passengers on a train. Police officers tried to arrest him, and he resisted. A struggle ensued. The defendant appeared before the Brisbane Magistrates' Court charged with public nuisance, obstruct police and assault police.

Case study

The defendant was intoxicated. He was yelling and participating in a mock fight with a friend in Queen Street Mall. The police approached and told him he was committing a public nuisance. A struggle ensued. The defendant was charged with public nuisance, obstruct police and assault police.

Graph 2.2: Percentage of offensive language/behaviour and public nuisance charges accompanied by a charge of obstruct/assault police



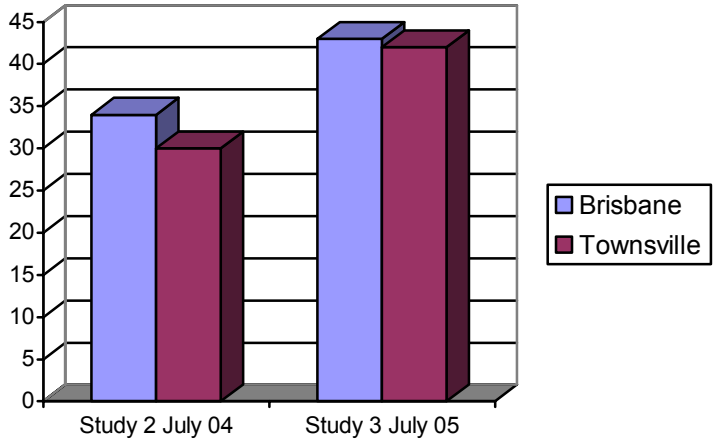
2.4 Recorded convictions

In both Brisbane and Townsville, the number of people who had convictions recorded for public nuisance was substantially higher in July 2005 than in July 2004. In July 2004, the rate of recorded conviction for public nuisance cases at the Brisbane and Townsville Magistrates' Courts was 34% and 30% respectively. By July 2005, this had risen to 43% and 42% respectively.

[36] Section 444 *Police Powers and Responsibilities Act 2000* (Qld).

[37] It should also be noted that at least one public nuisance defendant's interactions with police ended in the defendant's death in police custody. The case of Cameron Doomadgee, an Indigenous man from Palm Island, is well-documented.

Graph 2.3: Percentage of public nuisance cases in which a conviction was recorded



2.5 Conclusion

Contrary to expectations, the precedent set by *Coleman v Power* has not resulted in a reduction in the number of public nuisance cases coming before the courts, or the number of convictions recorded. In fact, the opposite effect has been observed. It seems, therefore, that Queensland police and magistrates are either unaware of the implications of the *Coleman* decision, or are ignoring them.

3. Defendant characteristics

3.1 Overview

Table 3.1: Offensive language/behaviour and public nuisance defendant characteristics

	Brisbane Feb 2004	Brisbane July 2004	Brisbane July 2005	Townsville July 2004	Townsville July 2005
Homeless	15%	5%	6%	24%	21%
Social security recipient	69%	31%	29%	54%	41%
ATSI	46%	10%	27%	35%	68%
Male	77%	91%	84%	75%	86%
Impairment	31%	16%	14%	16%	5%
Alcohol/drugs involved	54%	34%	61%	38%	40%
Age 17-25	46%	65%	61%	52%	30%
26-35	33%	29%	23%	32%	33%
36-49	21%	4%	12%	8%	30%
50+	0%	1%	3%	8%	7%

A significant proportion of public nuisance defendants are extremely vulnerable; many are homeless, of low income, Indigenous, cognitively, behaviourally or psychologically impaired, and/or young.

Five key trends may be observed from the table above:

- It appears that fewer homeless and low income people are being targeted under the new public nuisance offence as compared with the old offensive language/behaviour offence. (see Part 3.2)
- Indigenous people are significantly overrepresented amongst those charged for acting 'offensively'. (see Part 3.3)
- The number of young people charged for being 'offensive' has increased dramatically since the offence of public nuisance was introduced. (see Part 3.4)
- A substantial proportion of 'offensive' defendants suffer from cognitive, behavioural or psychological impairment. While it appears that the proportion of defendants with impairment has fallen since the introduction of the new section, these results should be treated with caution. (see Part 3.5)
- Many public nuisance defendants were affected by drugs or alcohol at the time the offence was committed. (see Part 3.6)

3.2 People who are homeless and/or in receipt of social security benefits

A large proportion of public nuisance defendants are social security recipients and/or homeless; around 30% in Brisbane and 40-50% in Townsville.

It is well-established that laws aimed at regulating public spaces have a disproportionate impact on the lives of those who are homeless or at risk of homelessness (as many social security recipients are). Homeless people, by definition, lack secure housing, and thus they tend to occupy public spaces more frequently than the remainder of the population. Homeless people, particularly those who lack shelter altogether, are forced to live out their lives in public. They necessarily conduct certain behaviours (such as urinating, defecating, drinking alcohol and socialising) in public which the majority of the population prefer to conduct in the privacy of their homes. As a result, people who are homeless are more visible to police, more likely to behave 'offensively', and in turn, more vulnerable to being considered a 'public nuisance'.[38]

The results of this research demonstrate that, in many cases, homeless people are charged for behaviour that should not reasonably be considered 'offensive'. For example, in one case observed during the study period, a homeless man was charged with public nuisance for accidentally upsetting a cart of oranges at an outdoor juice bar. Another was charged with public nuisance for shouting from his mattress, which was located outside a bank.

Homeless people may indeed be considered a 'nuisance' by some, but it is manifestly unjust to criminalise a group of people for circumstances invariably beyond their control. As Shanahan DCJ said in *Moore v Moulds*:

> 'It is not or should not be a criminal offence to be poor. It is not nor should it be a criminal offence per se to sleep on the river bank nor to adopt a lifestyle which differs from that of the majority… [such persons] do not, as a rule, commit criminal offences but are regarded as "nuisances" and their appearance is an affront to the susceptibilities of those members of the public who do not suffer from their disabilities.'[39]

Case study

A homeless man, who was intoxicated, caused some oranges to fall from a juice bar in Queen Street Mall. He was charged with public nuisance. Despite his claim that the incident was accidental, he was fined $30 by the court, with a one day default period of imprisonment attached.

Case study

A homeless man was shouting obscenities from the place where he slept on the street. The police searched his mattress and found a utensil. He was ultimately charged with public nuisance, possession of property unlawfully obtained and possession of a utensil. He was fined $800 with one month to pay.

[38] See also Philip Lynch, 'Begging for change: Homelessness and the law' (2002) 26 *Melbourne University Law Review* 690; Jeremy Waldron, 'Homelessness and community' (2000) 50 *University of Toronto Law Journal* 371.
[39] (1981) 7 QL 227.

3.3 Indigenous people

The rate at which Indigenous people are prosecuted for public nuisance is alarming – as many as 30% of public nuisance defendants in Brisbane and 60% in Townsville are Indigenous. This amounts to an Indigenous over-representation rate of 18 times in Brisbane and almost 14 times in Townsville.

In part, this might be attributed to the fact that Indigenous people occupy public space more often than non-Indigenous people as a result of their spiritual and cultural connection to the land. This connection may lead them to choose a life of permanent itinerancy, or to socialise with large groups in public places of significance to them.[40] Their frequent presence in public space may render them more likely to attract a public nuisance charge.

Sadly, however, the main reason for their overrepresentation amongst public nuisance defendants may be structural racism. Exclusion of Indigenous people from public space dates back to colonisation, and was codified in early colonial legislation. For example, one provision of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1987* (Qld) read:

> 'The Minister may from time to time cause any aboriginal or half-caste… to be removed from any reserve institution, or district, to any other reserve, institution or district and kept there.'

In a recent survey of public space users, Indigenous people were identified as a group that is still specifically targeted for selective enforcement of offences such as public nuisance. One respondent said:

> 'We people [ie. homeless people] get picked on all the time [by police]. To tell you the truth, I'm glad I'm not a blackfella. They cop lotsa shit, poor blokes.'[41]

Many of the cases observed in this study support this appraisal. In numerous cases, particularly in Townsville, merely gathering and drinking in a public place led to a public nuisance charge for Indigenous people.

Case Study

Some Indigenous people without conventional shelter were drinking in a cemetery. As police approached, they began to move away. The police pursued them and found a wine cask in the possession of the defendant. The defendant insulted the police officer. He was charged with public nuisance and fined $200.

Case study

A group of Indigenous people were found drinking in a park. The police approached them and the defendant acted 'abusively' towards them. The defendant was charged with public nuisance and held in custody for two days. In addition to the time in custody, the court imposed a $75 fine.

[40] See for example Paul Memmott et al, *Categories of Indigenous 'Homeless' People and Good Practice Responses to Their Needs*, Australian Housing and Urban Research Institute, Brisbane, 2003.
[41] Tamara Walsh, 'Who is the public in public space?' (2004) 25(2) *Alternative Law Journal* 81.

3.4 Young people

The rate at which young people are prosecuted for offensive conduct has increased dramatically since the offence of public nuisance was introduced, particularly in Brisbane. As many as 60% of public nuisance defendants coming before the Brisbane Magistrates' Court are aged 25 years or under.

Young people may occupy public spaces more frequently than older persons due to their lack of private space; that is, in public space, they may feel more able to express themselves without limitations being placed on them by adults (particularly parents and teachers). Public space provides young people with a place in which leisure time may be passed in relative freedom. Further, public space may provide a haven for those young people who are victims of abuse.[42] Due to the fact that young people are engaging in identity formation and boundary testing, they may be more likely to conduct themselves in an 'offensive' manner in public.

This research demonstrates that many young people are prosecuted for public nuisance when a caution would have been a more reasonable response to their immature behaviour. For example, one 17 year old[43] was charged with public nuisance for climbing onto the roof of a McDonalds restaurant. This child was found guilty and fined as a result. Such a response is proven to be inappropriate in the case of a young person; best practice suggests that young people should be diverted away from the criminal justice system in as many cases as possible to avoid the adverse impacts that criminalisation can have on their lives in the long-term.[44]

Case Study

A group of young people were gathered in a park at night. They were behaving loudly. The defendant was part of the group and was arrested for public nuisance. He received a three month good behaviour bond, with a $250 recognisance.

Case study

The 17 year old defendant was intoxicated and was seen climbing onto the roof of a McDonalds restaurant. He was later found asleep in a garden. He was arrested and charged with public nuisance. He was fined $200 with a 2 day default period.

3.5 People with cognitive, behavioural or psychological impairment

A significant number of people with recognised cognitive, behavioural or psychological impairments are prosecuted for public nuisance. The results of this research suggest that around 15% of public nuisance defendants suffer from impairment, however this is likely to be a gross underestimate. This figure represents only those defendants whose impairment was raised during the court proceedings. Since cognitive, behavioural and psychological impairments amongst disadvantaged

[42] See D Malcolm, 'Young people, culture and the law' (1999) 18(4) *Youth Studies Australia* 29.
[43] Children aged 17 are still prosecuted as adults under Queensland criminal law, despite extensive lobbying by all manner of groups for many years.
[44] See Tamara Walsh, *Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety*, 2004; available at www.lawandpoverty.org/tamarawalsh.

people often remain undiagnosed, and/or go unrecognised by lawyers and court personnel, the rate of impairment amongst public nuisance defendants is likely to be much higher. The significant decrease between February 2004 and July 2004/2005 is interesting, but possibly not terribly reliable.

What can be confidently concluded from the data collected in this study is that in most cases where impaired persons are prosecuted for acting 'offensively', their conduct is directly related to their illness. Numerous case examples observed throughout the study period could be cited to support this claim. For example, one defendant was charged with public nuisance for acting 'abusively' towards police and hospital staff after taking an overdose of his anti-psychotic medication. Another had been behaving 'violently' in a mall while suffering from hallucinations; he was under the belief that he was being chased by motorcycle gangs. Yet another was charged with public nuisance for attempting to commit suicide outside an Ozcare office. Clearly, prosecution for public nuisance is not an appropriate response in such circumstances. Best practice suggests that a therapeutic response would yield the best outcomes, both for the individual concerned and the wider community.[45]

Case Study

The defendant was causing a disturbance at Ozcare. He was asked to leave and then attempted to commit suicide in the street. He was arrested and charged with public nuisance. He was fined $150, with a two day default attached.

Case study

The defendant suffered from schizophrenia. He was standing at a bus stop waiting for the bus to arrive. The bus was very late; he became agitated and started yelling and swearing. He was arrested and charged with public nuisance.

Case study

The ambulance service received a call from a mentally impaired person who had taken an overdose of his anti-psychotic medication. The defendant was significantly impaired by the time police arrived. He refused to provide them with his particulars, and he acted 'abusively' towards staff on admission to hospital. The defendant was charged with public nuisance and was fined $300.

3.6 Alcohol and drug use

Also of note is the fact that a substantial proportion of public nuisance defendants were affected by alcohol or drugs at the time the offence was committed. Indeed, a number of defendants have been found guilty of public nuisance for chroming, despite

[45] See Tamara Walsh, *Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety*, 2004; available at www.lawandpoverty.org/tamarawalsh.

Victorian case law stating that chroming should not be considered 'offensive'.[46] In many cases of this nature, a health-based response is more appropriate and is likely to be a more successful way of dealing with the offending behaviour than the imposition of a criminal penalty.

3.7 Conclusion

Many vulnerable people are overrepresented amongst those prosecuted for acting 'offensively' even though their 'offensive' behaviour may be reflective of their disadvantaged status. Instead of a law and order response, a therapeutic approach that addresses the underlying causes of defendants' 'offending' behaviour must be implemented.

[46] *Nelson v Mathieson* [2003] VSC 451.

4. Fact scenarios leading to a public nuisance charge

4.1 Overview

Table 4.1: Percentage of public nuisance cases in which certain fact scenarios were present

[The columns do not add up to 100% because more than one precipitating fact may found a charge]

	Brisbane 2004	Brisbane 2005	Townsville 2004	Townsville 2005
Violence or threat of violence				
Assault	10%	3%	4%	0%
Fight	9%	27%	15%	5%
Nightclub-related incident	16%	24%	11%	8%
Threatening behaviour	3%	5%	0%	8%
Creating a disturbance				
At a place of business/government agency	26%	9%	19%	23%
Disturbing public property	1%	6%	4%	10%
Disturbance on a road	4%	6%	0%	5%
Offensive/abusive language/behaviour				
Offensive language (not at police)	4%	35%	26%	45%
Offensive language directed at police	23%	22%	30%	20%
Offensive behaviour directed at police	3%	0%	4%	5%
Yelling	25%	19%	33%	28%
Verbal argument (no threats; no risk of violence)	7%	5%	22%	13%
Waving arms around	0%	3%	0%	3%
Behaviour that amounts to a separate offence				
Begging	0%	3%	0%	5%
Wilful exposure	3%	0%	0%	8%
Urinating in public	22%	15%	4%	26%
Behaviour associated with drug/alcohol use				
Behaviour associated with drug/alcohol use	34%	61%	38%	40%
Chroming	0%	3%	0%	0%

Four conclusions may be drawn from the data presented in the table above:

- In many cases, people are charged with public nuisance for engaging in extremely trivial behaviours. (see Part 4.2)
- Many people are prosecuted for public nuisance when their case would have been more appropriately dealt with under another criminal law provision. (see Part 4.3)
- Some differences in the facts leading to prosecutions for public nuisance between July 2004 and July 2005 are suggestive of police crackdowns on particular types of conduct. (see Part 4.4)
- A significant number of prosecutions for public nuisance are based on behaviour directed at police officers. (see Part 4.5)

4.2 Public nuisance and trivial behaviour

Many people are charged with public nuisance for engaging in trivial offending behaviour. In many cases, it would seem that the conduct in question is not sufficiently offensive to warrant the attention of the criminal law, or to meet the standard set by *Coleman*.

For example, one of the most common behaviours that resulted in a public nuisance charge in July 2005 was the use of 'offensive language' (most often swearing) (45% of cases in Townsville, 35% of cases in Brisbane) and/or yelling (28% of cases in Townsville, 19% of cases in Brisbane). This is despite the fact that according to contemporary standards of conduct, most swearing should be considered legally inoffensive (see Part 1.1 above). Further, engaging in a verbal argument, where there was no threatening conduct and no apparent risk of violence was a common factual scenario leading to a public nuisance charge. Indeed, in Townsville in July 2004, 22% of all public nuisance cases arose out of a non-violent, non-threatening verbal argument. In the majority of these cases, the defendant was arguing with their spouse, neighbour or friend either at home,[47] in the street or in a mall.

Case Study

The defendant was yelling at a person on a train. The police charged the defendant with public nuisance, despite the fact that he was verbally defending his friend against another passenger who had insulted her.

Case study

The defendant was involved in a domestic dispute with his 'alcoholic' mother. He left the house and was heard yelling and swearing from the footpath outside his house. He was charged with public nuisance.

Many public nuisance charges were based on trivial 'nuisance' behaviour such as waving arms around, kicking street lights, arguing with shop assistants and walking out onto the road (see 'disturbance' in the table). However, in many cases, an arrest does not seem to have been the most appropriate course of action open to police. For example, in one case, the defendant had been a victim of domestic violence. She called the police for help. When they arrived she became upset and behaved 'aggressively'; she was charged with public nuisance as a result. In another case, a young woman was yelling obscenities and waving her arms around at a hostel. She was fined $300 for committing a public nuisance.

Further to this, two defendants in July 2004 were charged with public nuisance for vomiting in public; four defendants in July 2005 were charged with public nuisance for begging in public; and two defendants in July 2005 were charged with public nuisance for chroming. None of these circumstances could be considered 'offensive' in the *Coleman v Power* sense of the term; and a law and order response could not be considered appropriate in any of these cases.[48]

[47] Arguments at home have been prosecuted under the offence of public nuisance on the basis that such conduct can be observed from a public place, ie. the street. They are thus said to be likely to interfere with others' enjoyment of that public place.

[48] The trend towards a zero-tolerance approach to unavoidable offensive behaviour seems pervasive in Queensland. The State Transport Minister recently announced an intention to crackdown on people engaging in anti-social behaviour on public transport. Those stated to be the specific target of enforcers include people who vomit or collapse on trains and buses, on platforms and in lifts.

4.3 More appropriate provisions

The fact that any defendants found begging are being prosecuted under public nuisance seems absurd in view of the fact that begging is a separate offence under section 8 of the *Summary Offences Act 2005* (Qld).

Similarly, it seems anomalous that any public urination cases be brought under section 6 of the *Summary Offences Act 2005* (Qld) when the legislation specifically provides for urination to be dealt with under section 9. The Explanatory Note to the *Summary Offences Bill* specifically states that the purpose of the double-barrelled wilful exposure provision is to create 'a clear differentiation between situations where a person wilfully exposes himself or herself for the purpose of urination and attempts to find a place out of public view for that purpose, as opposed to those persons who expose themselves for shock value or for sexual gratification'. It is likely that the reason public urination cases are prosecuted under section 6 rather than section 9 is that an offence under section 9 attracts a maximum penalty of only two penalty units, while an offence under section 6 attracts a maximum penalty of 10 penalty units.

Prosecuting behaviours as public nuisance that should reasonably be brought within other sections creates uncertainly and thus, in the absence of a cogent justification, is contrary to the rule of law.

4.4 Police crackdowns – fights and language

As may be seen from the table, there were two significant differences in the kinds of facts leading to a public nuisance charge in July 2004 as compared with July 2005.

First, there was an increase in the proportion of public nuisance cases arising from situations in which violence had occurred, or was likely to occur. For example, in Brisbane, the proportion of cases involving a fight in a public place increased from 9% in July 2004 to 27% in July 2005 and the proportion of cases arising out of a nightclub incident increased from 16% to 24%. This finding reflects a police 'crackdown' on violence in and around licensed premises following certain isolated incidents in the Brisbane CBD in early 2005.[49]

Second, and not so positive in nature, the proportion of public nuisance cases in which offensive language (not directed at a police officer) contributed to the charge increased significantly in Brisbane, from 4% of cases to 35% of cases. While the reason for this difference is not apparent, it may suggest a police 'crackdown' on the use of offensive language. This is of concern, particularly considering the fact that there is so much case law from around Australia which indicates that offensive language should not attract a criminal charge (see Part 1.1 above).

[49] The Hon Judy Spence, 'Tough new laws on safety and public order' Media Release, 18 February 2005.

4.5 Public nuisance and conduct directed at police officers

Similarly, there is a substantial amount of Australian higher court commentary suggesting that offensive conduct directed at police officers should not generally form the basis of a criminal charge (see Part 1.1 above). Yet, many people in Queensland are prosecuted for public nuisance because they have offended a police officer.

The proportion of cases founded merely on insulting language being directed at a police officer has decreased since the old offence was repealed and replaced by the offence of public nuisance. In February 2004, 42% of offensive language/behaviour cases that came before the Brisbane Magistrates' Court were based solely on behaviour or language directed at a police officer. In July 2004, this had fallen to 34%, and by July 2005, offensive language or behaviour directed at a police officer was present in only 22% of cases. Common insults include 'pig', 'faggot', 'thug', 'mole', 'thug', 'racist' and 'bitch'.

The view of the majority of judges in *Coleman v Power* would suggest that any charge founded on such insults alone is invalid, for it is not likely to be 'offensive' within the meaning of the section. On this basis, one might have expected the 2005 results to reflect a more significant shift away from charges associated with insults directed at police.

Case Study

The police were engaged in an arrest and the defendant was a friend of the person being arrested. The defendant began yelling at police when they forced his friend's hands behind his back. This was because his friend had a broken collar bone. He was charged with public nuisance.

Case study

The defendant was looking after an injured friend. When the police arrived, they pushed the defendant away. The defendant tried to push past police to get to the friend, and became 'abusive'. The police used capsicum spray and charged the defendant with public nuisance.

4.6 The July 2005 study – compliance with *Coleman v Power*

The detailed factual analysis performed on all the public nuisance cases that came before the Brisbane and Townsville Magistrates' Courts in July 2005 ultimately showed that in 48% of cases, the *Coleman v Power* standard of offensiveness was not met. That is, in 48% of cases:

- no aggressive, threatening or violent conduct was engaged in;
- no victimisation, intimidation or bullying occurred;
- there may have been public urination, but it was done discretely and out of necessity; and/or
- the charge would have been more appropriately dealt with under another provision.

Incidentally, these cases were one and a half times more likely to have come before the Townsville Magistrates' Court than the Brisbane Magistrates' Court.

Defendants prosecuted for behaviour inconsistent with the *Coleman* standard were also much more likely to have been affected by drugs or alcohol at the time of the offence; in Brisbane, 90% of these defendants were so affected and in Townsville, 53% were so affected. This might suggest that police officers (particularly in Brisbane) feel they have no alternative means of dealing with intoxicated persons. However, this perception would appear to be incorrect, since section 210 of the *Police, Powers and Responsibilities Act 2000* (Qld) allows police to take an intoxicated person to a place of safety instead of charging them.

In Townsville, defendants whose conduct did not meet the *Coleman* standard were more likely to be homeless or social security recipients. This might indicate selective enforcement against such people. Further research will be required to confirm these speculations.

5. Representation

5.1 Overview

Table 5.1: Representation of public nuisance defendants

	Brisbane 2004	Brisbane 2005	Townsville 2004	Townsville 2005
Duty lawyer/legal aid	35%	38%	33%	17%
Aboriginal legal service	5%	7%	31%	33%
Self-represented	39%	36%	0%	4%
Private lawyer	10%	6%	8%	4%
Other*	0%	2%	3%	0%
Ex parte[+]	10%	11%	25%	43%

* eg. friend, service provider, public trustee

[+] ie. in the absence of the defendant

Key observations based on the results presented in the table above include:

- An alarming number of public nuisance defendants in Brisbane appear in court unrepresented. (see Part 5.2)
- The large increase in Indigenous defendants coming before the court for public nuisance has not been matched by an increase in the proportion of cases taken on by the Aboriginal Legal Service. (see Part 5.3)
- The vast majority of public nuisance defendants have not engaged counsel privately. (see Part 5.4)
- A growing number of public nuisance cases are being dealt with ex parte in Townsville. (see Part 5.5)

5.2 Lack of legal representation in Brisbane

Over one third of public nuisance defendants in Brisbane appear before the court unrepresented. This is a most disturbing finding, as it means that a significant number of public nuisance defendants are unaware of the defences available to them, both those contained in the *Criminal Code 1899* (Qld) (including the defences of emergency and mental illness), and those associated with the scope of the offence (eg. that the behaviour in question was not offensive within the meaning of the section, or did not meet the standard of offensiveness set in *Coleman v Power*).

5.3 Indigenous representation

Despite the 33% increase in public nuisance cases involving Indigenous defendants in Townsville between July 2004 and July 2005, and the 17% increase in Brisbane, a corresponding increase in the proportion of cases taken on by the Aboriginal legal services was not observed. While the reason for this is not apparent from the data, one might speculate that this is a result of the inadequate funding and staffing of Aboriginal legal services; with a limited number of lawyers, only a limited number of people may be assisted, despite fluctuating trends in the policing of certain offences.

It would also imply that a substantial proportion of those cases dealt with ex parte in Townsville involve Indigenous defendants (see Part 5.5).

5.4 Low rate of private representation

Very few public nuisance defendants in Brisbane and Townsville engage the services of a private lawyer; the highest proportion of private representation throughout the entire study period was 10%.

There are two possible reasons for this. First, this finding may further reinforce the observation made in Part 3 above that public nuisance defendants tend to be extremely disadvantaged and therefore unable to engage private counsel. Second, it may be reflective of the fact that those defendants who do not suffer from disadvantage do not feel that a public nuisance case warrants the monetary cost associated with obtaining counsel because any penalty imposed is likely to be minor. With regard to the latter, the increased propensity for magistrates to impose prison sentences for public nuisance (discussed in Part 6 below) might cast doubt on such an assumption.

5.5 Cases dealt with ex parte

There is an alarming trend in Townsville towards public nuisance cases being heard ex parte; the number of public nuisance cases heard ex parte there increased from 25% in July 2004 to 43% in July 2005.

This is of particular concern in light of the fact that those who fail to appear in court to face criminal charges are often homeless, Indigenous, or otherwise disadvantaged. A recent survey of homelessness service providers demonstrates the extent of the problem; 64% of respondents stated that either most or some of their homeless clients have faced difficulty appearing in court at the right date and time.[50] If their case is dealt with ex parte, such defendants have no opportunity to defend the charge, and will most likely have a fine imposed on them which they are unable to pay.

In a society that claims to uphold the rule of law, each of the observations outlined here should be considered a cause for concern.

[50] Paper presented at the *National Homelessness Conference*, Sydney Convention Centre, 1-3 March 2006; see also Tamara Walsh, 'Indigent representation: The US and Australia compared' (2006) forthcoming.

6. Penalties imposed

6.1 Overview

Under the *Penalties and Sentences Act 1992* (Qld), magistrates are able to impose the following penalties in public nuisance cases:

- Absolute release (s18 and s19(1)(a)) – The court may release the defendant absolutely, having regard to the following defendant characteristics:
    - character, age, health – this would allow a magistrate to release a young offender to avoid the adverse consequences that may flow from exposure to the criminal justice system at a young age.
    - mental health – this would allow a magistrate to release a defendant who suffers from cognitive, behavioural or psychological impairment on the basis that the imposition of a criminal penalty for behaviour associated with illness is unjust.
    - circumstances making the offence less serious than it might otherwise have been – this would allow a magistrate to release a defendant who has been charged with 'nuisance' behaviour that is trivial in nature, or only arguably offensive.
    - anything else the court considers appropriate to have regard to – this would allow a magistrate to release a homeless or Indigenous defendant[51] where appropriate.

- Conditional release (s18, s19(1)(b) and s19(2)) – Having regard to the defendant's character, age, health, mental health, the circumstances of the offence or anything else the court considers relevant, a magistrate may release an offender on the basis that he/she enter into a recognisance, on the condition that the defendant be of good behaviour, and comply with any other condition the court considers appropriate. This would allow a magistrate to release a disadvantaged defendant on the condition that they attend a welfare or treatment service to obtain assistance.

- Probation (s91 and s93) – Since public nuisance is punishable by imprisonment, a magistrate may impose a probation order on a public nuisance defendant. The order may include a condition to attend counselling or some other appropriate program. Thus, magistrates could refer a repeat offender who is homeless or impaired to a treatment or welfare service to obtain assistance, instead of imposing a sentence of imprisonment.

- Community service order (s57(1) and s101) – Since public nuisance is punishable by imprisonment, an order to undertake community work may be imposed on a public nuisance defendant, as long as he/she is judged a 'suitable

[51] This is consistent with the *Aboriginal and Torres Strait Islander Justice Agreement*, signed by the Queensland Government in 2000. The Agreement (at 13) states that the practices of the criminal justice system should be changed to ensure that the culture, history and life circumstances of Indigenous people are duly acknowledged.

person to perform community service'. This may be appropriate for some defendants, but for many disadvantaged people, undertaking community work will not be a viable option due to lack of transport, drug addiction, cognitive, behavioural or psychological impairment, or other health difficulties.

- Fine (s44, s45, s48, s50 and s51) – Fines may be imposed for any offence, in addition to or instead of another penalty, whether a conviction is recorded or not. However, if a court decides to fine an offender, it must as far as practicable take into account the financial circumstances of the defendant and the nature of the burden that payment of the fine will place on the defendant. The court may provide the defendant with time in which to pay the fine or may order that the fine be paid in instalments.

- Prison (s9(2)) – A sentence of imprisonment is an available penalty in public nuisance cases, however the legislation states that a sentence of imprisonment should only be imposed as a last resort, and that a sentence which allows an offender to remain in the community should be considered preferable. Thus, it would seem fair to assume that a sentence of imprisonment would not be imposed upon a public nuisance defendant in the absence of extraordinary circumstances.

While the range of penalties available to magistrates is indeed limited, there are sufficient alternatives available to prevent injustices in circumstances where a defendant has been charged with public nuisance for behaviour that is associated with their disadvantaged status, or is petty or only arguably offensive in nature.

Yet, despite the alternative penalties available to them, magistrates invariably impose a fine on public nuisance defendants; indeed, the proportion of public nuisance defendants who received a fine increased between July 2004 and July 2005 (see Table 6.1 below).

A further cause for concern is that in July 2005, some public nuisance defendants were sentenced to prison by the Townsville Magistrates' Court (see the table below). The impacts of such sentences are discussed below.

Table 6.1: Penalties imposed for public nuisance

	Brisbane 2004	**Brisbane 2005**	**Townsville 2004**	**Townsville 2005**
Fine	74%	77%	72%	85%
Bond/recognisance/probation	14%	3%	6%	0%
Discharge	3%	8%	0%	3%
Suspended sentence	1%	0%	6%	0%
Prison	0%	0%	0%	6%
Community service order	0%	2%	3%	0%
Arrest warrant issued	0%	0%	6%	0%
Adjourned	6%	11%	11%	9%

6.2 Fines as a penalty for public nuisance

6.2.1 Trends in fines

Table 6.2: Average fine amounts, time to pay and default periods of imprisonment imposed for offensive language/behaviour and public nuisance

	Brisbane Feb 2004	Brisbane July 2004	Brisbane July 2005	Townsville July 2004	Townsville July 2005
Av fine amount	$152	$202	$212	$208	$223
Av time to pay	2.75 months	1.8 months	2.0 months	2.3 months	2.4 months
Av payment per month	$55	$112	$104	$90	$93
Av default period	2.75 days	5 days	4 days	6 days	4 days

As can be seen from the table above, fine amounts have risen significantly since the offence of public nuisance was introduced. Indeed, between February 2004 and July 2004, the average payment required per month doubled. Of course, the reason for this is that the maximum fine amount was increased from $100 to $750 when the new offence was introduced. In a number of cases observed during the July 2004 study, magistrates remarked that this increase in the maximum fine amount signalled to them an intention by Parliament to 'crackdown' on defendants creating a public nuisance, and that they were obliged to respond accordingly.

Another trend which may be observed is the increase in the average number of days imprisonment set in the event that fine default occurs. Under section 52 of the *Penalties and Sentences Act 1992* (Qld), the court may direct that default in payment of a fine within a fixed time will result in a defendant's imprisonment for 'a period ordered by the court'. There is no legislatively prescribed arithmetic relationship between the default period set and the fine amount, nor is there any guidance on the circumstances in which a default period of imprisonment should be imposed. Magistrates, therefore, do not adopt a consistent approach.

In view of the prescriptions in the Act to the effect that imprisonment should only be imposed as a last resort, it seems inappropriate for a default period to be set in relation to a petty offence such as public nuisance. Further, such a practice derogates from the *State Penalties Enforcement Act 1999* (Qld) which was intended to prevent fine defaulters from being imprisoned.

6.2.2 Fines and disadvantaged defendants

It was established in Part 3 above that the majority of public nuisance defendants are extremely disadvantaged. On this basis, it seems absurd that the most common penalty imposed for public nuisance is a fine.

The average fine amount imposed for offensive language/behaviour increased significantly when the offence of public nuisance was introduced, however since then the amounts seem to have remained steady at just over $200 with around two months to pay. While most may consider this a 'small' fine, for many of the defendants on whom they are imposed, such fines are impossible to pay.

Social security benefits are pegged at levels well below the poverty line. Newstart recipients (ie. unemployment people of working age) receive a maximum of $252 per week on which to live. This equates to 71% of the Henderson poverty line.[52] Youth Allowance recipients (ie. young people seeking employment or participating in education or labour market programs) receive a maximum of $217 per week, which equates to 60% of the Henderson poverty line. For those who rely on social security benefits for their livelihood, fine payments of $50 a fortnight are impossible to sustain. Although Queensland's fine enforcement agency, the State Penalty Enforcement Registry (SPER) permits social security recipients to pay fines at the rate of $20 per fortnight, this option is not open to defendants until they default on the payment of their fine, and default attracts an additional fee of $44. Further, if a default period of imprisonment has been set, the defendant may end up being sent to prison in the event of default instead of coming under SPER's jurisdiction. Default, therefore, often involves significant risks.

The number of cases in which magistrates are attaching default periods of imprisonment to fines has increased since the offence of public nuisance was introduced. In July 2005, 83% of those fined for public nuisance in Brisbane, and 79% of those fined for public nuisance in Townsville, faced an average of five days imprisonment in the event of default. Thus, for most public nuisance defendants on whom a fine is imposed, default carries with it a significant risk of imprisonment.

6.3 Imprisonment as a penalty for public nuisance

Generally, the only time a custodial sentence for public nuisance is considered (not including those cases where a default period has been set) is in the case of repeat offenders who continually fail to pay their fines. However, imprisoning such people will not address the underlying causes of their offending behaviour.

Further, such a practice is blatantly inconsistent with the spirit of the *State Penalties Enforcement Act 1999* (Qld) which, as noted above, was introduced specifically to reduce the number of fine defaulters committed to prison.

It is also inconsistent with the goals of sentencing outlined in the *Penalties and Sentences Act 1992* (Qld). Imprisonment for public nuisance cannot be considered 'just' or 'fair' punishment because it is not proportionate to the crime committed. It will not bring about the 'rehabilitation' of the 'offender' because people emerge from prison with even fewer supports, employment prospects, financial resources and housing options than before they went in.[53] Rather, imprisoning 'offensive' people will amount to a 'costly and fruitless policy of despair, which achieves nothing more positive than to remove them for a short period of time from the society which they offend against or annoy.'[54] There are alternatives and they should be used.

[52] The Henderson poverty line is calculated regularly by the Melbourne Institute of Applied Economic and Social Research; see www.melbourneinstitute.com.
[53] See Tamara Walsh, *Incorrections: Investigating Prison Release Practice and Policy and its Impact on Community Safety*, 2004; available at www.lawandpoverty.org/tamarawalsh.
[54] Geoff Wilkins, *Making Them Pay: A Study of Some Fine Defaulters, Civil Prisoners and Other Petty Offenders Received into a Local Prison*, 1979 at 69.

7. Recommendations

7.1 Recommendations for legislators

Recommendation 1:

Amend section 6 of the *Summary Offences Act* to better reflect the High Court's definition of offensiveness

It appears from the results of this research that police officers are treating the public nuisance offence as something of a 'catch-all' offence – anything that does not come within another criminal law provision (and some things that do) is prosecuted under this section, with seemingly little regard for the standards of offensiveness established in the Australian case law.

It is recommended, therefore, that the offence be amended to better reflect the standard of offensiveness laid down by the majority of the High Court in *Coleman v Power*. There are a number of ways in which this could be achieved.

First, a sub-section (3A) could be added to section 6 which reads something like:

> (3A) 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.

This would reflect the Attorney-General's stated intentions for the public nuisance offence (see Part 1.2 above), and would more accurately reflect the position of the majority of the High Court in *Coleman v Power*.

Second, an alternative means of factoring the case law into section 6 would be to add a sub-section (3A) along the lines of:

> (3A) 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

The court might also be instructed to turn their minds to these factors in determining a prosecution under section 6.[55]

[55] This was suggested to the Minister for Police and Corrective Services by the Rights in Public Space Action Group (RIPS) prior to the passing of the *Summary Offences Act 2005* (Qld); see Rights in Public Space Action

Third, sub-section (4) could 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. This would go some way towards ensuring that the circumstances prescribed by Gleeson CJ (ie. provocation of violence, victimisation, intimidation, bullying) were present.

Fourth, a sub-section (4A) regarding appropriate sentencing for public nuisance could be added which reads something like:

> (4A) 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 section 19 of the *Penalties and Sentences Act 1992* (Qld)).[56]

Either way, as long as the wording of the section does not accurately reflect the relevant case law, unjust arrests and convictions for public nuisance are possible, if not likely.

Recommendation 2:

> **Introduce a defence of reasonable excuse or insert a 'vulnerable persons' provision into the *Summary Offences Act***

The lack of available defences to counter a charge under provisions such as 'public nuisance' has been recognised by the High Court.[57] Additional defences are required to avoid further injustices. In New South Wales, a statutory defence of reasonable excuse is available to those charged with offensive language or offensive behaviour under the *Summary Offences Act 1988* (NSW).[58] The availability of such a defence in Queensland would go some way towards ensuring 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 impacted by the provision.

In addition, or perhaps as an alternative to this, the Rights in Public Space Action Group (RIPS) has proposed that a 'vulnerable persons' provision be inserted into the *Summary Offences Act 2005* (Qld). The aim of such a section would be to ensure that police officers consider alternative courses of action before proceeding against a vulnerable person for petty, or only arguably offensive, behaviour. Such a strategy is

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Group, *Submission to the Minister for Police and Corrective Services on the Draft Summary Offences Bill 2004*, August 2004; available at www.rips.asn.au.

[56] This was suggested to the Minister for Police and Corrective Services by the Rights in Public Space Action Group (RIPS) prior to the passing of the *Summary Offences Act 2005* (Qld); see Rights in Public Space Action Group, *Submission to the Minister for Police and Corrective Services on the Draft Summary Offences Bill 2004*, August 2004; available at www.rips.asn.au.

[57] See McHugh J in *Coleman v Power* (2004) 209 ALR 182 at [69-71].

[58] See ss 4 and 4A.

modelled on the diversionary scheme outlined in section 11 of the *Juvenile Justice Act 1992* (Qld). A 'vulnerable persons' section might read:[59]

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* (Qld) applies;
    (d) contact a welfare agency and request their attendance and assistance;
    (e) take the person to a place of safety if sections 210 or 371C of the *Police Powers and Responsibilities Act 2000* (Qld) 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.[60]

(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).

[59] See Rights in Public Space Action Group, *Submission to the Minister for Police and Corrective Services on the Draft Summary Offences Bill 2004*, August 2004; available at www.rips.asn.au.

[60] A sub-section of this nature is necessary to prevent more punitive action being taken against a vulnerable person on the basis that they are a repeat offender. Repeat offences are to be expected if the criminal law does not deal appropriately with vulnerable people.

Recommendation 3:

Increase the range and appropriateness of sentencing alternatives for petty offences, by:

(a) extending the definition of community service to include attendance at treatment or other rehabilitative programs

(b) introducing a fairer system of fine calculation

(c) establishing a court diversion program

Magistrates often lament that the sentencing alternatives available to them are inadequate to enable them to deal appropriately with repeat offenders who suffer from multiple layers of disadvantage. As noted in Part 6.1 above, there is some room to move within the existing provisions. However, diversion and appropriate sentencing would be more likely to occur if a greater range of alternatives were available to magistrates. Three possible reforms are suggested here.

First, a new sentencing alternative akin to the New South Wales intervention program order or the community-based order in Western Australia and Victoria could be introduced. These orders allow the court to sentence defendants to attend approved programs to promote rehabilitation. They are therapeutic rather than punitive in nature.[61]

However, a similar result could be achieved if the Director-General of Corrective Services exercised his power under section 194 of the *Corrective Services Act 2000* (Qld)[62] to extend the definition of community service work to include attendance at approved rehabilitative and treatment programs. This would dramatically increase the range of persons who could be considered suitable for a community service order, and would provide magistrates with a viable alternative to fining (some) disadvantaged public nuisance defendants.

Second, the routine imposition of fines on disadvantaged public nuisance defendants would be of less concern if a fairer, more realistic means of fine calculation were in place. In many jurisdictions around the world, fines are tailored not only to the gravity of the offence, but also to the means of the defendant. The unit fine or day fine system provides a reasonable, workable and proven alternative to the imposition of flat-rate fines. A pilot project should be considered by the Queensland Government.[63]

Third, a diversion program modelled on the Victorian Criminal Justice Diversion Program could be established in Queensland. The Victorian program is aimed at diverting low level offenders away from the criminal justice system by ordering them to undertake certain restitutive and rehabilitative tasks instead of imposing a more traditional sentence. The diversion plan, which might include writing letters of apology, attending certain programs/community services or undertaking voluntary work in the community, is developed by the magistrate in consultation with court

[61] See further Tamara Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People*, 2004, available at www.lawandpoverty.org/tamarawalsh.
[62] Section 270 of the new *Corrective Services Bill 2006* (Qld).
[63] For more information on unit/day fines, see Tamara Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People*, 2004, available at www.lawandpoverty.org/tamarawalsh.

liaison officers, and charges are adjourned until the plan has been completed. This is an innovative and successful program which Queensland might consider adapting for local implementation.[64]

7.2 Recommendations for the Queensland Police Service

Recommendation 4:

Provide continuing education to police officers on:

(a) the implications of the *Coleman v Power* decision on the scope of the public nuisance offence

(b) the impacts of the criminal justice system on vulnerable people

Based on the findings of this research, it seems that police officers may be unaware of the nature of the court's decision in *Coleman v Power*, or its implications for the policing of 'offensiveness'. Further, despite continual acknowledgements by the Queensland Police Service of the difficulties their officers face in dealing with people who are homeless, of impaired capacity or otherwise disadvantaged, it seems that few strategies have been implemented to address the problem.

Unless a commitment is made to fund additional police liaison officer positions, police officers must be resourced to deal with such situations themselves. They require continuing education on the subjects of homelessness, mental illness, intellectual disability, acquired brain injury, behavioural disorders, cultural sensitivity and age-appropriate interaction. They also require regular formal updates on the impact of case law on their operations, and instructions on how to incorporate judicial directions into their policing practices. A commitment to such educational initiatives must be made by the Department of Police.

Recommendation 5:

Include instructions in the Queensland Police Service *Operations and Procedures Manual* to the effect that:

(a) a police officer should not interfere with individuals' peaceful enjoyment of public space unless this is necessary to protect the public

(b) a police officer should ordinarily take vulnerable people acting 'offensively' to a treatment or welfare service instead of arresting them

(c) a police officer should not ordinarily arrest a vulnerable person unless this is necessary to protect the public

Education of police officers in the nature of that discussed above should be reflected in the *Operations and Procedures Manual*. Advice on how to deal with vulnerable people, based on best practice principles, should be included.

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[64] Magistrates Court Victoria, *Guide to Court Support* Services, 2004 at 5-7. See further Tamara Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People*, 2004, available at www.lawandpoverty.org/tamarawalsh.

More specifically, in relation to public nuisance, the implications of the decision in *Coleman v Power* should be recorded in the manual. Further, best practice in relation to diversion should be incorporated into policing procedures. Examples of directions that might improve police practices are:

(a) that a police officer should not interfere with individuals' peaceful enjoyment of public spaces unless this is necessary to protect the public;
(b) that a police officer should ordinarily take any vulnerable person who is acting 'offensively' to a treatment or welfare service instead of arresting them; and
(c) that a police officer should not ordinarily arrest a vulnerable person unless this is necessary to protect the public.

Consultation with community service providers, community lawyers and disadvantaged people themselves will be necessary if such directions are to be appropriately formulated.

Recommendation 6:

> **Police officers should receive an official reminder of their duty under section 210 of the *Police Powers and Responsibilities Act 2000* (Qld) to take an intoxicated person to a safe place rather than charging them, where appropriate**

The large number of intoxicated people who are charged with public nuisance suggests that police officers may not be utilising their power under section 210 of the *Police Powers and Responsibilities Act 2000* (Qld) to take intoxicated persons to a safe place for recovery rather than charging them with an offence. Best practice suggests that a health-based response to intoxication, rather than a law and order response, is most appropriate and effective; Queensland policing practices should reflect this.

7.3 Recommendations for magistrates

Recommendation 7:

> **Magistrates should discharge public nuisance cases where the conduct in question does not meet the *Coleman v Power* standard of offensiveness**

Improved outcomes in public nuisance cases might also be achieved if magistrates were to amend some of their practices. For example, magistrates should not impose criminal penalties in cases where, legally, no offence has taken place.

Case analysis of the July 2005 data in this study suggests that up to half of all public nuisance cases brought before magistrates do not meet the *Coleman v Power* standard of offensiveness. Yet, very few public nuisance defendants are discharged; a maximum of only 8%.

Apparently, magistrates need to be more discerning in the way they deal with public nuisance cases. The 'knee jerk' reaction should not be to impose a fine. Rather, magistrates should analyse the facts, apply the *Coleman v Power* test of offensiveness,

and determine whether the conduct in question justifies the intervention of the criminal law, or the imposition of a penalty. If the standard is not met, or if the imposition of a criminal penalty is not likely to meet the goals of sentencing outlined in sections 3 and 9 of the *Penalties and Sentences Act 1992* (Qld) (ie. just punishment, rehabilitation, deterrence, denunciation and community safety), then the defendant should be released.

Further, if the defendant is vulnerable, magistrates should be more pro-active in facilitating the provision of treatment and other forms of assistance to that person. While it is true that magistrates are not social workers, they can draw on the skills and knowledge of court liaison officers to make a real difference in the lives of those coming before them. In the case of repeat offenders, the duty of the court to protect the public by preventing the commission of further offences, is clear.

With the impending introduction of the Homeless Court Pilot Program (still in the planning stages at time of writing), this therapeutic jurisprudential role may become mandated with regard to homeless defendants. However, other disadvantaged defendants such Indigenous people, people of impaired capacity, and young people require similar kinds of support, and magistrates are in a unique position to facilitate this.

Recommendation 8:

> **Magistrates should make use of the alternative sentences that are available to deal with petty offenders (eg. conditional releases, bonds/recognisances)**

As noted above, instead of imposing a fine in public nuisance cases, magistrates could utilise the sentencing alternatives that are available to them. For example, they could more often utilise their power under section 19 of the *Penalties and Sentences Act 1992* (Qld) to release defendants absolutely where appropriate, or subject to the condition that they be of good behaviour. Magistrates are permitted to attach any condition they see fit to such an order; this enables magistrates to set a condition that the defendant seek required treatment, welfare or other required services. At present, hardly any conditional releases are imposed on public nuisance defendants.

Similarly, magistrates could impose intermediate orders, such as probation orders, more frequently, in appropriate circumstances (particularly where a magistrate is considering imprisoning a repeat offender).

As noted above, it is true that magistrates have only a limited range of sentencing alternatives available to them. But this does not justify the continual imposition of fines on people who are simply unable to pay them. Not only is it a logical absurdity, it is a direct contravention of section 48 of the *Penalties and Sentences Act 1992* (Qld) which requires magistrates to take defendants' means into account before imposing a fine.

Recommendation 9:

> **If a magistrate does decide to fine a public nuisance defendant, he/she should inquire into the means of the defendant, and should impose a realistic fine, based on the likely burden a fine would have on the defendant.**

If, having considered the available alternatives, a magistrate does decide to impose a fine on a public nuisance defendant, a thorough inquiry into the defendant's means should be made, and any fine imposed should be realistic as regards those means. As much is required by section 48 of the *Penalties and Sentences Act 1992* (Qld), yet at present this hardly ever occurs.

Recommendation 10:

> **Magistrates should stop attaching default periods of imprisonment to fines imposed for public nuisance.**

As has been noted above, the *State Penalties Enforcement Act 1999* (Qld) was introduced with the main aim of ensuring that fine defaulters were not imprisoned. The practice of setting default periods of imprisonment when fining public nuisance defendants flies in the face of this. It may also lead to an unfair and disproportionate penalty being imposed on a defendant who has engaged in only trivial behaviour. Such a practice must stop if further injustices are to be prevented.

7.4 Final remarks

There are many problems in Queensland associated with the public nuisance offence. It is being applied in situations which do not warrant the intervention of the criminal law and, in particular, it impacts disproportionately on disadvantaged people.

The problems identified here seem big; at first glance, it appears that broad-scale, systemic changes are required if vulnerable people are to be protected from adverse impacts of the criminal justice system.

It is true that systemic reform is needed. However, the recommendations outlined above demonstrate that the situation can be improved significantly with only a few minor changes to legislation or policy, many of which are of negligible or no cost.

If Queensland's reputation as the 'Smart State' is to be fostered, if its human rights record is to be protected, and if its integrity as regards the *Aboriginal and Torres Strait Islander Justice Agreement* is to be retained, changes must be made to the policing, prosecution and sentencing of 'offensive' people.

Related publications by the same author

Tamara Walsh, 'Offensive language, offensive behaviour and public nuisance: Empirical and theoretical analyses' (2005) 24(1) *University of Queensland Law Journal* 122

Tamara Walsh, 'Won't pay or can't pay? Exploring the use of fines as a sentencing alternative for public nuisance type offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217

Tamara Walsh, 'The overruled underclass: The impact of the law on Queensland's homeless people' (2005) 28(1) *University of New South Wales Law Journal* 123

Tamara Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People*, Queensland University of Technology, Brisbane, 2004

Tamara Walsh, *Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety*, Queensland University of Technology, Brisbane, 2004

Tamara Walsh, 'Who is the public in public space?' (2004) 29(2) *Alternative Law Journal* 82

Tamara Walsh, 'Defending begging offenders' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 58

Tamara Walsh and Carla Klease, 'Down *and* out? Homelessness and citizenship' (2004) 10(2) *Australian Journal of Human Rights* 77

Tamara Walsh, 'Waltzing Matilda one hundred years later: Interactions between homeless people and the criminal justice system in Queensland' (2003) 25(1) *Sydney Law Review* 75

Tamara Walsh, 'Diverting mentally ill women away from prison in NSW: Building on the existing system' (2003) 10(1) *Psychiatry, Psychology and the Law* 227