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06/04500

Our Ref: OSCR 05/8354
Your Ref:

30/10/05

Dr Mark Lynch
Deputy Director
Research and Prevention
Crime and Misconduct Commission
GPO Box 3123
Brisbane QLD 4001

Dear Dr Lynch

Please find attached the advice provided to the Assistant Commissioner, Metropolitan North Region following a question by the Officer in Charge, Tactical Crime Squad, Central District, Queensland Police Service, regarding the effectiveness of prosecutions for offensive behaviour under s.6 of the *Summary Offences Act 2005* (the Act) (Attachment A). Also, a précis of the case Inglis v Fish (Attachment B), Explanatory Notes to s.6 of the Act (Attachment C) and a full copy of the Case Inglis v Fish.

As you are aware, pursuant to s.7 of the Act, the Crime and Misconduct Commission is responsible for the evaluation of the Act commencing as soon as practicable after 1 October 2005. I refer this matter to you for consideration in the review process.

Should you wish to discuss this matter further, the Service's contact officer is Senior Sergeant Cameron Hall, Legislation Development Branch. The Senior Sergeant may be contacted on telephone 30155694 or e-mail: <Hall.CameronB@police.qld.gov.au>.

Yours sincerely

J C BANHAM
ASSISTANT COMMISSIONER
OPERATIONS SUPPORT COMMAND

ATTACHMENT A

The enquirer is concerned about the impact of the judgment the Supreme Court of Victoria handed down in Inglis v Fish [1961] VR 607, (see attachment I). He interpreted this judgment to mean that a closed toilet cubicle is not a public place thus compromising police investigations and charges under s.6 of the Act.

Advice

On this occasion Constable Inglis crouched down on his hands and knees to look under the door of the toilet cubicle occupied by the defendant Fish and observed the defendants behaviour. On appeal by the prosecution, it was held by Judge Pape, that 'If he is in a public place and his conduct there is capable of being seen, he may be convicted, but if his conduct cannot be seen even if he is in a public place, then he cannot be convicted' (p:614). The behaviour of Fish could only be observed if Inglis took an unusual action to see it. This however does not mean that a closed toilet cubicle in a public toilet is not a public place, rather it is the manner in which any behaviour within the cubicle is observed.

This decision does not impede Queensland police from pursuing a matter under s.6(2)(b) of the *Act,* upon their own evidence, or upon complaint by a member of the community. If the behaviour of the offender is such that it interfered with the peaceful passage through or enjoyment of, a public place by a member of the public, then it could be held to be disorderly, offensive or threatening.

Determining whether s.6 of the Act is applicable requires an examination of the circumstances that surround each individual matter. Guidance in relation to this matter may be found through examining *Inglis v Fish* and the Explanatory Notes to the Act (see attachment II).

Due to the nature of offences likely to be committed in a public toilet, the manner of behaviour causing offence or threat to other users and subsequent detection by police, is most likely to be by the offender's verbal behaviour or overt physical actions. This would be provided for under s.6(3)(a) or (b) of the Act. That is, attention will be drawn to the offender by the words or actions used, not by actually seeing them within a closed toilet cubical.

Recommendation

Any proposal to amend legislation must specify why the existing legislation is inadequate or needs modification. It is necessary to identify the 'mischief' to which the proposed law is directed. In this matter by correctly applying the provisions of s.6(3)(a) or (b) of the Act, any impact by *Inglis v Fish* is extinguished.

Sufficient legislative provisions currently exist, provided the correct facts are used to support a charge laid by the investigating officer, therefore I recommend that no amendment is required in relation to this issue.

ATTACHMENT B

Inglis v Fish [1961] VR 607

Date of decision: 17 May 1961

Court: Supreme Court of Victoria

Walter Fish was charged with behaving in an offensive manner in a public place under the Police Offences Act 1958 (Vic) by First-Constable William Inglis. Fish pleaded not guilty and the charge was dismissed by the local court at Portland. Inglis applied to the Supreme Court for a review of the court's decision.

The facts:

At the public toilets in the Botanical Gardens at Portland, the male section backed onto the female section with a wall joining them. Someone had bored a hole into the wall. This enabled Fish to go into a cubicle in the male toilet and look through into the female cubicle while women were going to the toilet. He shut and locked the door to the cubicle, sat on the toilet seat and put his eye to the hole in the wall.

Inglis observed him going in and out of the toilet and followed him in. To see what he was doing he had to crouch down on his hands and knees and look under the door.

The decision:

The judge held that whether behaviour is offensive depends on where that behaviour took place and the circumstances in which it took place. He found that a toilet cubicle is a public place, regardless of whether the door is locked or not.

However, behaviour is only offensive if it occurs in a place where members of the public might reasonably be expected to be and in circumstances where the behaviour could be seen by anyone who happened to be present. It doesn't matter that no one was actually present or looking at the time.

The important element identified by the judge was that the behaviour could have been observed if a member of the public had been present.

In this case, although the behaviour was 'reprehensible and disgusting', it couldn't be observed by members of the public who happened to go into the toilet, because Fish had locked himself in the cubicle. It could only be seen by an unusual action, such as crouching down and looking under the door. Therefore his behaviour was not legally considered 'offensive'. The appeal was dismissed and the magistrate's decision upheld.

Cited in <http://www.over-the-rainbow.org/digest/inglis_v_fish.htm>

Part 2 — Offences

Division 1 – Offences about quality of community use of public spaces

Object of div 1

Clause 5 states the objective of division 1 is to ensure that members of the public should be able to lawfully use and pass through public places without interference from the unlawful acts of nuisance committed by other people.

Public nuisance

Clause 6 creates an offence of 'public nuisance' and defines what constitutes the offence. In determining what is a 'public nuisance' offence in terms of the section, a court, is not limited by, but should take into account the following examples –

1. A person calling another person a slut in a shopping centre or a park may constitute offensive language.
2. A person using obscene language in a mall or a street may constitute offensive language.
3. A person using obscene language in the public bar of a hotel in the course of a conversation with another person may not constitute offensive language.
4. A person who disrupts a church service by using language offensive to persons at that service or to persons who are gathering for the service or to persons who are outside a place of worship after a service may commit an offence. However, the section does not prevent a person from lawfully protesting and expressing an opinion about adverse decisions or actions of a church or its members.
5. A person encourages another to participate in a fight.
6. A person running over the roofs of parked cars.
7. A person engaging in an act of sexual intercourse in view of others in a public place.
8. A person urinating in view of another in a public place.
9. A person walking past persons dining and interfering with a person's food.
10. A person seeking money or property from another in a manner that causes a person to be intimidated, have concern about their safety, or such as to cause a person to leave a public place.
11. Behaving in a manner that might cause another person to leave a public place.

Order accordinglu.

licitors for the mother: *F. J. Orames & Downing.*

licitor for the father: *R. H. Dunn.*

ERIC E. HEWITT
BARRISTER-AT-LAW

OTE:—Since this judgment was delivered, I have learned that the sary formalities for the appointment of welfare officers in Victoria been completed.—J.V.B.]

INGLIS V FISH
[1961] VR 607

PAPE, J.

12 April, 17 May 1961

Police offences—Offensive behaviour in a public place—Looking through hole of closed cubicle in public convenience—Conduct observable only by taking unusual or abnormal action—Police Offences Act 1958 (No. 6337), s. 27.

A block of public conveniences contained cubicles for both males and females. The accused entered one of the male cubicles and, through a hole in the wall, looked into the female part of the conveniences and observed women therein. In order to see the accused whilst he was so engaged, the informant had to crouch on his hands and knees and look underneath the locked door of the cubicle occupied by the accused.

Held: though a locked cubicle in a public convenience is a public place, for behaviour in a public place to be offensive within the meaning of s. 27 of the *Police Offences Act* 1958 it is necessary that such behaviour be observable, though not necessarily observed, by any member of the public who happened to be present if he were looking, and the behaviour of the accused was not offensive behaviour within the meaning of the section, because conduct which cannot be seen without the observer having to take abnormal or unusual action to observe it cannot be said to be offensive.

Order to Review

On the information of William Inglis, First-Constable of Police, the defendant, Walter Francis Fish, was charged that on 20 January 1961, at Portland, he did behave in an offensive manner in a public place, to wit the public toilets in the Botanical Gardens, Portland.

A court of petty sessions at Portland having dismissed the information in the circumstances described in the judgment, the informant obtained an order *nisi* to review such dismissal.

J. A. Gobbo, for the informant, to move the order absolute.

H. G. Ogden, for the defendant, to show cause.

Cur. adv. vult.

Pape, J., delivered the following written judgment: On 22 February 1961, the defendant appeared at the court of petty sessions at Portland before Mr. J. N. Fitzpatrick, S.M., and pleaded not guilty to a charge under s. 27 of the *Police Offences Act* 1958, that "on 20 January 1961, at Portland, he did behave in an offensive manner in a public place, to wit the public toilets in the Botanical Gardens, Portland".

The evidence led for the informant was as follows: Gilbert Henry Pritchard, the curator of parks and gardens at the Botanical Gardens at Portland deposed that he was familiar with the toilets in those gardens and had noticed for some time that a hole had been bored at the back of one of the cubicles in the men's toilet, which cubicle connected at the back with the rear of one of the cubicles in the ladies' toilet. This hole was 28 inches from the floor level. When he saw this hole, he immediately plugged it with wood.

This witness also gave evidence regarding the defendant's conduct at this toilet on occasions other than that in respect of which he was charged. This was objected to by the defendant's solicitor, and the affidavit in support of the order *nisi* does not state what ruling the

magistrate gave on such objection being taken. The admissibility of this evidence is not a ground of the order *nisi* and I propose not to refer to it, as Mr. Gobbo, for the informant, was content to rely solely upon the evidence of the informant.

I must not, however, be taken to have decided either that this evidence was admissible or that it was inadmissible. It is possible (although I do not so decide) that such evidence might be admissible on the authority of cases such as *Thompson* v. *R.*, [1918] A.C. 221; *R.* v. *Johnson*, [1938] V.L.R. 37, and *Griffith* v. *R.* (1937), 58 C.L.R. 185; [1937] A.L.R. 653, as being evidence designed to show a system and as negativing any possible defence of mistaken identity or innocent motive.

The evidence of First-Constable Inglis, the informant, was to this effect: At 12.25 p.m. on 20 January 1961, he went to the Botanical Gardens in plain clothes. As he entered the gardens, he saw the defendant get out of his car, which was left in Cliff Street. The defendant entered the gardens, went direct to the public toilets and entered the cubicle in the men's section nearest to the entrance, which cubicle backed on to a cubicle in the ladies' section. He (First-Constable Inglis) watched the toilet for 15 minutes, and during that period the defendant remained in the cubicle, and during the same period four women entered the ladies' section.

At the end of this period, the defendant came out of the toilet and stood partly concealed by some bushes close to the entrance. He remained there for about three minutes, looking towards the entrance to the gardens. Two ladies then entered the toilet and at the same time the defendant re-entered the men's section and went into the same cubicle that he had previously entered. He (First-Constable Inglis) waited outside for about a minute and then entered the men's section of the toilet. He looked into the cubicle in which the defendant was and saw him sitting back to front on the toilet seat looking through a hole in the wall at the back of the cubicle. He (First-Constable Inglis) had examined this hole and found it to be a quarter of an inch in diameter and two feet eight inches from ground level, immediately above the pan. He knocked on the door and said, "Police here. Open this door", and when the defendant opened it, said: "I know what you have been up to". The defendant said: "Can you not forget it this time?" The defendant was asked if he removed the paper that was used to block up the hole that day, and he admitted that he had done so, and said that he would not do it again. He admitted that he was looking through the hole at women as they came into the toilet and said that if he was allowed to go, he would never do it again. He admitted that he saw women in the other toilet but that he could not see much.

At the police station he made a written statement admitting that he went to the toilets, removed the paper from the hole, looked through the hole and could see women through it as they were going to the toilets and that he had done it on a good many other occasions.

There was an answering affidavit by the defendant's solicitor from which it appeared that, in cross-examination, the informant (First-Constable Inglis) had said that the toilets were a brick building divided into two sections—one for use by ladies and one for use by men. The men's section consisted of a urinal, a passageway and several cubicles, each of which was fitted with a door. The ladies' section was similarly divided into cubicles.

Upon entering the men's section, he (the informant) was unable to see into the cubicle occupied by the defendant as the door was closed, and he crouched down on his hands and knees and looked underneath

the door in order to see him. He agreed that with the door closed in the ladies' cubicle, it was not possible to see very much as there was not much light.

At the conclusion of the case for the informant, the defendant's solicitor submitted that there was no case to answer, on the ground, first, that the toilet was not a public place, and, secondly, that the defendant's behaviour, as established by the evidence, was not offensive.

The magistrate appears, at this stage, to have cut short the defendant's solicitor's submissions by saying: "You need not labour this point. Although this is a reprehensible type of conduct, it does not conform to what is required to be offensive". Then he dismissed the information and gave no further reasons.

The sole ground of the order *nisi* is "that the magistrate should have held that there was a case for the defendant to answer". Reading the informant's affidavit in conjunction with the answering affidavit, it would appear that the evidence before the magistrate disclosed that the defendant entered a cubicle in the men's section of the toilet and shut the door and locked it from the inside, then seated himself on the lavatory seat and applied his eye to this hole in the wall, which gave him a view (albeit an imperfect one) of the occupant of the adjoining cubicle in the women's section of the toilet.

The evidence further showed that it was not possible for any person entering the men's section of the toilet to observe what was happening in this closed cubicle unless that person crouched down on his hands and knees and looked underneath the door.

The informant gave no evidence as to the construction, size and condition of this door, but I think from the fact that he himself said he knocked and called upon the defendant to open the door and that the defendant did so, that the magistrate was entitled to draw the conclusion that I myself draw, namely, that the door was closed and locked. Further, because the informant swore that he was unable to see into the cubicle as the door was closed, and that he crouched on his hands and knees and looked underneath it in order to observe the defendant's actions, the magistrate was entitled to draw the conclusion that I also draw, namely, that it was not physically possible for any person to look into the cubicle and see what was going on there, except by crouching down and looking underneath the door.

These facts and circumstances present a neat problem in law, which appears not to be covered by any direct authority.

The section under which the defendant was charged was s. 27 of the *Police Offences Act* 1958, which provides that "every person who, in, on or near any public place, or within the view or hearing of any person being on or passing therein or thereon (*a*) behaves in a riotous, indecent, offensive, threatening or insulting manner, or (*b*) uses any threatening, abusive or insulting words, shall be liable to a penalty".

The defendant was charged with behaving in an offensive manner *in* a public place. It is, I think, clear that whether behaviour of any kind can be said to be "offensive" within the meaning of this section must depend to some extent upon where that behaviour took place, and the circumstances in which it took place. Conduct which might undoubtedly be described as offensive if it took place on a public street or footpath could hardly be said to be "offensive" if it took place in the privacy of the front room of a house which abutted on to that street or footpath if the blinds were drawn so that it was not possible to see what was going on. In *Anderson* v. *Kynaston*, [1924] V.L.R. 214; 30 A.L.R. 135, Cussen, A.-C.J., for himself, Mann, J., and McArthur, J., said at pp. 217-18, speaking of the word "offensive" in s. 25 of the *Police Offences*

Act 1915 (which is in the same form as the section is in the 1958 Act), "that word must be considered in connexion with the words 'behave', 'manner', 'view or hearing', and 'public place', all of which suggest the application of what is the ordinary standard in criminal cases—that is, the 'external standard', and that the section is dealing with a person's conduct in the external relations of life, and this view is supported by the consideration that s. 25 and its associated sections are concerned with the preservation of order and decorum in streets and other public places, and with the punishment of 'police offences' committed therein'." He therefore posed the single question for the court's decision as being: "Has it been satisfactorily shown that the defendant behaved in an offensive manner in a public place?" (at p. 218).

The same idea was stated by Sim, J., in *Walker* v. *Crawshaw*, [1924] N.Z.L.R. 93, in relation to s. 41 of the Police Offences Act 1908, which enacted that every person who wilfully does any grossly indecent act in any public place or within view thereof shall be guilty of an offence. At p. 95, he said: "If an act is done in such a way that it cannot possibly be seen by others, and so that offence to anyone is avoided, then for the purposes of the Act it is not an indecent act. If, however, the act is done in such circumstances that it may possibly be seen by others, then it may be an indecent act". In that case, the defendant, according to the police evidence, was having sexual intercourse with a woman in the back seat of a motor car which was standing in a street at night. The hood of the motor car was up and the side curtains were in position, and the constable was only able to see into the rear seat by shining his torch on to it. His Honour held that as the motor car was in a public street, the act was committed in a public place; and as "there was always a chance of some other person seeing the appellant in the same way as the policeman saw him", the appellant had committed an indecent act in a public place.

In *Worcester* v. *Smith*, [1951] V.L.R. 316; [1951] A.L.R. 660, O'Bryan, J., held that in order to come within the meaning of "offensive behaviour" in s. 25 of the 1928 Act the behaviour must be such as is calculated to wound the feelings, arouse anger or resentment, or disgust, or outrage in the mind of a reasonable person (see V.L.R. p. 318). His Honour then used words which seem to me to indicate that his view was that such "a reasonable person" must be present when the alleged offensive behaviour took place, and have observed it. He said: "Under a similar Act in New South Wales, it has been held that the offence of using insulting words in a public place is not committed unless the words are insulting to some person present when they are uttered, either because they are insulting to him personally or because he is related in such a way to the person about whom they are uttered that he would reasonably resent them as being insulting—*Ex parte Breen* (1918), 18 S.R. (N.S.W.) 1; *Lendrum* v. *Campbell* (1932), 32 S.R. (N.S.W.) 499; see also *Wragge* v. *Pritchard* (1930), 30 S.R. (N.S.W.) 279. I think a like meaning should be given to the word 'offensive' in this section." However, in *Annett* v. *Brickell*, [1940] V.L.R. 312; [1940] A.L.R. 285, the same learned judge had to consider the meaning of the words "insulting words" in this section, and he then declined to regard either *Ex parte Breen, supra*, or *Lendrum* v. *Campbell, supra*, as authorities which should persuade him to hold that, in order that words might be held to be "insulting", it was necessary to show that the words were personally insulting to a person who was present or to someone closely associated with somebody present at the time they were used. He decided that, because the words used were clearly capable of a meaning insulting to the dignitaries of the Roman

Catholic Church and any member of that Church, they were insulting words within the meaning of s. 24 of the 1928 Act, even though there was no evidence that either a dignitary of the Church or any member of the Church was present and heard them. For myself, I find some difficulty in understanding why, if the learned judge was not prepared to give the same interpretation as had been given in New South Wales to the same words appearing in the Victorian Act, he felt constrained in the later case to give that meaning to different words appearing in the same section of the Victorian Act. I find it difficult to see why words should be said to be "insulting" without proof that there was any person present who was insulted, and yet behaviour should be said to be "offensive" only if it is proved that some person present was offended. If the words "insulting" and "offensive" mean subjectively that some person must be insulted or offended, then the same degree of proof should be necessary, if the defendant is charged with using insulting words, as would be necessary if he were charged with behaving offensively. But the words are each equally capable of an objective meaning, and, in my view, that is the meaning that they should bear in s. 27.

With all respect to what I understand to have been the learned judge's view in *Worcester* v. *Smith, supra*, I would prefer to adopt his reasoning in *Annett* v. *Brickell, supra*, and to say that behaviour can be "offensive behaviour in a public place" within the meaning of s. 27 of the Act if it is committed in a public place and is such as is calculated to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man, notwithstanding that no member of the public is present, or (if there be members of the public present) that nobody is offended, provided such behaviour occurred in a place where the presence of members of the public might reasonably have been anticipated; and in circumstances where such behaviour could be seen by any member of the public who happened to be present if he were looking. Such a construction is, I think, more consistent with the trend of the authorities than a construction which requires proof of the presence of the public, and of the fact that they were offended. See *R.* v. *Benson*; *Ex parte Tubby* (1882), 8 V.L.R. (L.) 2; *Hannaberry* v. *Crowther*, [1945] V.L.R. 158; [1945] A.L.R. 92; *Densley* v. *Mertin*, [1943] S.A.S.R. 144; *Macgrath* v. *Brady*, [1917] V.L.R. 346, per Madden, C.J., at p. 349; 23 A.L.R. 191; *Ex parte Bellamy* (1927), 44 W.N. (N.S.W.) 112; and *Lunt* v. *Bramley*, [1959] V.R. 313, per Adam, J., at p. 316. In this last-mentioned case, Adam, J., was dealing with s. 26 (*a*) of the *Police Offences Act* 1957, which made it an offence for a person to use indecent or obscene language in or on any public place, or within the view or hearing of any person being or passing therein or thereon. The defendant was charged with using indecent language within the hearing of people in a public place, and not with using indecent language in a public place. His Honour pointed out that this section created two distinct offences (just as s. 27 of the 1958 Act creates two distinct types of offence), and, at p. 316, he said: "In one limb of the section the use of indecent language is made an offence if used in a public place. In such a case it seems clearly immaterial whether or not any person actually heard the words complained of or, indeed, whether any person whatsoever happened to be in the public place". He then concluded, contrary to what had been said in *Ex parte Bellamy* (1927), 44 W.N. (N.S.W.) 112, and other cases, that where the offence was charged under the other limb of the section, no offence was established unless the indecent language had in fact been heard by some person in a public place. But in declining to follow all of what had been said by Campbell, J., in *Ex parte Bellamy*, his Honour did

not, I consider, disagree with the statement of the learned judge that "if indecent language is used in a public place it is an offence against the section whether it is heard by persons passing in the street or not" (44 W.N. (N.S.W.), at p. 113). Indeed, he expressly came to a similar conclusion.

I can see no reason why a similar construction should not be given to s. 27 under which the defendant was charged. In my view, if a person's conduct in a public place is such that it would clearly give offence to any member of the public who happened to be there, and who could see such conduct if he were looking, that is sufficient to bring him within that part of the section which deals with offences committed in a public place, and it is immaterial that no such person was present or, if he were, that he did not see the behaviour complained of. In most cases that come before the courts in connexion with charges of offensive behaviour in a public place, there will inevitably be some person present who observed the defendant's behaviour, for if there were not it would be almost impossible to prove a case against him. For this practical reason there is usually some person (a policeman or some other person who witnessed the incident) who is called to say what he saw and who may well regard the conduct as offensive. But, technically, I think that even if nobody saw the behaviour, and the only evidence of it were the defendant's voluntary confession, he could still be convicted, providing it could be shown that his behaviour occurred in a public place in circumstances in which it could have been seen by any person who happened to be there. But the all-important consideration is that it must be shown that the behaviour could have been observed, had some member of the public been present, so that whatever he did was open to the public to see.

In this case, although, as I shall later indicate, I think that what the defendant did was done in a public place, nevertheless the evidence shows that his behaviour, reprehensible and disgusting though it was, was not capable of being observed by members of the public who were exercising their right to be present in this toilet. The defendant had locked himself in this cubicle and so withdrawn himself and his actions from observation by the public, and I do not think it to be any answer to this proposition that the first-constable, or any other member of the public, by crouching down and looking under the door, could see what the defendant was doing. Where conduct is observable only by the observer taking some unusual or abnormal action in order to obtain a view of that conduct—as by peeping through a keyhole, using a periscope in order to see through a fanlight, or crouching down and looking under a door—in my view such conduct does not cease to be what I might call behaviour in private; and conduct which is not capable of giving offence to anybody because it cannot be seen, cannot be said to be offensive behaviour. See *Walker* v. *Crawshaw*, [1924] N.Z.L.R. 93.

In this case, had the door of the cubicle been of such a size that any person walking down the passageway in which the cubicles were situated could have looked into the cubicle and seen what was going on, the defendant's conduct could rightly have been described as offensive, and in my view he could, with propriety, have been convicted of offensive behaviour in a public place, even though nobody had bothered to look over the door and even though there was no evidence that any other person had entered the toilet while the defendant was in the cubicle, because then his conduct would have been sufficiently public to make it offensive. But because his conduct was not observable by any other member of the public using this toilet in the normal way, I do not think his conduct can be said to have been offensive, any more than a lewd

performance between two people in a room in a private house abutting on the street can be said to be "offensive behaviour" within this section. Such conduct, if visible through the window to any passer-by would, I think, undoubtedly be offensive behaviour within the view of a person passing in the street, but, consistently with what Adam, J., decided in *Lunt* v. *Bramley*, [1959] V.R. 313 (which was approved by the Full Court in *Shaw* v. *Medvecky*, [1959] V.R. 733), would require evidence that the conduct was actually seen by a person passing in the street. Whether seen or unseen, the conduct is precisely the same; it is "offensive" in the one case because it is capable of offending others who are able to see it, in the other case it is not offensive because it is not capable of offending for it cannot be seen. For these reasons, I think, the magistrate was right in dismissing this information. It was also argued that, because the defendant had locked himself in this cubicle and so denied entrance to others, his act was not committed in a public place. It was conceded that the toilet was a public place in the sense that any member of the public who desired to go there was entitled to enter it, but it was said that once the door of the cubicle was shut and locked on the defendant, the cubicle ceased to be a public place. I do not think this argument is correct. It was based upon the view that, notwithstanding that many places which are on private property have been declared to be public places—see *Ward* v. *Marsh*, [1959] V.R. 26 (ground floor of a city emporium); *Moloney* v. *Whitwell*, [1924] V.L.R. 454; 30 A.L.R. 343 (a convenience in a churchyard); *R.* v. *Harris* (1871), L.R. 1, C.C.R. 282 (a urinal in Hyde Park); *R.* v. *Wellard* (1884), 14 Q.B.D. 63 (a place in a marsh); *Moss* v. *McIntyre*, [1934] A.L.R. 149 (a hall used for payment of sustenance payments); *McKinna* v. *Connelly*, [1918] V.L.R. 641; 24 A.L.R. 363 (a muster room on a stevedoring company's premises); *Sewell* v. *Taylor* (1859), 7 C.B. (N.S.) 160 (a private house while an auction sale was being conducted); *Swan* v. *McLellan* (1865), 2 W.W. & a'B. (L.) 6 (a room in a hotel where a public meeting was being held)—none of those decisions go so far as to say that every part of the premises must be said to be a public place, and that, therefore, there may be premises which consist partly of public places and partly of private places, and that a locked cubicle in a public toilet was one such private place.

It is undoubtedly true to say that one building may, at the same time, comprise both public places and private places. There is no warrant for saying that because the ground floor of the Myer Emporium was held to be a public place, it must be held that the departmental manager's private office on that floor, or the staff changing room, must also be said to be public places. These places may, in certain circumstances, be public places, or they may not. Ultimately, I think that whether such places are or are not public places will depend upon the extent of the invitation (express or implied) to the public to use them. I use the word "invitation" here in a fairly broad sense, as including cases covering a statutory right of entry or user (as in the case of public highways), dedication as streets of private lands to the public, and cases where either express or implied leave and licence is granted. An implied invitation to the public to enter the Myer Store does not include an invitation to enter the managing director's private office, although in certain circumstances (such as an invitation to the public to inspect the entire premises) such an invitation might extend to all parts of the premises. It is, therefore, relatively easy to decide, in respect of privately owned premises, which parts of them are public places for the purposes of Acts such as the Police Offences Act. But a distinction must be drawn, I think, between such cases, and cases where the premises

are such that a general invitation to use the entire premises for a particular purpose is extended to the public, but some provision is made for a limited degree of privacy for those accepting that invitation. In the former class of case, the invitation is limited and does not extend to those parts of the premises which the invitor desires to keep private; in the latter class of case the invitation is general and extends to the entire premises, but facilities enabling those who enter, pursuant to the invitation, to obtain a limited degree of privacy, are provided. In this case, every member of the public was entitled to enter these toilets for the purpose for which they were provided, and every member of the public so entering was entitled to enter these cubicles and by closing the door to obtain a limited degree of privacy—the invitation covered the use of the cubicles. But because that provision is made, and advantage is taken of it, does not, in my view, have the effect of withdrawing the place in which the privacy is obtained from its essential character as a public place. I cannot think that a cubicle in a polling booth ceases to be part of a public place every time a voter enters it. It would be unthinkable that, because a known thief entered such a cubicle in a toilet, and shut the door whilst waiting to rob the next person who came in, he could not be convicted of loitering in a public place with intent to commit a felony under s. 72 (1) (*i*) of the Act; or that a person who, whilst enclosed in such a cubicle, used obscene language or sang an obscene song which could be heard throughout the toilet, could not be convicted under s. 34. Nor is it necessary to give any restricted meaning to the words "public place" in order to prevent injustice, if my view as to what is required to make behaviour offensive is correct; for that view makes the defendant's liability to conviction depend upon his "conduct in the external relations of life", which is his observable conduct. If he is in a "public place" and his conduct there is capable of being seen, he may be convicted, but if his conduct cannot be seen even if he is in a "public place", then he cannot be convicted.

I think, therefore, that the magistrate was right, and that this order *nisi* should be discharged with costs; and the order will be in accordance with what I have said.

Order nisi discharged.

Solicitor for the informant: *Thomas F. Mornane*, Crown Solicitor.

Solicitors for the defendant: *Nicol Silvester & Culhane*, Portland.

ERIC E. HEWITT
BARRISTER-AT-LAW

SUPREME COURT OF VICTORIA

Re DOWLING, deceased; THOMPSON v. UNION TRUSTEE COMPANY OF AUSTRALIA LTD.

HERRING, C.J.

27-29 May, 29 June, 19 September 1959

Will—Trustees—Commission on capital of estate "upon the realization collection and conversion thereof"—Date at which calculated—Commission on annual income of estate—Whether borne by residuary estate or annual income—Special power of appointment—Rule against perpetuities—Property Land Act 1958 (No. 6344), s. 158.

Under a testator's will the trustees were entitled to commission at two and a half per cent "on the capital of my estate upon the realization collection and conversion thereof". The trust property included a substantial pastoral property which was to be held on trust to pay the income to certain persons for life then to other named persons. During the interest of the life tenants the property was acquired by the Soldier Settlement Commission.

Held: the trustees were entitled to commission at the rate of two and a half per cent of the value of this property, such value to be calculated as at the time when the legal estate became vested in the trustees as trustees, i.e. when their executorial functions ceased.

Re Chirnside, [1956] V.L.R. 295; [1956] A.L.R. 721, followed.

The will further provided that the trustees were also entitled to commission at five per cent on "the annual income of my estate", and that "the remuneration of my trustees shall be paid out of my residuary estate".

Held: the expression "the remuneration of my trustees shall be paid out of my residuary estate" related to the administration of the estate for the purpose of ascertaining the residuary estate and did not relate to commission upon the annual income of the estate; therefore the commission to which the trustees were entitled at the rate of five per cent on "the annual income of my estate" was payable out of the income of the property earning such income, and was not to be borne by the residuary estate.

The will further provided that the trustees were to hold the property on trust to pay the income to named persons and the survivor or survivors of them for their lives and upon the death of the last survivor of them and of T.D. to hold the property upon trust for the issue of T.D. upon their attaining 21 years or being daughters attaining that age or marrying under that age in such manner and in such shares as T.D. should by his will appoint and in default of appointment then in equal shares.

Held: the power of appointment was valid and did not infringe the rule against perpetuities.

Blight v. *Hartnoll* (1881), 19 Ch. D. 294, distinguished.

Originating Summons

The plaintiffs, Noel Barclay Thompson, Evelyn Charles Chickeley Tucker, and Edward John Wilson Chapple, as trustees of the will and codicil of George Ware Dowling, deceased, took out an originating summons to determine certain questions arising in respect of the estate. The various defendants were: Union Trustee Company of Australia Ltd. (as executor of Percy Charles Dowling), Jean Dowling Parsons, George Robinson Parsons, and Geoffrey Edward Taylor (as executors of Reginald Laws Dowling), Garnet Hatherley Dowling, Charles Ware Dowling, Tom Douglass Dowling, Jennifer Marguerite Dowling, Angela Wynne Dowling, Diana Jane Dowling, Gillian Lena Smith, Alan Dowling, Neil Smith, and Ian Neil Smith.

L. Voumard, Q.C. (with him, *R. E. McGarvie*), for the plaintiffs.

C. I. Menhennitt, Q.C. (with him, *R. M. Northrop*), *F. M. Bradshaw*, *Arthur Adams* and *H. R. Newton*, for the various defendants.

Cur. adv. vult.