Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland

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I. Introduction

In September 2003, the Queensland Premier's Department announced that reforms aimed at addressing the 'flagrant and repeated refusals' of some people to pay fines for 'public nuisance type offences' were being considered by the Attorney-General (Office of the Premier and Trade 2003). While few would object to more rigorous enforcement of fines against those who wilfully refuse or culpably neglect to pay their fines, it would seem unjust to apply the same approach to those who are unable to pay. Since the vast majority of those who default on payment of fines are too poor to pay their fine (see Raine, Dunstan & Mackie 2003; Morris & Gelsthrope 1990; Shaw 1989; Mahoney & Thornton 1988; Wilkins 1979; Softley 1978), an indiscriminately harsh response to fine default appears unfair and arguably misguided.

The *State Penalties Enforcement Act* 1999 (Qld) established a new fine enforcement scheme in Queensland for the 21st century. It introduced a variety of fine enforcement mechanisms including seizure of property, garnishing of earnings, direct debit from Centrelink payments and community service. While imprisonment remains the ultimate sanction for fine default, it is presented in the Act as a sanction of last resort. Indeed, a stated goal of the legislation is to reduce the number of people committed to prison for fine default (s9(d)). Any policy which results in increased rates of imprisonment for fine default in Queensland would thus represent a departure from the intent of the legislature and would signal a step backwards.

Imposing a fine on a person who does not have the capacity to pay fails to comply with the goals of sentencing outlined in ss3 and 9 of the *Penalties and Sentences Act* 1992 (Qld). Imposing a fine on a poor or homeless person who does not have the means to pay is an instance of neither just punishment nor fairness. It will not meet the goals of rehabilitation

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or deterrence, but rather may encourage the person to engage in more serious criminal behaviour in order to pay the fine, or to obtain those necessities of life that may be forgone as a result of making the payments (DeJong & Franzeen 1993).

There are various legislative provisions in Queensland which aim to prevent undue hardship from being caused to indigent people by the imposition of fines for minor criminal offences. For example, the court must take into account an offender's capacity to pay before imposing a fine; the court may provide a defendant with additional time in which to pay a fine, or to allow the defendant to pay a fine in instalments, if it is satisfied that the defendant will otherwise be unable to pay the fine; and offenders who cannot pay their fine may apply to have their fine converted into a certain number of hours' unpaid community service work (see *Penalties and Sentences Act* 1992 (Qld) ss5(1)(b), 48, 50, 52, 59). Further, viable alternatives to imposing a fine for a minor offence exist under legislation; the court may release an offender absolutely, or on the condition that they access drug treatment and/or other social services, or the court may impose a good behaviour bond or probation order with treatment or other conditions attached (see *Penalties and Sentences Act* 1992 (Qld) ss19, 24, 94). However, there is evidence to suggest that these options are underutilised by magistrates when sentencing public space offenders (see Part IV below).

This article explores the complex relationship between marginalised people, 'public nuisance type offences' and fines law. It reports on court observation research conducted in Brisbane which suggests that indigent people are more likely than others to appear before the court on charges related to public space offences, and that they are just as likely as others to receive a fine in response to their offending behaviour despite the legislative provisions aimed at avoiding this. Fine enforcement procedures in Queensland will also be explored and recommendations for reform will be made.

II. Public Nuisance Type Offences and People who are Marginalised

Presumably, when the Queensland government uses the phrase 'public nuisance type offences', it is referring to minor summary offences under laws which (ostensibly) exist to ensure the safety, comfort and peaceful enjoyment of people in public space. Such 'public space offences' include offensive behaviour, offensive language (now combined in a new offence called 'public nuisance'; see previously *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s7AA; now *Summary Offences Act* 2005 Qld s6), begging (previously *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s4(1); now *Summary Offences Act* 2005 Qld s8), public drunkenness offences (*Liquor Act* 1992 (Qld) ss164, 173B and previously *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s4(1)(c); now *Summary Offences Act* 2005 Qld s10), summary trespass offences (previously *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s4A; now *Summary Offences Act* 2005 Qld s11), wilful damage (*Criminal Code* 1899 (Qld) s469), failure to properly dispose of a syringe (*Drugs Misuse Act* 1986 (Qld) s10(4A)) and possession of a knife in a public place (*Weapons Act* 1990 (Qld) s51). The phrase is likely also to encompass offences such as failure to follow a police direction (including failure to move on) and obstructing or assaulting a police officer in the course of his/her duty (see *Police Powers and Responsibilities Act* 2000 (Qld) ss444, 445); often, offenders are charged with one or all of these offences in addition to one or more public space offences (see for example Dennis 2002).

Laws which regulate public space have a disproportionate impact on the lives of those who are marginalised. It has been consistently reported that certain population groups (such as Indigenous people, people who are poor and/or homeless, young people and people with

mental illness) are more likely to appear in court for public space offences (Walsh 2004a; Middenforp 2002; Spooner 2001; Sanders 2000; New South Wales Bureau of Crime Statistics and Research 1999). According to commentators, service providers and public space users themselves, there are three main reasons for this.

First, marginalised people spend more time in public space than other members of the population. Indigenous people occupy public space more frequently than the remainder of the population for reasons related to cultural and social life; Indigenous persons' spiritual and cultural connection to the land may lead them to choose a lifestyle of permanent itinerancy and/or to socialise in public spaces in large groups on an intermittent basis (Memmott et al. 2003; Goldie 2002; Coleman 2002; Memmott 2002; White 1997). Homeless persons' occupation of public space is a direct result of their lack of access to private space; due to their lack of housing, they are forced to live public lives. Further, for those living in boarding houses or other crowded housing situations, and for those who are unemployed, public space provides a place to escape to, in which to enjoy more pleasant, interesting and entertaining surroundings.[1] Young people tend to occupy public spaces at a rate greater than the remainder of the population because many feel that they a lack private space within which to fully express themselves without limitations being placed on them by adults, particularly parents and teachers; public space provides a location in which boundaries may be tested, and leisure time may be passed in relative freedom (Crane & Dee 2001; Robinson 1999; Malcolm 1999). Also, for young people who do not consider their home to be a place of safety, public space may provide them with a haven from abuse and domination (Malcolm 1999). People with mental illness are also present in public space at a greater rate than the remainder of the population, due mainly to the trend in recent decades towards deinstitutionalisation. People with mental illness who were once housed in public institutions are now 'maintained' in the community and, owing to the lack of services available to them, many occupy public space during the day (Robinson 2003; Human Rights and Equal Opportunity Commission 1993:754).

Thus, since Indigenous people, people who are homeless or poor, young people and people with mental illness are more likely than other members of the population to occupy public space, they are more visible to police, more vulnerable to surveillance, and thus more likely to be charged with 'public nuisance type offences'.

Second, marginalised people may be targeted for the selective enforcement of public space offences by police. Police exercise broad powers of discretion when deciding whether or not to charge a public space user with a public space offence, and many studies have suggested that police are more likely to charge marginalised public space users with public space offences than other, seemingly more 'legitimate', public space users (Morey 1999; White 2002; Lipmann 2002; Walsh 2004a; Middenforp 2002; Sanders 2000; New South Wales Bureau of Crime Statistics and Research 1999). This issue was raised by public space users and their service providers in a recent survey conducted in inner-city Brisbane. One homeless respondent remarked (see Walsh 2004a):

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

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1 This is most clearly expressed by public space users themselves. In a recent survey of public space users in inner-city Brisbane, one respondent remarked 'I come into public space to get out of my flat. It's a little housing commission flat. The walls start to close in on you.' Another said 'When I don't have any money after paying the rent and food, my mate and I just like to go and sit in Queen Street and watch the people go by.' See Monique du Briard, *Public Space, Public Rights: A Report by Caxton Legal Centre* 2003. The results of this survey are reported in Walsh 2004a.

One service provider noted (see Walsh 2004a):

> A lot of Indigenous people have been kicked out of public space for drinking whereas tourists can do it freely.

Offensive behaviour and offensive language are those offences most often implicated in accusations of selective enforcement. Language offences tend to be disproportionately enforced against Indigenous people and young people, for whom 'offensive' language may be part of their everyday vocabulary (see Heilpern 1999; Pirie & Cornack 1993). Since many words previously considered 'obscene' have become commonplace over time, many commentators have questioned police officers' continued enforcement of offensive language offences in circumstances where the words were not used with the intention of causing offence (Walsh 2005; Heilpern 1999; Pirie & Cornack 1993; Weisbrot 1991; Wilson 1978). Also, a common example of offensive behaviour is public urination (Walsh 2005). Many people engage in this conduct as a result of necessity, either because they are homeless and thus cannot access private amenities, or because they have a mental illness or acquired brain injury and do not wholly appreciate the 'offensiveness' of their actions. It could be argued that a more appropriate response to this kind of offending behaviour would be to refer the person to a welfare service rather than to arrest them. As a result of the tendency towards selective enforcement of these laws, various commissions and commentators have recommended that these offences be repealed or amended to prevent undue hardship to marginalised groups (Schetzer 1999; Pirie & Cornack 1993; Victorian Law Reform Commission 1992; Western Australian Law Reform Commission 1992; Johnston 1991).

Third, some public nuisance type offences criminalise conduct associated with a particular status. For example, some public space offences are directly associated with homelessness (Walsh 2004b). The offence of 'vagrancy', which was on Queensland's statute books until March 2005 (see *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s4), is a clear example of this. Vagrants were stated to include those who 'have no visible lawful means of support'; in practice, prosecutions under this offence invariably involved homeless defendants observed eating out of bins and sleeping on riverbanks (see *Parry v Denman* in West 2000; *Moore v Moulds* (1981) 7 QL 227). The offence of begging criminalises behaviour directly associated with poverty; it is now well-established that many of those who beg are homeless, and that most of those who beg do so in an effort to supplement their inadequate income and provide themselves and their families with the necessities of life (Horn & Cooke 2001), yet in Queensland this behaviour is still criminalised. Many jurisdictions in Australia have seen fit to repeal these offences in recognition of the fact that they essentially criminalise homelessness: insufficient lawful means of support is now an offence only in Western Australia, and the offence of begging was repealed in New South Wales as far back as the 1970s (by the *Offences in Public Places Act* 1979 (NSW), since repealed).

In addition, squatting is often prosecuted under the offence of 'entering or remaining on a building or enclosed lands without reasonable excuse' and the prohibition against possessing a knife in a public place is often enforced against people who are homeless who have no choice but to store all their belongings in public places. Thus, many public space offences amount to the criminalisation of homelessness.

A number of other public space offences are associated with the status of being an 'alcoholic' or 'drug user'. 'Habitual drunkenness' was an offence in Queensland until March 2005 (see *Vagrants, Gaming and Other Offences Act* 1931 (Qld) s4(1)(c)), and a number of offences related to the public consumption of liquor and intoxication in a public

place are listed in the *Liquor Act* 1992 (Qld) and the *Summary Offences Act* 2005 Qld, such as being drunk in a public place and consuming liquor in designated public places (including roads, parks and entrances to premises). Further, failing to properly dispose of a hypodermic syringe is an offence with which only intravenous drug users are likely to be charged.

Thus, marginalised people are more likely to be charged with public nuisance type offences due to their frequent occupation of public space, their vulnerability to the selective enforcement of these laws by police, and the tendency of public space offences to criminalise behaviour associated with status.

III. Fines as Penalties for Public Nuisance Type Offences

For every public space offence in Queensland, a fine is one available penalty; imprisonment is often another. However, there are a number of alternative sentencing options available to magistrates in Queensland under existing legislation. Under s19 of the *Penalties and Sentences Act* 1992 (Qld), an offender may be released absolutely, or under conditions imposed by the magistrate at his/her discretion. Under s91 of the *Penalties and Sentences Act* 1992 (Qld), any person convicted of an offence punishable by imprisonment may instead receive a probation order. And under s101 of the *Penalties and Sentences Act* 1992 (Qld), a community service order may be imposed in relation to any offence punishable by imprisonment if the person is judged to be suitable for this kind of work. To assist magistrates in determining whether a defendant is suitable for alternative sentencing, Brisbane Magistrates' Court employs a Court Liaison Officer, who can, at a magistrate's request, arrange social service assistance for defendants as part of their sentence. While there is not a wide, or particularly creative, array of alternative sentencing options available for use in Queensland, sufficient alternatives exist, and adequate advice and assistance is available, for magistrates to be able to impose a sentence other than a fine on those who do not have the means to pay.

Yet, a fine is the most common penalty imposed in response to 'public nuisance type' offending. Table 1 lists penalty outcomes for key public space offences in Queensland as a proportion of the total number of convicted charges for each offence. It demonstrates that the most common penalty imposed in response to 'public nuisance type' offending is a fine.

Table 1 — Penalty outcome as a percentage of all convicted charges 2001/02
(Statistics obtained from the Office of Economic and Statistical Research, Queensland)

Offence	Penalty outcome — % convicted charges 2001/02*					
	Convicted but not punished	Fine	Imprison-ment	Bond or Pro-bation Order	CSO	Other+
Drunkenness	9%	86%	3%	1%	1%	0%
Begging	6%	60%	10%	12%	6%	6%
Offensive language	3%	87%	4%	5%	1%	0%
Offensive behaviour	6%	82%	5%	4%	1%	2%

* Note that these statistics do not allow for global penalties — a more serious charge may have contributed to the penalty outcome.
+ Includes restitution, suspended sentence, and 'other'.

Of course, the tendency of magistrates to impose a fine in response to most offending behaviour conducted in public space may not be a cause for concern in and of itself. The *Penalties and Sentences Act* 1992 (Qld) provides judges and magistrates with the power to tailor a fine according to a defendant's means. Indeed, the court is required to take into account the defendant's means, and the nature of the burden that payment of the fine will cause to the defendant, when imposing a fine (s48). Also, the court has the power to impose a fine that is less than the amount prescribed in the relevant Act, it may provide a defendant with time to pay, and it may give permission for a fine to be paid in instalments (ss47, 50, 51). Further, where a person is found guilty of two or more offences which are founded on the same facts, the court may impose a single fine for all of the offences (s49). If magistrates utilise these powers to alter fine amounts and payment options in view of individual offenders' financial circumstances, the imposition of fines for public space offences as a matter of course may not lead to inequitable penalties or undue hardship to offenders. However, detailed information on magistrates' reasoning when imposing a sentence for a public space offence is not readily available. Hence the need for the field research reported upon below.

IV. Sentencing of Public Space Offenders in Brisbane Magistrates' Court

In order to determine the extent to which magistrates tend to draw on their powers of discretion to tailor a penalty to the circumstances of an offender, court observation research was conducted at the Brisbane Magistrates' Court in February 2004.

Methodology

Two final year law students attended Court 1 of the Roma Street Magistrates' Court in Brisbane every sitting day in the month of February 2004, and recorded detailed information on each 'public nuisance type offence' which came before the court in that period of time. For the purposes of this research 'public nuisance type offences' were defined as those offences listed in Part II. These are offences which impact upon the safety, comfort and peaceful enjoyment of people in public space. Information collected on each case included the presiding magistrate, the facts of the case, the charge, the exact penalty imposed, mitigating factors in sentencing, whether alternative penalties were considered by the magistrate and the amount of court time devoted to the case. In addition, some information on offender characteristics was collected where available including age, gender, Indigenous status, housing status, income, and the presence of mental illness or intellectual disability.

In many cases these offender characteristics were explicitly noted in court. In other cases, this information had to be deduced through observation. This caused particular difficulties in relation to mental illness and intellectual disability, which are often impossible to accurately classify through mere observation. Thus, the information collected on mental health and intellectual disability was based purely on the information made available to the court at the hearing, and as a result, the level of mental illness and intellectual disability amongst defendants is likely to have been much greater than that reported here.

Operationally, income and homelessness were defined in the following ways. Defendants who were unemployed and/or receiving government benefits were considered to be of low income for the purposes of the study. Defendants were classified as either homeless or adequately housed according to the Chamberlain and MacKenzie (1992, 2003) definition of homelessness, which states that there are four categories of homelessness; primary, secondary, tertiary and marginally housed. Primary homelessness is when a person

is without conventional shelter, that is, they are living on the streets, sleeping in a park, squatting or living in an improvised dwelling. Secondary homelessness is when a person moves from one temporary shelter to another, including refuges, hostels or the homes of family and friends. Tertiary homelessness is where a person lives in a boarding house on a medium to long-term basis. And a person is marginally housed when they live permanently in a caravan park because they are unable to afford alternative accommodation. Again, on most occasions, this information was made available to the court during the hearing.

Results

Overview

Six different magistrates presided over the Brisbane Magistrates' Court during the 20 day study period. Of the cases which came before the court during that time, 57 included at least one public nuisance type charge. In 52 of these 57 cases, defendants were charged with public space offences only. In the remaining five cases, defendants were charged with at least one public space offence and at least one other offence which was not a public space offence. All other cases were judged to be irrelevant to this research. They included mostly charges for failure to appear; breach of bail, community service order, or release requirements; assault; minor drug offences; and petty theft. Notably, not one defendant charged with a 'public nuisance type offence' contested their charge; all 57 defendants pleaded guilty.

Public nuisance type charges

Of the 57 people who were charged with a public space offence, 17 (29.8%) were charged with offensive behaviour, nine (15.8%) were charged with failing to follow a police direction, eight (14.0%) were charged with offensive language, six (10.5%) were charged with failing to properly dispose of a syringe, five (8.7%) were charged with wilful damage, one person (1.9%) was charged with trespass associated with squatting, and one person (1.9%) was charged with drinking alcohol in public. Further, 22 (38.6%) were charged with obstructing police, and 11 (19.3%) were charged with assaulting police. Notably, 77% (n=17) of those charged with obstructing police, and all of those charged with assaulting police, were also charged with another public space offence. Of all 57 cases involving a public space charge, 35.1% (n=20) were also charged with obstruct or assault police.

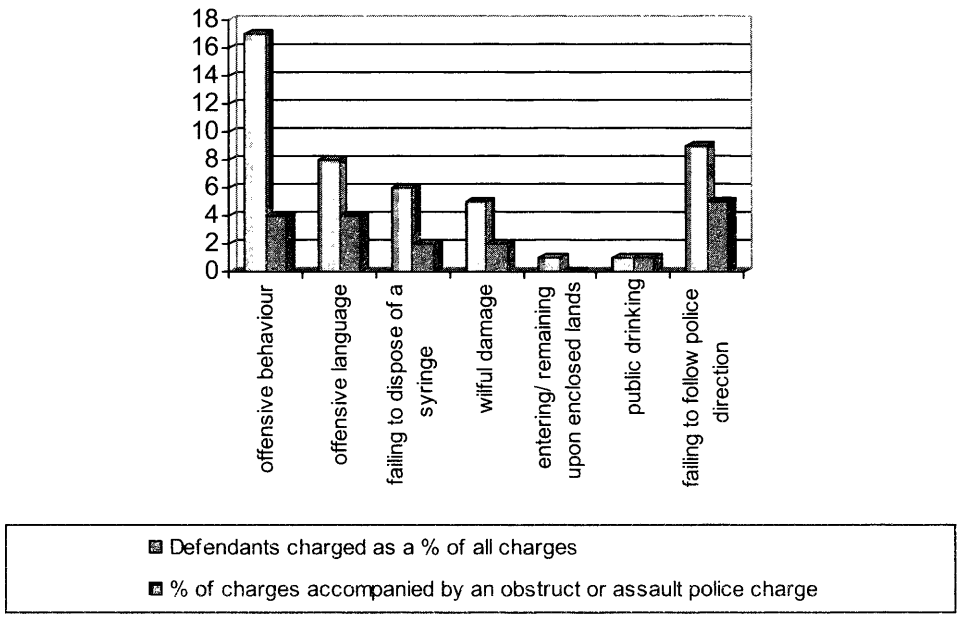
Of the 52 people charged with public space offences only, 29 were charged with one offence, 19 were charged with two offences, and four were charged with three or more offences.

Defendant characteristics

Of the 57 people charged with public space offences, 10 were homeless and an additional 24 were of low income, a total of 60%. In addition, 41% (n=22) were Indigenous. Eighty-one percent (n=46) of defendants were male. Around 39% of defendants were aged between 17 and 25, an additional 39% were aged between 26 and 35, 18% were aged between 36 and 50, and the remainder were older than 50 years of age. In 9.6% (n=5) of cases, it was stated in court that the defendant suffered from a diagnosed mental illness or an intellectual disability.

In 52% of cases, drugs, alcohol or chroming were related to the offence, either because the defendant was affected by drugs or alcohol at the time the offence was committed, or because their addiction and/or associated health and welfare difficulties otherwise contributed to the offence.

Figure 1: Public space charges before the Brisbane Magistrates Court, February 2004



Representation

Thirty-four percent of those charged with a public space offence in Brisbane Magistrates' Court during the study period represented themselves in court. A further 26.4% were represented by legal aid or the duty lawyer, and 28.3% were represented by a lawyer from the Aboriginal and Torres Strait Islander Legal Service (ATSILS). Only 11.3% of defendants were represented by a private lawyer.

Notably, the type of representation a defendant had was associated with the amount of court time devoted to their case; the relationship approached significance ($F=1.61$; $p=0.212$). The average time taken for all public space offence cases was 7.2 minutes. However, for those represented by a private lawyer, this increased to an average of 9.88 minutes. Those who represented themselves were devoted an average of only 5.7 minutes of the court's time.

Penalties imposed

Of those charged only with public space offences, 48.1% (n=25) received a fine, 30.8% (n=16) received probation or a good behaviour bond (only one of which had treatment conditions attached to it), 9.6% (n=5) were discharged and 3.8% (n=2) received bail. One person was sent to prison for six months (for wilful damage), one was remanded in custody, one was ordered to pay restitution and two matters were adjourned. In approximately 40% of cases, a conviction was recorded, and around 12% of defendants (50% of whom were Indigenous) were in police custody prior to their court appearance. Alternative penalties were considered in only 11 cases; ten of these cases were presided over by the same magistrate.

Of the 25 defendants upon whom a fine was imposed, at least 14 (56%) were homeless or of low income. The average fine imposed for all cases was $186, however the average fine amount imposed was higher at $194.28 for those identified as homeless or of low income. The average time provided in which to pay the fine was 2.65 months for all cases; it was only slightly higher for homeless and low income defendants at 2.94 months. The average amount that the court required a defendant to pay per month was $101.40; this was higher for homeless and low income defendants at $109.61 per month.

Notably, the average fine amount imposed for a single charge was higher than the average fine amount imposed for two charges. For defendants charged with only one public space offence, the average fine payable was $167.86, while for defendants charged with two offences, the average fine payable was $162.50. This rose to $167.50 for those cases where the second charge was assault police. For defendants charged with three or more offences, the average fine amount was much higher at $295.

The higher fine amounts imposed on homeless and low income people cannot be explained by a tendency for them to be charged with more offences. There was no significant relationship between homelessness/low income, and the number of charges imposed ($F=0.748$; $p=0.392$). The average number of charges imposed on homeless and low income defendants was 1.6 charges, while the average number of charges imposed on those who were not homeless or of low income was 1.4.

Defendants were rarely informed of their right to pay their fine by instalments or to have the fine converted into an order to perform a certain number of hours' unpaid community service. Only one of the six magistrates observed during the study period routinely informed poor and homeless defendants of these options.

Discussion

Public nuisance type charges and marginalised people

The results of this study provide some support for the comments made above in Part III, that marginalised people are more likely to be charged with public space offences. As noted above, 41% of those charged with public space offences during the study period were Indigenous, 60% were either homeless or of low income, at least 10% suffered from a severe mental illness or intellectual disability and 39% were aged between 17 and 25 years. Clearly, Indigenous people, poor and homeless people, people with mental illness and young people were overrepresented in the numbers of people charged with public space offences who came before the Brisbane Magistrates' Court in February 2004.

There was also some evidence to suggest that charges for 'public nuisance type offences' resulted from defendants' perceived status as homeless, 'alcoholic' or 'drug user'. For example, defendants no. 10 and no. 110 were sleeping in a public place, woken by police and instructed to move on. Both were charged with offensive language as a result of the subsequent verbal exchange with police. Defendant no. 7 was charged with trespass for squatting in an otherwise unoccupied house. And defendant no. 4, a homeless man, was charged with offensive behaviour and obstructing police after being found by police drinking alcohol at a train station, and later urinating in public. In addition, nine defendants who received charges for public space offences were engaging in behaviour associated with alcoholism when approached by police. A further eight were using or affected by drugs when approached by police, and an additional three were known by police to be intravenous drug users. Thus, a person's perceived status as homeless, 'alcoholic' or 'drug user' may increase the probability of their being charged with 'public nuisance type offences'.

The results of this research also demonstrate that interactions between police and public space users for minor 'public nuisance type' offending behaviour may ultimately result in more serious charges being laid. As noted above, over 35% of all defendants charged with public space offences during the study period were also charged with either obstructing police or assaulting police. As a result, extremely trivial offending behaviour may result in a relatively serious penalty being imposed by the court. This is known as the 'trifecta effect' (see Sarre & Sparrow 2002; Dennis 2002). For example, defendant no. 15 was intoxicated and yelling obscenities at patrons in a café. He failed to cease his yelling when instructed to do so by police and was charged with obstructing police as a result. Defendant no. 27 was swinging his arms around in close proximity to a police officer, and did not step back when asked to do so by the officer. He was charged with obstructing police. In both these situations, a relatively severe penalty was imposed as compared with what might have been imposed had the offender been convicted simply of the initial offence.

Similarly, the use by police of their 'move on' powers often results in charges being laid in response to extremely trivial offending behaviour. For example, defendant no. 32 was found by police waiting in a car park and was asked to leave. When he refused to do so, he was charged with failing to follow a police direction. Defendant no. 6 was drinking alcohol in a public place. He was instructed by police to move on but he failed to do so. As a result he was charged with failing to follow the direction of a police officer and obstructing police. He received a fine, which was converted into 20 hours' community service work. Thus there is some evidence from this research to suggest that interactions between police and public space users in relation to 'public nuisance type offences' may eventually lead to more serious charges being laid and a more severe penalty being imposed than the precipitating event may have warranted.

Public nuisance type offences and the rule of law

Another notable finding of this research was the difference that legal representation can make to the amount of court time devoted to a defendant's case. The average amount of court time taken up by a case was associated with the form of representation secured; those who represented themselves were afforded the least amount of court time, followed by those represented by the duty lawyer, legal aid, or ATSILS, and those with private legal representation were afforded the most court time. Although the results do not demonstrate a significant correlation between the type of representation and the penalty ultimately imposed, the amount of court time devoted to a case may be considered an indicator of a defendant's capacity or opportunity to raise all relevant issues and circumstances. Thus, the fact that less time is generally devoted to those who represent themselves may contravene the rule of law requirement that all people be treated equally by and before the law (for a discussion of rule of law requirements, see Raz 1977; Finnis 1980:270–1).

The results of this research also highlighted the fact that people who are charged with public space offences tend to plead guilty and incur a penalty rather than to contest the charge, despite the fact that a defence might have been available to them (see Walsh 2003a). As noted above, every defendant who appeared in the Brisbane Magistrates' Court on a public space charge in February 2004 pleaded guilty. Yet when the facts of individual cases are examined, it is clear that at least some defendants may have been able to contest their charge.

For example, defendant no. 19 was found screaming and waving his arms around by police. He was told by police that if he did not stop this, he would be arrested. He did not stop and was arrested for offensive behaviour under the old s7 of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld). While it may be agreed that such behaviour would have

caused annoyance to the police officer, it is debatable whether it constituted 'riotous, violent, disorderly, indecent, offensive, threatening, or insulting' conduct within the meaning of the section. Further, though not mentioned in court, it appears likely that the defendant was suffering from psychotic symptoms at the time of the offence, thus a defence on the basis of mental illness may have been available to him under s27 of the *Criminal Code* 1899 (Qld). However, the defendant pleaded guilty and received a penalty.

Similarly, defendant no. 27 was charged with obstructing police for swinging his arms around in close proximity to a police officer, and failing to step back when asked to do so by the officer. In this case, the charge may have been contested on the basis that the defendant's behaviour was not in fact hindering, resisting or attempting to obstruct the police officer within the meaning of the section, yet the defendant pleaded guilty.

Defendant no. 110 was found sleeping on a footpath by police. The defendant was homeless, there was evidence to suggest that he was suffering from severe depression and he had exhibited suicidal behaviour. However the charge of offensive language which resulted was not defended on the basis of his mental illness. Rather, the defendant pleaded guilty and received a fine of $250.

Defendant no. 7 was prosecuted for squatting under the summary trespass offence. The defendant stated that the reason for his occupying the abandoned house was that he did not have anywhere else to stay; he had recently moved to Brisbane from Sydney and was in the process of applying for an income support allowance. On these facts, one defence which may have been open to this defendant is the 'emergency' defence under s25 of the *Criminal Code* 1899 (Qld), which states that a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise. The defendant may have been able to argue that his state of poverty and homelessness presented him with just such an emergency, and that an ordinary person could not have been expected to pass up the opportunity to spend the night in an abandoned dwelling.[2]

Further, defendants no. 4 and no. 13 were charged with offensive behaviour because they urinated in public. It is possible that the 'emergency' defence under s25 of the *Criminal Code* 1899 (Qld) might also have been applicable to them, considering that this bodily function may have been unavoidable in the circumstances.

It cannot be stated with certainty that these defences would have been successful because there is no record of their ever having been raised in relation to a 'public nuisance type offence' in Queensland in the past; thus there is no case law on these points of law.[3] However, the fact that defendants are pleading guilty rather than attempting to contest their charges where there may be a defence available to them greatly reduces the accountability of police for their actions in enforcing the law related to these offences. and it may result in the contravention of the rule of law and the presumption of innocence.

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2 This argument was rejected by Lord Denning MR in *Southwark London Borough Council v Williams and Anderson* [1971] 1 Ch 734 but it has not yet been tested in Australia. For a discussion of the 'necessity' defence in relation to public space offences, see also Walsh 2004a and Walsh 2004c.

3 There is some case law on squatters' use of necessity defence. As noted above (ibid), the English case of *Southwark London Borough Council v Williams* tests the use of the necessity defence in relation to homelessness, however no equivalent argument has been run in Australia. The Australian case which provides the most guidance on the issue is *Barns v Edwards* (1993) 31 NSWLR 714 where Dunford J held that a person must have a 'bona fide claim of right' to enter a property to avoid a trespass charge.

Magistrates' sentencing for public space offences

The results of this research demonstrate that magistrates are making use of their power to impose a global penalty where more than one charge is laid based on the same facts. However, the results also demonstrate that magistrates in Brisbane may not be using their discretion to tailor penalties to the circumstances of individual defendants to the extent permitted and prescribed by the *Penalties and Sentences Act* 1992 (Qld). It appears that, during the study period, Brisbane magistrates' decisions on whether a fine should be imposed for a 'public nuisance type offence' were not influenced by offenders' capacity to repay such a fine. Poor and homeless defendants in this study were not less likely than other defendants to be fined for a public space offence, nor were they likely to be fined a lesser amount. Also, they were not provided with much additional time in which to pay a fine; indeed on average a poor or homeless person in this study was provided with only one week's extra time in which to pay a fine than defendants with greater capacity to pay. Neither was extensive use made of alternative sentences in relation to public space offenders during the study period; only five public space offenders were discharged and a treatment plan was attached to only one probation order.

Further, sentencing practices varied widely between individual magistrates. As noted above, the study recorded information on cases presided over by six different magistrates. Of these, only one magistrate made significant attempts to ensure that defendants had the capacity to pay fines imposed on them. This magistrate alone relied extensively on alternatives to fines, and only this magistrate made an effort to ensure that defendants in need of welfare assistance received it. Further, only this magistrate made use of the Court Liaison Officer when considering attaching a treatment or intervention plan to a probation order or bond. Other magistrates did not appear to give significant weight to, or even explicitly consider, the capacity of an offender to pay a fine before imposing one. Nor did they routinely inform defendants of the option to pay their fine by instalments, or to have the fine converted to a community service order. Thus, while the *Penalties and Sentences Act* 1992 (Qld) provides magistrates with the power to tailor their sentences to meet defendants' individual needs, it seems that the majority of magistrates in Brisbane do not choose to make use of the relevant provisions. Further research will be required to determine why this is the case.

V. Fine Enforcement in Queensland

The results of this study suggest that many people in Queensland may be issued with fines for public space offences which they are unable to pay. Those who do find themselves unable to pay a fine within the time limit set by the court and do not apply to the court for alternative payment options will be referred to the State Penalties Enforcement Registry (SPER) under s34 of the *State Penalties Enforcement Act* 1999 (Qld). At this time, a $44 registration fee is added to the fine, and SPER becomes responsible for collecting the unpaid amount.

SPER has the power to enforce payment of fines by seizure of property (ss63–74) and redirection of earnings or financial assets (ss69, 75–103). If a person upon whom a fine has been imposed can demonstrate that they are unable to pay the fine within the time limit, the person may apply to SPER for an extension of time to pay, or for permission to pay the fine by instalments (s42). The minimum amount payable per month is generally $60 however, for those who rely on social security benefits as their sole source of income, instalments may be debited directly from their payment at the lower rate of $20 per fortnight. Alternatively, a person may apply to have the fine amount converted to a period of unpaid community service work if they can satisfy SPER that they are unable to pay the fine (this is called a fine option order) (ss43–46).

While these arrangements appear reasonable, they may not be suitable for people who are homeless or very poor. First, the seizure of property of such persons will generally be insufficient to satisfy the fine amount. Second, payment by instalments may not prove viable for those in receipt of social security benefits. Social security benefits are pegged at levels well below the poverty line, thus they are insufficient to enable recipients to provide themselves with the necessities of life (Walsh 2003b). This is demonstrated by the fact that 88% of people who are homeless report being in receipt of social security benefits (Australian Institute of Health and Welfare 2005:66). Even a payment in the order of $10 per week may be too onerous for a person solely reliant on social security benefits to pay for rent, food and other necessities. Third, people who are homeless or poor may be considered unsuitable for community service work. Such people may be unable to attend community service work due to their lack of access to transport, they may be unable to keep close track of time, and more pressing concerns related to obtaining shelter, food and other necessities may provide too great a distraction for them. Further, many people who are poor and/or homeless suffer from health difficulties including mental illness and drug and alcohol addiction which may prevent them from being able to complete such work.

Despite the fact that none of these options may prove viable for some disadvantaged members of the community, SPER does not have the power to remit fines in cases where an offender is unable to pay (s28). The only alternative means available to SPER of enforcing a fine other than the enforcement procedures outlined above, is to issue a warrant for the arrest and imprisonment of the debtor (s119). The only discretion SPER has to prevent undue hardship to those who are unable to pay is to issue them with a good behaviour bond in lieu of imprisonment. However this is only available to defendants who can prove that for medical or psychiatric reasons it is inappropriate to enforce the fine in this way (s118).

Thus, under Queensland's fine enforcement system, those who are unable to pay their fine may eventually be sentenced to imprisonment. Despite the fact that one of the goals of the *State Penalties Enforcement Act* 1999 (Qld) is to reduce the use of imprisonment for fine default (s9(d)), SPER does not have the capacity to treat those who cannot pay differently from those who refuse to pay. On this basis, it may be argued that existing fine enforcement procedures in Queensland are already sufficiently (or indeed overly) punitive, and that any measures taken by the government to 'crack down' on fine defaulters will likely result in further hardship to already disadvantaged individuals.

VI. Sentencing Alternatives and Suggestions for Reform

It follows from the above that any changes to the fine enforcement process must recognise that those who persistently fail to pay their fines for public nuisance type offences are generally unable, rather than unwilling, to pay. 'Cracking down' on fine defaulters will not address the circumstances underlying many offenders' 'flagrant and repeated refusals' to pay. Some alternative suggestions for reform are made below. The recommendations address both sentencing for public space offences, and the fine enforcement process.

Making greater use of sentencing alternatives under existing law

Existing law in Queensland does provide magistrates with a sufficient array of sentencing alternatives to allow them to impose a sentence on public space offenders which is tailored to the circumstances of the offender including his/her indigence.

For example, s19 of the *Penalties and Sentences Act* 1992 (Qld) provides the court with the discretion to release an offender absolutely. In light of the generally trivial nature of the offending behaviour which leads to charges for public nuisance type offences (see Part IV

above), this would seem appropriate in most cases. Indeed, the appropriateness of this approach has been formally recognised in other Australian jurisdictions. In Tasmania, s58 of the *Sentencing Act* 1997 (Tas) allows a magistrate to dismiss a claim in order that rehabilitation may be provided; to take account of the trivial or minor nature of the offence; to allow for circumstances in which it may be inappropriate to inflict any punishment on the defendant; or to allow for exceptional circumstances that may justify the court showing mercy to the defendant. Similarly in South Australia, a person who has received a fine may apply to the issuing authority for review of their case on the basis that the offence for which the fine was imposed was 'trifling'. If the issuing authority is satisfied that the offence was trifling, the notice must be withdrawn (*Expiation of Offences Act* 1996 (SA) s8A).

Section 19 of the *Penalties and Sentences Act* 1992 (Qld) also allows a court to release an offender on the condition that the defendant comply with certain requirements of the court's choosing. This provision enables magistrates to order offenders to attend drug or alcohol treatment, counselling and other health and welfare services, or complete restorative tasks such as apologising to an aggrieved party or providing restitution to them. Bonds and probation orders may also be accompanied by conditions of this nature (*Penalties and Sentences Act* 1992 (Qld) ss24, 94).

In order to ensure that penalties imposed on public space offenders are equitable, practicable and just, magistrates should be encouraged to make greater use of these sentencing alternatives. Judicial education on, or a reminder of the availability of, these alternatives is clearly warranted.

Reforms to community service orders

Magistrates could also make greater use of community service orders either as an alternative penalty, or in the form of a fine option order. However, as noted above, one difficulty in imposing community service orders as an alternative to fines is that often those people who are unable to pay a fine are also unsuitable to perform community service work. This is particularly the case for defendants who are homeless and/or suffer from mental illness or drug addiction. In recognition of the special needs of these offenders, some jurisdictions in Australia, including Victoria (see *Sentencing Act* 1991 (Vic) s38) and Tasmania (see *Sentencing Act* 1997 (Tas) s28), permit offenders to attend education, treatment or counselling sessions as part of their community service order, that is, attendance at these sessions is credited to them as community service work. This is not available to offenders in Queensland, which limits the number of public space offenders for whom a community service order is a viable alternative.

Further to this, some jurisdictions around the world have established 'half-way' houses which provide defendants with housing, food and other forms of support while they complete a community service or other order. There are a number of half-way houses operating in the United States (Conly 1999; Latessa & Travis 1992), and similar facilities have been established in Japan (Nishikawa 1994), Hong Kong (Wing Hong Chui 1999), Israel (Wozner & Arad-Davidson 1994), and Kenya (Vyas 1995). In England, it has been suggested that half-way houses be established for homeless people with psychiatric conditions who attract multiple charges for public nuisance type offences (Joseph 1996). While the establishment of such facilities may require significant initial outlay, they are less expensive to run than the corrective facilities which recidivist public space offenders are often eventually committed to, but more importantly, they provide an opportunity for criminogenic factors to be addressed and future offending to be prevented (Layton MacKenzie 2002; Latesss & Travis 1992).

Thus in order for community service orders to be a viable alternative penalty for public space offenders, the special needs of marginalised offenders must be taken into account, either through expanding the range of activities which are considered to be community service work, or by establishing residential facilities where offenders may receive the support they require while completing a community service order.

Changing the method of fine calculation

One explanation for the underutilisation of alternative sentencing options might be a belief amongst magistrates in the inherent value of fines as an effective sentencing alternative. Fines have been exalted in international literature as a highly effective penalty for a wide range of crimes and an effective alternative to custodial sanctions; they are punitive, flexible, inexpensive (indeed they may generate revenue) and they have been found to have a deterrent effect on individual offenders (Layton MacKenzie 2002; Raine, Dunstan & Mackie 2003; Cole 1992; Hillsman & Greene 1992; Greene 1988; Mahoney & Thornton 1988). However, academic commentary and government-commissioned reports from around the world agree that there is a serious shortcoming in the use of fines as a sentencing alternative; fines are an inherently inequitable penalty. Flat-rate fines have a disproportionate impact upon offenders depending on their level of income; they may have little to no impact on an affluent offender while causing extreme hardship to an indigent offender (Raine, Dunstan & Mackie 2003; Tonry 1999; Ashworth 1995; Joutsen & Zvekic 1994; DeJong & Franzeen 1993; Morris Gelsthrope 1990; Carlen 1989; Shaw 1989; Wasik & von Hirsch 1988).

More stringent requirements, akin to those which exist in a number of international jurisdictions, may be needed in Queensland to ensure that fines are calculated according to an offender's capacity to pay. Under s734(2) of the *Canadian Criminal Code*, a court may only impose a fine on a defendant if it is satisfied that the defendant is able to repay the fine, and a formula has been developed to assist courts in calculating fines in accordance with wage levels (Daubney 2002). Similarly in Kenya, it is a common law requirement that any fine imposed on a defendant under the criminal law must bear a reasonable relationship to an offender's ability to pay (see *Juma v R* 1 Tanganyika L Rep (Revised) 257 (HCt 1942) in Vyas 1995). The introduction of similar rules in Queensland might go some way towards ensuring that only equitable and realistic fines are imposed.

Other jurisdictions that make extensive use of fines as a sentencing alternative have formalised the requirement that fines be tailored to an offender's means through use of the unit fine system. The unit fine system was developed in the Scandinavian countries in the 1920s and 1930s, and it has now been adopted by jurisdictions throughout Europe and Latin America (Layton MacKenzie 2002; Tonry 1999; Klein 1997:223; Ashworth 1995:265; Kiko Begasse 1995; Tonry & Hamilton 1995:33–37; Joutsen & Zvekic 1994:14; DeJong & Franzeen 1993:62; Hillsman & Greene 1992:127ff; Carlen 1989:24; Shaw 1989:41; Greene 1988:39; Wasik & von Hirsch 1988:556–567). Both the United States and the United Kingdom have conducted trials of the unit fine system, and both trials were heralded as a success (Tonry 1999; Ashworth 1995; Tonry & Hamilton 1995). Australia and Canada are the only two jurisdictions that rely heavily on fines as a sentencing alternative and yet have not trialled the unit fine system (Tonry 1999).

Under the unit fine system, fines are calculated according to both the gravity of the offence and the offender's means. First, the court allocates a unit value to the offence on the basis of its seriousness. In all unit fine systems, public space offences are considered to be the most minor of all offences; thus, in a system where offences are ascribed a unit value of between 5 and 120, public nuisance type offences are given a value of 5 (eg. Staten Island

pilot, see Greene 1988:45–48). Second, the court must determine the dollar value of each unit on the basis of the offender's means. In Sweden, each unit represents 0.1% of the offender's annual income and in Germany, each unit represents one day's income (hence the name, 'day fine'). In the English and New York pilots, the unit value was calculated on the basis of weekly disposable income minus deductions for expenses. In New York, a user-friendly table was developed for ease of calculation. Once these two determinations have been made, the number of units (representing the gravity of the offence) is multiplied by the unit value (based on means to pay) to yield the fine amount.

Under this system, a fine as low as a few dollars a week might be imposed for a public space offence. While this may appear lenient, if an offender is only able to spare this amount of money each week due to their low income, this (relatively) small fine is not derisory. Rather, it is proportionate to the offender's means to pay and thus represents a just and practicable penalty. If courts are to continue to rely heavily on fines as a sentencing option for minor offences, the introduction of a unit fine system should at least be considered, and a pilot implemented.

Fine enforcement agency discretion to remit fines

SPER is the only fine enforcement agency of its kind in Australia which does not have the discretion to remit fines where the interests of justice would suggest that this is appropriate. Other fine enforcement agencies in Australia do have some powers to remit fines where an offender is unable to pay. For example the equivalent of SPER in NSW, the State Debt Recovery Office (SDRO), has the power under s101(2) of the *Fines Act* 1996 (NSW) to remit unpaid fines where the fine cannot be converted into a community service order because the person is unsuitable for community service work. SDRO internal policy states that a fine may be remitted where the fine defaulter can demonstrate that due to ongoing and severe financial, medical and/or domestic circumstances they do not, and will not have in the foreseeable future, the money or means to pay the fine; they do not own any property which may be seized to satisfy the fine; and they are not suitable to undertake community work under a community service order (SDRO 1998). Similarly, the Northern Territory equivalent of SPER, the Fines Recovery Unit (FRU) may cancel a warrant of commitment on application of the fine defaulter or on their own initiative and write off unpaid fines (*Fines and Penalties (Recovery) Act* 2001 (NT) ss93, 96)

In Victoria, outstanding fines are referred to the Penalty Enforcement by Registration of Infringement Notice (PERIN) System for enforcement. The PERIN Court, a division of the Magistrates' Court, deals exclusively with the enforcement of fines. The Registrar of the PERIN Court has the power to revoke a fine enforcement order at any time if they are satisfied that 'special circumstances', such as mental or physical illness, or drug or alcohol addiction, contributed to the person's commission of the offence (*Magistrates Court Act* 1989 (Vic), Schedule 7, cl10A). Although homelessness and financial hardship alone are not considered by the PERIN Court to amount to 'special circumstances', this provision does provide the court with some discretion to waive fines in circumstances of disadvantage.

In Western Australia, fine enforcement is conducted by the generalist courts rather than an administrative agency or a specialist court. Under s45(5) of the *Fines, Penalties and Infringement Notices Enforcement Act* 1994 (WA), the Registrar of the court may cancel a warrant issued as a result of non-payment of a fine 'for good reason', and the court may elect to discharge the defendant from payment at any time under s39(2).

In Sweden, courts frequently remit fines in cases where an offender is unable to pay; the strict enforcement of fines, and the imposition of penalties for fine default, is reserved for those who wilfully refuse or culpably neglect to pay their fine (Carlen 1989:25; Shaw 1989:39). Similarly, many courts in the United States choose not to enforce fines where it seems unlikely that the offender will be able to pay (Raine, Dunstan & Mackie 2002:183; Hillsman & Greene 1992:289–9; Cole 1992:143).

In the United Kingdom, s165 of the *Criminal Justice Act* 2003 (UK) gives courts the power to remit fines either in whole or in part if, on inquiring into the offender's financial circumstances, the court is satisfied that had it been privy to this information, it would have fixed a smaller fine amount or would not have fined the offender at all. And in Canada, s734.7(1) of the *Canadian Criminal Code* prevents a court from issuing a warrant of committal for fine default unless the court is satisfied that the offender refused to pay the fine without reasonable excuse.

Thus, the inability of SPER to remit fines where the defaulter does not have the means to pay is unique. In order for the system to be just and for hardship to be minimised, SPER should be given the discretion to remit fines where it is clear that the person is unable rather than unwilling to pay the fine, and the person is unsuitable to perform community service work.

An alternative to providing SPER with the discretion to remit fines would be to provide a clearer avenue for those who are unable to pay fines to apply to the court for remission of a fine. At present, there is nothing in the *State Penalties Enforcement Act* 1999 (Qld) that allows debtors to apply to the court for alternative sentencing once the matter has been referred to SPER (see s41).

In South Australia, the Fine Payment Unit (FPU) exercises some functions similar to those of SPER. While the FPU does not have the power to remit fines as the SDRO does, it may investigate an offender's means to pay a fine, and where the Registrar is satisfied that the person does not have sufficient means to pay the fine, the FPU can refer the matter to court for alternative sentencing (*Criminal Law (Sentencing) Act* 1988 (SA) ss3, 66, 70I).

The establishment of a similar opportunity for an offender to attend court to have a fine remitted on the basis that special circumstances exist would thus be an alternative means of avoiding the undue hardship that fines may cause to disadvantaged persons.

Summary offences law reform

It has been forcefully argued elsewhere that public space offences such as begging, public drunkenness, offensive behaviour and offensive language should be repealed (Walsh 2003a; Lynch 2002; Waldron 2000; Pirie & Cornack 1993). Many of these offences may be considered archaic, and they tend to be selectively enforced against certain population groups, perpetuating their marginalisation and disadvantage. Yet the Queensland government remains unpersuaded that these offences should be repealed. Rather, it remains convinced by arguments to the effect that these public space laws are necessary to stem the tide of troublesome behaviour inflicted on the community by certain population groups, and to ensure that all members of 'the public' are able to enjoy public spaces (see the Explanatory Note to the *Police Powers and Responsibilities and Other Legislation Amendment Bill* 2003 (Qld) and the *Summary Offences Bill* 2004; Iveson 2000).

Both these arguments, however, are flawed. First, the kinds of behaviours that are prohibited under these sections generally constitute a mere annoyance rather than bringing about any real harm (Waldron 2000:379–380). They are the kinds of behaviours that might

easily be tolerated rather than criminalised. While observing a person begging, hearing a person use obscene language, or viewing some other manifestation of a person's marginalised status may be experienced by some as unpleasant, the 'harm' occasioned to the observer is not severe enough to warrant the attention of the criminal law (Waldron 2000). Further, some public space offences criminalise behaviour conducted in public which if conducted in private would be perfectly lawful. For those who are forced to occupy public space because they have no private space to retreat to, behaviours such as urinating, defecating, swearing, drinking alcohol and sleeping must be conducted in public. To punish someone for engaging in this conduct in public when they do so as a matter of necessity is clearly unjust, and is arguably contrary to the rule of law (Lynch 2002:8; Scott LJ in *Ledwith v Roberts* (1936) 3 All ER 570).

Second, it may be argued that statements related to the 'reclaiming' of public space for the community demonstrate a lack of equity and compassion. Those members of the community who are forced to occupy public space on a regular or permanent basis are those who have no where else to go. To exclude these people from such spaces to make way for the broader community and their delicate sensibilities is to exclude these people from their homes (Drew & Coleman 1999; Goldie 2002). The broader community has vast expanses of private and commercial space to occupy. Should they choose to access public spaces, they should accept the fact that they may encounter public manifestations of the poverty and dispossession which they as a society have chosen to tolerate (Waldron 2000:386–7; Foscarinis 1996:55–56; Walsh 2004a).

Thus, it might be argued that the most appropriate response to the minor offending behaviour which may result in charges for public nuisance type offences is to decriminalise it. Police officers should be required to refer such 'offenders' to welfare or health agencies rather than arresting them. The resources of the police, SPER and the courts in prosecuting marginalised people for these offences would thus be spared, and the hardship caused to marginalised people as a result of these laws would be avoided.

Conclusion

The Queensland government has expressed an intention to 'crack down' on people who default on payment of fines imposed for 'public nuisance type offences'. This seems to demonstrate ignorance of the fact that the most common reason for fine default in these cases is inability, rather than blatant refusal, to pay. Marginalised people are more likely than other members of the population to be charged with public space offences, and the penalty imposed is most often a fine. Legislation does provide magistrates with a number of options to ensure that undue hardship is not imposed upon poor and homeless offenders, such as reducing the fine amount according to means, providing a poor offender with more time to pay, or imposing an alternative sentence such as a bond or conditional release. However, if a fine is imposed and an offender defaults, the matter is referred to SPER which has no discretion to remit fines on the basis of inability to pay.

On the face of it, imposing a fine on a poor or homeless person seems absurd, if not cruel. Magistrates may be encouraged to impose more equitable sentences, and SPER may be given greater discretion in remitting fines where the interests of justice allow. But both published commentary, and the results of the research reported on here, suggest that the offending behaviour criminalised by 'public nuisance type offences' may be so trivial, that the most prudent response to it is decriminalisation. The research reported on here demonstrates that people are coming before the court on charges associated with swinging their arms around, hanging around in car parks, sleeping in public, drinking in public and

swearing in public. In February 2004, two or three cases of this nature were brought before the court each day. We as a society must consider whether the resources of the police and the courts might be better applied to other more serious criminal matters.

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