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Abstract

The policing of public order is fraught with conflict. The 'right' of one person or group to enjoy public spaces is often presented as being in conflict with the rights of others to do the same. Other rights may conflict with one another in the context of public space, including the right to freedom of expression, the right to freedom of assembly and the right to freedom from interference. Further, interactions in public space between police and members of the public can result in both verbal and physical conflict. Each may harbour resentment and prejudice against the other which influences, and is influenced by, the exchanges that occur between them in public space. In the midst of all this, laws must be drafted to regulate behaviour and protect rights. While the aim is to strike the right balance between competing interests, the interests of some have historically taken precedence over those of others. The 'public nuisance' offence provides an apt example of this.

POVERTY, POLICE AND THE OFFENCE OF PUBLIC NUISANCE

TAMARA WALSH*

Introduction

The policing of public order is fraught with conflict. The 'right' of one person or group to enjoy public spaces is often presented as being in conflict with the rights of others to do the same.¹ Other rights may conflict with one another in the context of public space, including the right to freedom of expression, the right to freedom of assembly and the right to freedom from interference.² Further, interactions in public space between police and members of the public can result in both verbal and physical conflict. Each may harbour resentment and prejudice against the other which influences, and is influenced by, the exchanges that occur between them in public space. In the midst of all this, laws must be drafted to regulate behaviour and protect rights. While the aim is to strike the right balance between competing interests, the interests of some have historically taken precedence over those of others.³ The 'public nuisance' offence provides an apt example of this.

The offence of 'public nuisance' was introduced in Queensland in April 2004.⁴ It replaced the old offence of 'obscene, abusive language, etc.' which similarly criminalised offensive language and offensive behaviour, but was antiquated in its

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¹ See for example Tony McGrady MP, *Queensland Parliamentary Hansard*, Second Reading Speech of the Police Powers and Responsibilities and Other Amendments Bill 2003, 25 November 2003 at 5095: 'All too often people in our community will not accept the standards that the community imposes upon itself... I think law abiding citizens have a right to go about their lives free from some of the nonsense that goes on in public space.'

² *International Convention on Civil and Political Rights* articles 17, 19 and 21. As to the interaction of these rights in the context of public space, see Cassandra Goldie, *Living in Public Space: A Human Rights Wasteland*, PhD Thesis, University of New South Wales, 2008.

³ For a historical account of the offence of vagrancy see Tamara Walsh, 'Waltzing Matilda one hundred years later: Interactions between homeless persons and the criminal justice system in Queensland' (2003) 25(1) *Sydney Law Review* 75.

⁴ Originally *Vagrants, Gaming and Other Offences Act 1931* (Qld) section 7AA, and then *Summary Offences Act 2005* (Qld) s 6.

expression, and potentially impermissibly overbroad.⁵ Predictions as to the likely impact of the change to the provision varied markedly. The then Attorney-General believed that prosecutions for public nuisance-type behaviour would decrease since the new offence was targeted towards more serious criminal behaviour than the old,⁶ while certain members of the community legal sector expressed concerns that the new section would lead to an increase in prosecutions, particularly amongst those vulnerable groups that typically make up their client base.⁷

Once the provision commenced operation, it quickly became clear that the legislative change was having an impact on the manner in which public order was policed. Community legal centres reported increases in demand for their legal advice and representation services for public nuisance matters. For example, the Aboriginal and Torres Strait Islander Legal Service reported that client representations for disorderly/public nuisance matters had increased from 220 in 2003/04 to 380 in 2004/05 to 550 in 2005/06.⁸ Legal Aid Queensland stated that they 'perceived that in some locations, including Brisbane city, there has been an increase in the number of persons charged in relation to such behaviour and language'.⁹

The then Chief Magistrate reported similar observations. He said: 'The impression is that there has been an increase in the charges brought for the offence as compared to the position before 1 April 2004'.¹⁰ Indeed, the volume of cases coming before the Brisbane Magistrates Court increased so substantially at this time that the arrest court was literally unable to cope with demand, necessitating the introduction of a second arrest court in March 2006 after a trial period of around 12 months. In addition to this, the Special Circumstances Court was introduced in the Brisbane Magistrates

⁵ The President of the Supreme Court of Queensland had expressed the view (in dissent) in *Power v Coleman* [2002] 2 Qd R 620 that the prohibition against the use of 'insulting' words in the old section was constitutionally invalid by reason of its encroachment on the freedom of political communication. The offence of public nuisance was introduced whilst the decision of the High Court on appeal was pending. The majority of the High Court (McHugh J dissenting) ultimately held that the old provision was not constitutionally invalid: *Coleman v Power* (2004) 220 CLR 1.

⁶ Rod Welford MP, statement made at the *Legislated Intolerance: Public Order Law in Queensland* forum, Banco Court, Queensland, June 2004.

⁷ Rights in Public Space Action Group (RIPS), 'Queensland No Smart State for the Homeless and Poor', Media Statement, 28 October 2003.

⁸ Aboriginal and Torres Strait Islander Legal Service (Qld South), *Submission to the CMC Review of Public Nuisance*, 2006, available at www.rips.asn.au.

⁹ Legal Aid Queensland, *Submission to the CMC Review of Public Nuisance Laws*, 2006, available at www.legalaid.qld.gov.au.

¹⁰ Queensland Crime and Misconduct Commission (CMC), *Policing Public Order: A Review of the Public Nuisance Offence*, 2008 at 52.

Court in May 2006 to deal with the volume of public order charges brought against marginalised people.¹¹ The number of cases heard by this court continues to increase.¹²

My own research suggested a substantial increase in the number of public nuisance cases coming before certain Magistrates Courts in Queensland. Court observation in Brisbane and Townsville revealed statistically significant increases in public nuisance matters after the introduction of the new offence.¹³ Even the Police Minister reported both anticipated and actual increases in arrest rates as a result of the operation of the new offence.¹⁴

Yet, despite this, the Queensland Crime and Misconduct Commission (CMC) concluded in its recent review of the public nuisance offence that its analysis of the data '[did] not show any marked changes since the introduction of the new public nuisance offence'.¹⁵ The recommendations made by the CMC on the 'management of public nuisance offending' demonstrate fundamental misunderstandings regarding the manner in which public nuisance is policed, and the impact that convictions for public nuisance have on the 'street people' and 'party people' they refer to in their report.¹⁶

This article will question how the CMC could have arrived at a finding that so categorically contradicted the balance of legal professional opinion regarding the new offence and its impact on the volume of cases proceeding to court. It then reports on the results of the latest court observation study on public nuisance cases undertaken at the Brisbane Magistrates Court. Most importantly, it provides empirical information on the impact of public order policing on people living in poverty in Queensland, in their own words, to allow some of those who have been personally affected by the public nuisance provision to have a voice in the debate.

¹¹ Judge Marshall Irwin, 'Special Circumstances List' paper presented at the *Sisters Lock 'Them' Up? Disability and Mental Illness Aren't Crimes: Sisters Inside 4th International Conference*, 17-19 May, Brisbane.

¹² See Tamara Walsh, 'The Queensland Special Circumstances Court' (2007) 16 *Journal of Judicial Administration* 223.

¹³ See Tamara Walsh, 'Offensive language, offensive behaviour and public nuisance: Empirical and theoretical analyses' (2005) 24(1) *University of Queensland Law Journal* 123.

¹⁴ Judy Spence MP, 'Brisbane police get tough on drunken revellers', Media Statement, 26 October 2005; Judy Spence MP, 'Tough new public safety laws passed in Queensland Parliament', Media Statement, 24 October 2005. See also CMC at 51.

¹⁵ CMC, above n 10 at xvi.

¹⁶ These are the labels that the CMC ascribes to these groups; they are not my own.

The CMC inquiry into the public nuisance offence

In May 2008, the CMC released its review of the public nuisance offence.¹⁷ A legislative requirement that the CMC review the public nuisance provision as soon as practicable after 1 October 2005¹⁸ was imposed in the context of considerable anxiety amongst certain groups regarding the potential impact of the provision. In particular, representatives of the community legal sector expressed concerns regarding the breadth of the provision and the potential for adverse impacts on marginalised groups, particularly young people, Indigenous people and people experiencing homelessness.¹⁹

In its review, the CMC considered police data obtained from the Queensland Police Service (QPS), court data obtained from the Department of Justice and Attorney-General, 24 written submissions,²⁰ and certain 'qualitative police data', a random sample of narratives from 354 Queensland police officers.²¹ There was no attempt made by the CMC to engage with those who have been charged with public nuisance, or the 'street people' or 'party people' it identified as most often targeted in public nuisance policing.²²

The CMC concluded that 'on balance, Queensland's public nuisance laws are being used fairly and effectively, in the sense that police are taking action to respond to the messages being sent by the broader community'.²³ It went on to make five recommendations related to the 'management of public nuisance offending in the criminal justice system'. One of these recommendations was that a ticketing system be introduced for public nuisance offences, giving police officers the power to issue an on the spot fine as an alternative to issuing a notice to appear or arresting the person.²⁴ This recommendation was hastily taken up by the Queensland Government, which has announced that a 12 month ticketing trial will commence in

¹⁷ CMC, above n 10.

¹⁸ *Summary Offences Act 2005* (Qld) s 7, and before this, *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7AA(6)-(9).

¹⁹ See for example Rights in Public Space Action Group, *Submission to the Minister for Police and Corrective Services Regarding the Vagrants, Gaming and Other Offences Act, 2004*, available at www.rips.asn.au.

²⁰ These submissions were received in response to a public call for submissions by the CMC. However, it should be noted that at least three of these submissions were received from branches of the Queensland Police Service, and a further three were received from State or Local Government authorities: CMC, above n 10 at 10-11.

²¹ CMC, above n 10 at 10-11.

²² *Ibid* at 131.

²³ *Ibid* at xvii.

²⁴ *Ibid* at 130.

2009.²⁵ While there is no doubt this will result in 'cost savings for police and Queensland courts'²⁶ the implications for disadvantaged people are significant, and will be discussed further below.

The CMC was able to reach the conclusion that there have not been any 'marked changes' since the introduction of the new offence because it restricted its analysis to a comparison between the 12 months prior to, and the 12 months subsequent to, the introduction of the new offence. Then, it deduced that the new offence was not actually 'driving the changes' that were observed between the two periods.²⁷ Police data indicated that there was a 9% increase in public nuisance incidents in the 12 months following the introduction of the offence,²⁸ and the CMC conceded that across the full two year period (from 1 April 2003 to 31 March 2005) there was a statistically significant increase in the rate of public nuisance incidents per 100,000.²⁹ Yet these increases were dismissed by the CMC as being merely reflective of 'continuing upward trends' in public nuisance incidents observable across the ten year period between 1997 and 2007.³⁰ The CMC reported that there was an average increase in the rate of public nuisance offending of 7% per year in the decade from 1997 to 2007.³¹ However, averaging out the increase masks the fact that the 'upward trend' is much more marked in the three years from 2004 to 2007 than any other period during the decade under consideration. Data in an appendix to the report³² demonstrates that there was a 36% increase in the rate of 'public nuisance incidents' in the six years between 1997/98 and 2003/04, while a 38% increase was recorded in the three years between 2003/04 and 2006/07. Thus, the rate of increase has actually doubled since the introduction of the new offence.

Further, substantial increases in public nuisance incidents were reported in certain QPS regions. The CMC conceded that in the 12 months subsequent to the introduction of the public nuisance offence, increases in public nuisance incidents increased by between 20 and 25% in at least three QPS regions.³³ Yet apparently, all of this demonstrates only 'modest' increases.

²⁵ Premier Anna Bligh and Judy Spence MP, 'On the spot fines for public urination', Media Statement, 10 August 2008.

²⁶ CMC, above n 10 at 130

²⁷ *Ibid* at xvi.

²⁸ *Ibid* at 53.

²⁹ *Ibid* at 54.

³⁰ *Ibid* at 54

³¹ *Ibid* at 55.

³² *Ibid* at 175.

³³ They are Metro North (21%), Metro South (25%), and Southern (20%); *ibid* at 64.

Similarly, court data indicating a statistically significant increase of 13% in court appearances for public nuisance offences in the 12 months after the introduction of the offence was explained away by the CMC as 'consistent with a trend that precedes the introduction of the new offence'.³⁴ Again, it concluded this despite its own finding that '[f]urther analysis of this data revealed a highly significant positive trend in the rate of public nuisance matters finalised per 100,000 population for offences occurring between 1 April 2003 and 1 March 2005'.³⁵

Moreover, the CMC failed to engage with publicly released police data indicating, for example, a 19% increase in good order offending (of which public nuisance is the primary sub-category) in the first six months of 2006.³⁶ By limiting its focus to only the 12 months after the introduction of the offence, significant trends such as these were excluded from the analysis.

The CMC juxtaposed its findings against my own results, obtained through court observation,³⁷ in support of its conclusion that previously published reports of increases in public nuisance matters had been inflated. There are a number of reasons why the results I obtained through court observation cannot be compared with the official court data. First, court observation methodologies record 'appearances' before the court, while official court data records matters that are 'finalised' within the same period. There are significant differences between the two.³⁸ Second, the CMC does not define what it means by a 'public nuisance case' in relation to data for the period prior to the introduction of the public nuisance offence. This is critical as there is no direct equivalent for the 'public nuisance' offence prior to its introduction in April 2004.³⁹ Before the commencement of the new offence, public nuisance-type cases

³⁴ Ibid at 57.

³⁵ Ibid.

³⁶ Judy Spence MP, 'Crime continues to fall in Queensland', Media Release 6 March 2007.

³⁷ This is discussed further below.

³⁸ For a matter to be considered 'finalised', it must have ended in either dismissal of the charge, charges proven, charges unproven, transfer to another court, guilty finding, imposition of sentence, permanent stay, withdrawal of charged by prosecution, or some other method of charge finalisation: see Australian Bureau of Statistics, *National Criminal Courts Data Dictionary*, (2006) Appendix 2 – Glossary. Adjourned cases are not considered 'finalised' as a subsequent court appearance(s) will be necessary to dispose of the case. Adjourned cases are, therefore, not included in the official count but they can make up a substantial proportion of court 'appearances'. The result is that there may be a significant difference between the number of 'finalised matters' and the number of 'court appearances' during any given period.

³⁹ See Tamara Walsh, 'Won't pay or can't pay? Exploring the use of fines as a sentencing alternative for public nuisance type offences' (2005) 17(2) *Current Issues in Criminal Justice* 217 at 218. See also CMC, above n 10 at 29-30.

were being prosecuted under a range of offences, including wilful damage,⁴⁰ 'conduct causing public nuisance' in licensed premises,⁴¹ failing to leave licensed premises when instructed to do so by an authorised person,⁴² vagrancy⁴³ and 'obscene language, etc.'⁴⁴ My research was clearly stated to be a direct comparison between cases under the old offence of 'obscene language, etc.'⁴⁵ and cases under the new public nuisance offence which replaced it.⁴⁶ Without knowing just how the CMC operationalised 'public nuisance' in relation to the period before 'public nuisance' existed, the CMC's data cannot reliably be compared with my own.⁴⁷

The strength of court observation research is that it provides us with information that official statistics cannot.⁴⁸ In particular, the facts of individual cases as presented by both parties may be recorded, and additional demographic characteristics such as those related to impairment and housing status may also be collected. My research has suggested that persons with psychiatric, mental or cognitive impairment, and people experiencing homelessness, are disproportionately represented amongst those charged with public nuisance-type offences.⁴⁹ Further, my data has consistently

⁴⁰ *Criminal Code 1899* (Qld) s 469.

⁴¹ *Liquor Act 1992* (Qld) s 164(1).

⁴² *Liquor Act 1992* (Qld) s 165(2), (4). See also s 165A(2) (a person must not resist a person who is lawfully preventing the person from entering licensed premises).

⁴³ *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 4(1) (since repealed).

⁴⁴ *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7 (since repealed).

⁴⁵ That is, the *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7 (since repealed).

⁴⁶ Under *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7AA (as it then was).

⁴⁷ There is much more I could say regarding the way in which my data was used and presented in the report, including the fact that despite the fact that my work is cited over 70 times in the report, I was not personally consulted with during the course of the inquiry, nor were any discrepancies between my data and the official data discussed with me prior to the publication of the report. The CMC could also have noted that the reason why researchers must adopt resource-intensive methodologies such as court observation is because the Queensland Government makes so few of its official statistics available to the public. In the absence of a freedom of information application, the Minister retains the discretion to determine whether or not a requested statistic will be released. A recent review of freedom of information laws and practices in Queensland recommended greater transparency of government information: FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, 2008.

⁴⁸ See John Baldwin, 'Research on the criminal courts' in Roy D King and Emma Wincup, *Doing Research on Crime and Justice*, 2nd edition, 2008 at 382.

⁴⁹ Walsh above n 39 at 223; Walsh above n 13 at 129.

suggested that Indigenous people are significantly overrepresented amongst public nuisance defendants.⁵⁰

Neither of these issues received the attention they deserved from the CMC review. In relation to the adverse impact of public nuisance-type laws on those who are homeless and/or impaired, the CMC categorically stated that the 'empirical evidence in this regard is not strong'.⁵¹ Certainly there are no official statistics on the subject, but extensive research on the relationship between disadvantage and public order policing has supported the conclusion that these individuals are adversely affected.⁵² Indeed, based on its own 'qualitative police data' the CMC was able to conclude that 'street people' are the 'core group of recidivist public nuisance offenders'.⁵³ The CMC stated that police considered that 'they often had little choice other than to use the public nuisance offence to deal with the behaviour of some "street people", especially those living in parks in particular areas'.⁵⁴ Despite this, no substantive recommendation was made by the CMC regarding how the disproportionate adverse impact of the public nuisance offence on those who are homeless and/or impaired might be addressed.⁵⁵

In fact, the CMC's recommendation that public nuisance be made a ticketable offence has the capacity to further disadvantage those experiencing homelessness and/or impairment who are charged with public nuisance. At present, public nuisance defendants in Brisbane who are homeless and impaired may have their matter dealt with by the Special Circumstances Court. This specialist list at the Brisbane Magistrates Court is aimed at finding alternative, more appropriate and effective ways of dealing with defendants with impaired capacity who are charged with public order offences.⁵⁶ The court adopts a case management approach, and

⁵⁰ Observed rates of Indigenous representation amongst public nuisance defendants have been as high as 46% in Brisbane and 68% in Townsville: see Tamara Walsh, *No Offence: The Enforcement of Offensive Language and Offensive Behaviour Offences in Queensland* (2006) at 17.

⁵¹ CMC, above n 10 at 19.

⁵² This is acknowledged by the CMC (above n 10 at 18-22). As to the research in Australia indicating the adverse impact of public nuisance-type laws on people who are homeless and/or impaired, see particularly Cassandra Goldie, 'Living in public space: A human rights wasteland' (2002) 27(6) *Alternative Law Journal* 277; Philip Lynch, 'Understanding and responding to begging' (2005) 29(2) *Melbourne University Law Review* 518; Paul Spooner, 'Moving in the wrong direction: An analysis of police move-on powers in Queensland' (2001) 20(1) *Youth Studies Australia* 27.

⁵³ CMC, above n 10 at xix.

⁵⁴ *Ibid* at 73.

⁵⁵ That is, apart from a call for continued 'partnerships' between QPS and 'other agencies' to develop and implement appropriate 'programs': see CMC, above n 10 at 136.

⁵⁶ See further Walsh, above n 12 at 223.

defendants receive 'penalties' which aim to address the underlying causes of their offending behaviour. Methods of disposition commonly include referrals to welfare and/or treatment services, and involve a case plan which is negotiated between the parties and overseen by the court.⁵⁷ If these defendants receive a ticket for public nuisance from police, as opposed to a notice to appear, they will no longer be able to benefit from the services provided by the Special Circumstances Court.⁵⁸ Instead, they will receive a fine which they are unable, and unlikely ever, to pay, transferring enforcement costs from the court system to the fine enforcement agency, SPER.⁵⁹ Obviously, such an approach is both illogical and unjust.⁶⁰ Indeed, it is well-established that infringement notice systems have a disproportionate adverse effect on individuals experiencing disadvantage and may ultimately exacerbate poverty and mental illness due to the financial and psychosocial stress they cause to 'offenders'.⁶¹

In relation to Indigenous people, the CMC concluded, based on its analysis of police narratives, that there existed 'a tense and volatile relationship between police and Indigenous people'.⁶² Further, it reported that Indigenous people were 4.5 times more likely to receive a custodial sentence for public nuisance, 3.4 times more likely to have a conviction recorded, and 1.6 times more likely to be dealt with by way of arrest, as opposed to a notice to appear.⁶³ These are significant, and very troubling, findings. They demonstrate that the concerns raised by the Royal Commission into

⁵⁷ Ibid at 228-229.

⁵⁸ While an 'offender' may still opt to appear in court in relation to the offence, Richard Fox's research indicates that only 1-2% of those who receive an infringement notice seek a full hearing: Richard G Fox, *Criminal Justice On the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) at 146.

⁵⁹ The State Penalty Enforcement Registry.

⁶⁰ See for example Walsh, above n 39; Philip Lynch, Sarah Nicholson, Simon Ellis and Gary Sullivan, *Disadvantage and Fines: Submission to the Victorian Government Regarding the Enforcement of Unpaid Fines Against Financially and Socially Disadvantaged People*, 2003; Judith Andrews, *Imprisonment for Fine Default in North Queensland*, 1999. Overseas literature includes W De Jong and S Franzeen, 'On the role of intermediate sanctions in corrections reform: The views of criminal justice professionals' (1993) 16(1) *Journal of Crime and Justice* 47-73; J Raine, E Dunstan and A Mackie, 'Financial penalties as a sentence of the court: Lessons for policy and practice from research in the magistrates' courts of England and Wales' (2003) 3(2) *Criminal Justice: International Journal of Policy and Practice* 181-197.

⁶¹ See particularly Parliament of Victoria Law Reform Committee, *Warrant Powers and Procedures* (2005) at 386-391.

⁶² CMC, above n 10 at 49.

⁶³ Ibid at 92, 99, 103.

Aboriginal Deaths in Custody,⁶⁴ and Queensland's own *Justice Agreement*,⁶⁵ remain unaddressed. Yet the most the CMC was willing to recommend in light of this was that a person charged with public nuisance be 'provided with sufficient particulars to identify which "limb" of the public nuisance definition the alleged behaviour falls' so that arrests and prosecutions based on offensive language might be more closely monitored in the future.⁶⁶

The CMC review has been met with a sense of great disappointment by community lawyers and public interest advocates. It was hoped the review would attempt to address some of the concerns they have for their clients, regarding the manner in which these already vulnerable people are affected by the policing and prosecution of public nuisance. There is a general sense of disbelief regarding how the CMC could have concluded that current practices are 'fair' and 'effective', and why it simply 'dismissed concerns that the new laws had targeted the homeless, mentally ill and Aboriginal people'.⁶⁷

Observation of public nuisance cases at the Brisbane Magistrates' Court – 2007

In November/December 2007, I conducted a court observation study of public nuisance cases at the Brisbane Magistrates Court. This replicated prior court observation studies conducted in February 2004, July 2004 and July 2005 all of which sought to monitor the use of the new public nuisance offence.⁶⁸ In each study, field researchers attended the arrest court for one month and recorded details on all public nuisance cases observed during that period. However in the 2007 study, unlike the

⁶⁴ In particular, Recommendation 86 which states that 'The use of offensive language in circumstances of intervention initiated by police should not normally be occasion for arrest or charge', Elliot Johnson, *Royal Commission into Aboriginal Deaths in Custody: Final Report* (1991) at [12.2.1].

⁶⁵ The *Queensland Aboriginal Torres Strait Islander Justice Agreement* was signed by all relevant Ministers of the Queensland Government in 2000. It represented a commitment by the government to work with Aboriginal and Torres Strait Islander communities to achieve a long-term reduction in the numbers of Aboriginal and Torres Strait Islander peoples coming into contact with the criminal justice system. An evaluation of the Agreement was conducted in 2005. It was reported that rates of Indigenous detention were actually higher in 2003/04 than when the Agreement was signed: see Chris Cunneen, Neva Collins and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement*, University of Sydney (2005).

⁶⁶ CMC, above n 10 at 120 (Recommendation 1).

⁶⁷ Darren Giles, 'On the spot fines for public nuisance offences', *The Courier Mail*, 10 August 2008.

⁶⁸ For previous results, see Walsh, above n 39; Walsh, above n 13; Walsh, above n 50.

previous court observation study periods, field researchers were placed in the two arrest courts and the Special Circumstances Court (which sits on a Thursday) rather than just a single arrest court, because this was the first court observation study conducted since the introduction of the second arrest court and the Special Circumstances Court.

During the 2007 study period, 169 people were observed appearing before the arrest courts for public nuisance. A further 11 people were observed appearing before the Special Circumstances Court during the same period. Thus, the total number of people charged with public nuisance observed at the court during the study period was 180. This represents a significant increase (62%) in the number of cases observed since the last court observation study of July 2005. There are at least three extraneous factors that might account for some of the difference. First, seasonal differences may account for some of the variance, as more people tend to frequent public spaces in warmer weather.⁶⁹ Secondly, this study period was close to Christmas time, so a greater number of people may have been present in public space attending Christmas functions, and a greater number of people may have affected by alcohol in public space as a result.⁷⁰ Third, as noted, research assistants were present in more than one court so, with more personnel, there was less chance of missing relevant cases.

When official police data is examined, it seems that the increase in public nuisance cases in the Brisbane Magistrates Court between these two study periods may indeed be reflective of a similarly large increase across Queensland. The CMC reported that in the 12 months between 1 April 2004 and 31 March 2005, a total of 15,225 public nuisance incidents were recorded by the Queensland Police Service.⁷¹ The Queensland Government recently announced that in 2006/07, 22,191 public nuisance offences were recorded in Queensland.⁷² This represents a 46% increase in public nuisance incidents in a period of just over two years, and goes some way towards confirming the validity of the large increases being observed through court observation research.

In terms of defendant characteristics, the results of the most recent court observation research are broadly consistent with those of the prior studies. Again, it was observed that young people comprise the bulk of public nuisance appearances at the Brisbane

⁶⁹ This has been recognised particularly with regard to Indigenous people: see Paul Memmott, Stephen Long, Catherine Chambers and Frederick Spring, *Categories of Indigenous 'Homeless' People and Good Practice Responses to Their Needs*, Australian Housing and Urban Research Institute, 2003 at 19.

⁷⁰ As to the association between alcohol and other drugs and public nuisance incidents: see CMC, above n 10 at 48 and Walsh, above n 13 at 129, 135, 139.

⁷¹ CMC, above n 10 at 53.

⁷² Bligh and Spence, above n 25.

Magistrates Court: 63% of defendants observed in this study were aged 25 years or less.⁷³ Most defendants observed received a fine (78%) and very few were dismissed without penalty (2%).⁷⁴ A large proportion of defendants (31%) were reported in court to be dependent on social security benefits as their main source of income.

Only three people (2.4%) observed at the arrest courts during the 2007 study were reported to be homeless. This appears to suggest a reduction in the number of homeless people appearing in the Brisbane Magistrates Court for public nuisance, as 6% of people observed before the court in the July 2005 study were reported to be homeless. However, a further 11 homeless people appeared before the Special Circumstances Court for public nuisance during the 2007 study period. When added with the arrest court numbers, the total number of public nuisance defendants who were homeless was 6%, indicating no real change between these two study periods in the rate of homelessness amongst public nuisance defendants. Obviously, however, this indicates a continued overrepresentation of people experiencing homelessness in public nuisance cases.

One key difference that was observed between the two study periods related to representation. Of those cases observed in the July 2005 study, 36% represented themselves in court. During the 2007 study period, 51% represented themselves, and the proportion of defendants represented by the duty lawyer was significantly less (22% in the 2007 study compared with 38% in the 2005 study). The difference in the proportion of defendants represented by the duty lawyer may be explained by examining the raw figures. In the 2007 study period, 38 of the observed public nuisance defendants were represented by the duty lawyer, compared with 42 in the 2005 study period. This is not a significant difference in number. The raw figures

⁷³ This is broadly consistent with QPS data which reports that 55% of public nuisance offenders are aged under 25 years (CMC, above n 10 at 76), and the CMC's claims (ibid at 73) that the principal use of the public nuisance offence is managing the behaviour of 'party people' (one would assume most of these 'party people' are young). Note, however, that the court observation results reported on here involve 'adults' only (including 17 year olds who are considered to be adults for the purposes of the criminal law in Queensland: see *Juvenile Justice Act 1992* (Qld) s 6(2)). The CMC reported (ibid at 80) that 7% of public nuisance defendants are actually under 17 years of age. This means that more than 1000 children aged 16 or less are being charged with public nuisance each year.

⁷⁴ The CMC reported (ibid at 101) that official court statistics indicated that in 92% of finalised public nuisance matters, the defendant received a fine. The discrepancy between my findings and the official statistics is reflective of the fact that court observation records court appearances, rather than the manner in which cases are ultimately finalised. This means that under court observation, a large percentage of case outcomes are adjournments (12.4% in the 2007 study). Many of these adjourned cases may ultimately result in the imposition of a fine. See further above n 38.

tend to suggest that duty lawyer services at Brisbane Magistrates Court may reach capacity at around this number, and that any defendants in excess of this may be forced to represent themselves due to a lack of available lawyers at court. This is merely a hypothesis, however, and the trend requires further investigation.

With so many disadvantaged individuals being affected by the operation of the public nuisance offence, it seems remiss of the CMC not to have included in its analysis an examination of their views and experiences, as expressed by them. Qualitative data was collected from police officers but not from those on the other side of the courtroom. The remainder of this article will offer some empirical evidence as to the experiences of some of these individuals, specifically those who are living in poverty and/or are homeless.

Public nuisance and people experiencing poverty: Qualitative data

The CMC inquiry relied heavily on 354 'police narratives' in its review of the public nuisance offence.⁷⁵ However, police narratives do not provide 'an unbiased account of the incidents described'.⁷⁶ It is not unusual for two completely different versions of the same incident to be presented to the court, so nothing can really be concluded by presenting the narratives of one half of the interaction. This may be contrasted with court observation methodologies where the researcher can consider the perspectives of both parties, and any conclusions are based upon the ultimate finding of the court, an objective arbiter of the events in question, rather than either one of the parties.⁷⁷

The CMC's presentation of 'qualitative police data' in this manner is highly questionable, and seems skewed towards the perspectives of police officers. Regardless of the fact that the CMC consistently refers to 'party people' and 'street people' as those most affected by the public nuisance offence,⁷⁸ it seems their perspective has been largely omitted from consideration.

In 2007, I undertook an examination of the perspectives of people living in poverty regarding the impact of the criminal law on their lives. The aim of the project was to provide those who are poor or homeless with a voice in the law and order debate, acknowledging that they too possess specialised knowledge regarding policing and maintaining public order in public spaces. A total of 131 people experiencing poverty in Queensland participated in 75 individual interviews and 11 focus groups in

⁷⁵ CMC, above n 10 Ch 7.

⁷⁶ This is acknowledged by the CMC, *ibid* at 39.

⁷⁷ See Baldwin, above n 48.

⁷⁸ See for example CMC, above n 10 at xix.

Brisbane, Townsville and Cairns.⁷⁹ The qualitative data yielded provides important information on the impact of public nuisance policing on the lives of these individuals.

One of the key themes to emerge from the data was that people experiencing poverty and homelessness believe that police officers routinely interfere in their lives in circumstances where no wrongdoing has occurred, or is likely to occur. This was the case amongst both Indigenous and non-Indigenous participants. They made comments such as:

'They just seen us sitting there, they knew who we were, and just came over and decided to find out what we were doing.'

'They will generally find a charge to make it fit to justify their time with you.'

'It prevents us from being able to just live a normal life. We cannot walk down the street without getting harassed by police, for just doing, just walking, you know what I mean?'

'Everywhere you go there's always police officers there coming up asking you for ID and everything. They do a lot of harassment.'

'Stopped, harassed, questioned. I mean, like something may have happened down the road. They'll just stop you because you're in the area. I wouldn't say that they target black people, but that's how it comes across as a black person sometimes.'

'Lately, I'm hardly game to walk down the street here, just because I'm thinking "yeah, the coppers are going to pull me up again." You know? That's no way to live.'

'They're going to have to build a lot more jails, I think, if they keep going the way they are.'

In contrast, a majority of participants remarked that they felt they were treated 'fairly' or even 'leniently' by the courts. When asked why they thought this was the case, many responded along these lines:

'Maybe because they realise that I'm just getting dragged in for rubbish all the time and it's just a way for police to fill their shift up.'

'A couple of times the magistrate actually took my side against the cops.'

⁷⁹ For further information on the results of this study, see Tamara Walsh, *No Vagrancy: An Examination of the Impact of the Criminal Justice System on People Living in Poverty in Queensland*, 2007; Tamara Walsh, 'Policing disadvantage: Giving voice to those affected by the politics of law and order' (2008) 33(3) *Alternative Law Journal* 160.

Indeed, some participants stated that once their case progressed to court, the police actually withdrew the charges. One participant said:

‘The police never present evidence. They basically have no case.’

This is consistent with a finding of the CMC review that there was a statistically significant increase in the proportion of public nuisance matters in which the prosecution withdrew charges or failed to offer evidence for charges in the 12 months after the introduction of the new offence.⁸⁰ Unfortunately, this finding received very little attention in the report.

The tenuous factual basis upon which many public nuisance charges are brought is further borne out in the reported case law of the District Court and the Court of Appeal. Many public nuisance convictions have been overturned on appeal because police officers’ evidence was contradictory or otherwise failed to establish the elements of the offence beyond a reasonable doubt.⁸¹ For example, in *Parsons v Raby*⁸² there was insufficient evidence for the Court of Appeal to conclude that the defendant was not acting in self-defence in engaging in ‘nuisance’ behaviour in a car park. In *Andrews v Rockley*⁸³ there was contradictory evidence of police officers as to whether the defendant’s penis was visible, and thus whether his nude sunbathing was ‘disorderly’; the defendant’s public nuisance conviction was ultimately overturned by the District Court. In *Courtney v Peacock*⁸⁴ the District Court found there was insufficient evidence to support the conclusion that the defendant’s holding up of a sign on a roadway alleging corruption amongst the police force and the government amounted to ‘disorderly behaviour’. And in *Couchy v Birchley*⁸⁵ it was held that there was insufficient evidence to support the identification of the defendant (an Indigenous woman known to police) as the person who had engaged in the alleged offensive behaviour. The courts, therefore, play a critical role in reviewing the lawfulness of public nuisance charges.

⁸⁰ CMC, above n 10 at 97. Unfortunately, this finding was not discussed at length. Nor was the connection made between this trend and the dangers of making the offence ticketable (see further below).

⁸¹ See also *Dart v Jacklin & Ingerson* [2007] QDC 371 (sentence for public nuisance held to be manifestly excessive and reduced to release upon entering a recognisance in circumstances where the defendant had behaved in an abusive’ and ‘threatening’ manner towards staff of the Department of Child Safety because she believed she would be prevented from attending visitation with her infant child).

⁸² [2007] QCA 98.

⁸³ [2008] QDC 104.

⁸⁴ [2008] QDC 87.

⁸⁵ [2005] QDC 334.

Many of the interview and focus group participants noted that interactions with police around 'public nuisance' type behaviour could result in altercations with police. Participants stated that they believed this was due to a sense of frustration and injustice aroused within those who feel that they are constantly 'harassed' by police for no reason, and that they are being unjustly accused of engaging in criminal conduct. They said these altercations can culminate in charges being laid in situations where this would not otherwise have occurred. This was acknowledged by the CMC in relation to Indigenous people. Specifically, the CMC said 'it appears police often respond to offensive language used by Indigenous people where it could not be suggested that there was any real "interference" with the police carrying out their duties'.⁸⁶ Yet, this was not presented as a key finding of the review.

Further to this sense of frustration, many participants expressed feeling afraid of police officers. High levels of police brutality were reported by participants; allegations of physical assault by police were made in 26 of the interviews and five of the focus groups. Many participants described police as being 'hot-headed' or on a 'power trip'. Others indicated that there may be a sense of 'peer pressure' amongst police officers. Comments along these lines included:

'When they're one on one they're normal people. But when there's two of them, they try and stand over you.'

'It's mostly rookies who cruise around because it makes them look good if they've got a whole lot of names on their book.'

Far from reducing the amount of crime occurring in public places, many of the participants in this research commented that this kind of policing fuels resentment against police officers,⁸⁷ and may indeed lead to further crime. Participants made statements like:

'I found I started stealing a bit, because I just had no respect for the law authorities anymore.'

'Makes me paranoid to go out, I'll tell you that much. I hate leaving the house. I'm on community service and I can't even make it to that. Just in case I get pulled up on the way or something and he locks me up for no reason at all. I may as well just breach myself because he's going to make sure that I get breached.'

These incidents also have a significant impact on individuals' sense of hope and purpose:

⁸⁶ CMC, above n 10 at 42.

⁸⁷ See further Paula Morreau, 'Policing public nuisance: The legacy of recent events on Palm Island' (2007) 28(6) *Indigenous Law Bulletin* 9.

'I feel belittled. I've lost my sense of pride and I've lost my sense of self-esteem, direction, all sorts of things.'

'It spoils your whole concept of just trying to achieve something positive, you know?'

'The more you persecute a person the more their self-esteem is going to be shot, and that's what keeps people going.'

'It's mentally scarring. I still get the effects of it now, from my head.'

'As a child, I wanted to be a policeman. I wanted to do something good, but when I can see these guys just picking out bad points about me ... that just sort of died that ambition.'

Conclusion

The CMC's conclusions that the offence of public nuisance is being policed in a 'fair' and 'effective' manner, and that the introduction of the new offence has not resulted in any 'marked changes' in the policing of public nuisance behaviour, seem to substantially lack supportive evidence. The balance of legal professional opinion is to the contrary, and even its own data and findings seem contradictory. It appears that a selective use of the data enabled the CMC to reach the conclusions it did, and its approach seems skewed towards the views of police officers.

Further to this, its recommendation that public nuisance be made a ticketable offence demonstrates a serious lack of understanding regarding the impact of the public nuisance provision, and infringement notice systems, on disadvantaged defendants. The public nuisance ticketing system, to be introduced in 2009, has the capacity to further marginalise poor, homeless and impaired defendants by practically restricting their access to the Special Circumstances Court, and limiting the very important role of the courts in reviewing the lawfulness of public nuisance charges. Those cases that have gone to appeal have demonstrated the need for court scrutiny, as often, it has been held that there was insufficient evidence to support the charge. By effectively removing these cases from public purview, opportunities to influence police practices are lost.

While the CMC's call for 'partnership' between the QPS and 'other agencies' is appropriate,⁸⁸ a vague recommendation of this nature is insufficient to deal with the very serious implications of the offence for Indigenous people, and socially and economically disadvantaged people. The policing of public nuisance has significant implications for relations between police officers and members of the public. It also

⁸⁸ CMC, above n 10 at 136.

has the potential to seriously impact upon individuals' sense of self-worth and their respect for the criminal law. As Justice Sackville noted in 1976:⁸⁹

The point is not that the use of police discretion can or should be avoided or that its exercise usually produces undesirable results, but that the importance of the discretion, and the opportunity it provides for discriminatory treatment of poor people, should be recognised and studied closely.

⁸⁹ Justice Ronald Sackville, *Commission of Inquiry into Poverty: Second Main Report – Law and Poverty in Australia*, Commonwealth Parliament, 1976 at 1.