Dealing with nuisance behaviour: Logical alternatives to traditional sentences

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Introduction

Recent years have seen an increase in the number of people coming before the courts for public space offences in Queensland. The majority of defendants in these cases are homeless, Indigenous, young and/or display signs of mental illness, intellectual disability and drug dependency[1]. Thus, it is the most vulnerable members of our society who tend to be charged with these offences.

Further, the most common penalty imposed in response to a public space offence is a fine. Marginalised defendants are generally unable to pay fines imposed upon them for public space offences due to their extreme poverty. It seems ridiculous, and indeed is more costly, to enforce fines against people who are simply unable to pay. Yet, the Office of the Premier has suggested that a 'crack down' on people who default on payment of fines for public space offences may be imminent.[2]

This paper canvasses a range of possible alternatives to arresting, charging and fining marginalised people for offending behaviour committed in public space. It makes recommendations for reform on four key dimensions: the legislation, police practices, sentencing alternatives available to the court, and the fine enforcement system.

Homelessness and Public Space Law in Queensland

High levels of homelessness have been reported in Queensland[3] and homelessness service providers report being overwhelmed by demand. Far from engendering tolerance of and compassion for such people, Queensland's public space laws are among the most oppressive in the country.

Some criminal laws in Queensland are directly targeted at people who are poor and/or homeless, for example, begging is an offence under section 8 of the *Summary Offences Act 2005* (Qld). This is despite the fact that it is well-established that people who beg generally do so because they have no other means available to them to supplement their

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[*] LLB, BSW (Hons1), PhD. This paper is an updated summary of a larger report: Tamara Walsh, *From Park Bench to Court Bench*, Brisbane, 2004 (available at www.lawandpoverty.org/tamarawalsh).
[1] Tamara Walsh, 'Won't pay or can't pay?' (2005) 17(2) *Current Issues in Criminal Justice* 217.
[2] See for example Office of the Department of Premier and Trade, 'Government to enact new controls on public drunkenness', Media Release, 12 September 2003.
[3] Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001*, Australian Bureau of Statistics, Canberra, 2003.

inadequate or non-existent income, and the fact that they very rarely act in an aggressive or threatening manner.[4]

Other laws impact disproportionately on people who are homeless because of their tendency to occupy public space more frequently than the remainder of the population. For example, people who are homeless are more likely to be charged with public nuisance under section 6 of the *Summary Offences Act 2005* (Qld), wilful exposure under section 9 of the *Summary Offences Act 2005* (Qld) and public drunkenness under section 10 of the *Summary Offences Act 2005* (Qld) because they are forced to live out their lives in public space – they do not have a private space to retreat to in which to swear, shout, urinate, defecate, vomit or drink alcohol. Similarly, they are more likely to be charged with being in possession of alcohol in public (s168B of the *Liquor Act 1992* (Qld)) and failing to move on when directed to do so by police (s445 of the *Police Powers and Responsibilities Act 2000* (Qld)).

Further, these laws tend to be selectively enforced against marginalised people, particularly those who are homeless, Indigenous, young, mentally ill or drug dependant. In recent surveys conducted in Brisbane, service providers and homeless people both commented that marginalised public space users are much more likely to have public space offences enforced against them than tourists or other 'legitimate' public space users.[5] In relation to the offence of public nuisance, this is made possible by sub-section 4 which states that a member of the public need not make a complaint for a police officer to commence proceedings for the offence. If a member of the public is not willing to make a complaint, it would seem that the behaviour is not really a public nuisance and should be ignored. Yet, because Queensland's public space offences are all framed as strict liability offences, defendants most often plead guilty even if a defence might have been available to them.[6] Those cases that do lead to a summary trial are often upheld.[7]

Homeless defendants also lack access to adequate legal assistance. This, in part, explains the dearth of case law on these offences. While defendants do have access to duty lawyers, they must plead guilty to the offence to be eligible for this assistance. Further, there is a high demand for duty lawyers' services and there is only limited time available to duty lawyers to become acquainted with the defendant and the case. The Queensland Public Interest Law Clearing House (QPILCH) Homeless Persons' Legal Clinic run by volunteer lawyers in Brisbane attempts to deal with issues associated with fine default, however resource limitations thus far have meant that it is unable to deal with criminal law matters before they reach the fine enforcement stage.

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[4] Michael Horn and Michelle Cooke, *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne*, Hanover Welfare Services, Melbourne, 2001.
[5] See Tamara Walsh, 'Who is the public in public space' (2004) 29(2) *Alternative Law Journal* 82; Tamara Walsh and Carla Klease, 'Down *and* out? Homelessness and citizenship' (2004) 10(2) *Australian Journal of Human Rights* 77.
[6] See Tamara Walsh, *No Offence: The Enforcement of Offensive Language and Offensive Behaviour Offences in Queensland*, University of Queensland, Brisbane, 2006.
[7] See for example *Police v Melissa Jane Couchy*, Brisbane Magistrates' Court, 13 August 2004.

The fact that marginalised people are subjected to criminal charges for behaviour related to their poverty and homelessness has been met with censure in the judicial and academic communities. Judges have expressed their displeasure at having to enforce these laws,[8] and have attempted to read down the offences[9] however they remain on Queensland's statute books. Further, it has been noted in the literature that such laws contravene international human rights law, and may offend the rule of law.[10]

Also worthy of note is the fact that the offences contained in the *Summary Offences Act 2005* (Qld) are replicated to a certain extent in other criminal law legislation. For example, aggressive begging behaviour may be dealt with under section 414 of the *Criminal Code 1899* (Qld) which prohibits demanding property with menaces; threatening violence and threatening assault are offences under the *Criminal Code 1899* (Qld) (sections 75 and 245) which renders the 'threatening' aspect of offensive language (under section 6 of the *Summary Offences Act 2005* (Qld)) somewhat obsolete; and the offence of common nuisance in section 230 of the *Criminal Code 1899* (Qld) seems at least in form to overlap considerably with section 6 of the *Summary Offences Act 2005* (Qld). Further, police move-on powers (section 39 of the *Police Powers and Responsibilities Act 2000* (Qld)) allow police to compel a person to move away from a place if they are causing anxiety or otherwise interfering with other persons' enjoyment of public space. The wording in this section overlaps considerably with that of section 6 of the *Summary Offences Act 2005* (Qld). Thus, it appears that much of the behaviour regulated by the *Summary Offences Act* (Qld) could be more appropriately dealt with under other criminal law provisions.

Sentencing and Fine Enforcement for Public Space Offences in Queensland

Currently, the most common penalty imposed for a public space offence is a fine – around 80% of offenders coming before the courts for public space offences in Queensland are dealt with in this way.[11] Further, fine amounts are not substantially altered on the basis of defendants' means to pay. This results in high rates of fine default amongst public space offenders because they are simply unable to pay their fines.

This lack of creativity in sentencing public space offenders in Queensland is disappointing in view of the alternatives which are available to magistrates under current legislation. Instead of fining a public space offender, a court may instead discharge or release the offender subject to conditions (*Penalties and Sentences Act 1992* (Qld) section 19). This allows the court to refer a disadvantaged person to welfare and other social services in an attempt to address the causes of their offending behaviour, yet this alternative is rarely used in relation to marginalised public space offenders.

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[8] See David Heilpern, '*Police v Shannon Thomas Dunn*' (1999) 24(5) *Alternative Law Journal* 238; *Moore v Moulds* (1981) 7 QL 227.
[9] See for example *Zanetti v Hill* (1962) 108 CLR 433, and the majority of the High Court in *Coleman v Power* (2004) 209 ALR 182, discussed in *No Offence* above n6.
[10] Justice Ronald Sackville, 'Homelessness, human rights and the law' (2004) 10(2) *Australian Journal of Human Rights* 11; Philip Lynch, 'Begging for change: Homelessness and the law' (2002) 26 *Melbourne University Law Review* 690.
[11] See Walsh above n1.

Alternatively, the court may impose a probation order, which may also have conditions attached (*Penalties and Sentences Act 1992* (Qld) section 91). This option is utilised more frequently, but not on a regular basis and not by all magistrates. While the conditions attached to a probation order may prove too onerous for a marginalised person to fulfil, a probation order may be a useful alternative to imposing a sentence of imprisonment upon a repeat offender.

Further, a community service order may also be imposed instead of a fine (*Penalties and Sentences Act 1992* (Qld) section 101), however people who are homeless are often judged to be unsuitable people to undertake community service work. Unfortunately (unlike other Australian jurisdictions) attendance at welfare agencies and participation in rehabilitative programs is not considered to be 'community service' in Queensland.

Thus, a limited range of appropriate sentencing alternatives do exist, but they are rarely utilised and are sometimes not appropriate or adapted to the needs of marginalised people. As a result, the majority of offenders receive a fine; some (around 4%) are even sentenced to imprisonment.[12] Many others end up in prison when they fail to pay their fine because the court has set a default period of imprisonment.[13]

If a person fails to pay their fine, and no default period has been set, their case is immediately referred to the State Penalty Enforcement Registry (SPER) for enforcement. SPER has the power to impose penalties for non-payment, and to enforce the fine by means of property seizure, suspension of drivers' license/registration, redirection of earnings/assets, or a fine option order (akin to a community service order) if the other options are unsuitable. Unfortunately, it does not have a corresponding power to waive a fine if the offender is unable to pay it. Technically, if these enforcement options are not suitable or effective, a fine defaulter may be imprisoned. While no person has been imprisoned for fine default since the introduction of the *State Penalties Enforcement Act 1999* (Qld), this is a policy decision which may lawfully be reversed at any time.

Clearly, imposing fines on people who are poor and imprisoning people for minor public space offences is inappropriate, unjust and contrary to the aspirations of the Queensland 'Smart State' initiative and the *Aboriginal and Torres Strait Islander Justice Agreement*.[14] It also makes no economic sense since it is extremely costly to prosecute, sentence and enforce penalties against marginalised people. These costs are disproportionate when compared with the trivial nature of the offending behaviour in question. Diversion would be a much more appropriate response.

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[12] See Walsh above n1 and the *No Offence* report above n6.

[13] Where a default period has been set their case may still be referred to the State Penalty and Enforcement Registry (SPER) but only at the discretion of the court.

[14] This document was signed by all key Ministers in 2001, and signaled a commitment to reducing the Indigenous incarceration rate, and the over-representation of Indigenous people within the criminal justice system in general.

Queensland has already established three innovative and successful diversionary programs in relation to minor offences under section 11 of the *Juvenile Justice Act 1992* (Qld), the Brisbane City Council Homelessness Strategy and the recent Volatile Substance Misuse Strategy. This expertise could be drawn upon in developing an appropriate alternative response to the minor offending behaviour of homeless people.

What can we learn from other jurisdictions in Australia?

Queensland does not have to look far for suggestions on how public space offenders and fine defaulters could be better dealt with. A number of jurisdictions in Australia have introduced innovative sentencing alternatives and fine enforcement procedures, and these should inform any reforms made to the Queensland law.

First, many jurisdictions in Australia have established diversionary schemes to better deal with offending behaviour conducted in public space at the level of policing. For example, in New South Wales (NSW), the Australian Capital Territory (ACT) and Tasmania, people found to be intoxicated and acting in a disorderly manner in public places are to be taken to a 'place of safety' by police rather than being charged with an offence. Such persons may be detained in a police cell while they recover for no more than eight hours, or they may be taken to a welfare agency. A like scheme could be established in Queensland to deal with people who are homeless who are found to be breaching public space law. If this were implemented, we could expect a massive reduction in the number of summary offences coming before the courts, and in turn, huge cost savings to the court, corrections and fine enforcement systems. Under section 210 of the *Police Powers and Responsibilities Act 2000* (Qld), taking an intoxicated person to a place of safety instead of arresting them is an option available to police, however many defendants still end up in the watch-house for alcohol-related offences.

Second, some jurisdictions have developed diversionary schemes which operate at the court stage. For example, the Victorian Magistrates' Court has established the Criminal Justice Diversion Program, which is aimed at diverting minor offenders away from the criminal justice system. Eligible defendants are referred to social service providers, and/or instructed to complete restorative tasks, and their case is adjourned while they complete their diversion plan. Also, many jurisdictions (such as ACT, NSW and South Australia (SA)) have a provision in their sentencing legislation which states that if an offence is trivial, the court should consider releasing the defendant without conviction, either conditionally or subject to conditions. Thus, many jurisdictions in Australia have a formal system of diversion in place at the sentencing level in relation to minor victimless offences.

Third, various jurisdictions have expanded the content of their community service orders beyond mere community service work. As noted above, homeless people in Queensland are generally judged to be unsuitable for a community service order; this is because their chaotic lives, lack of access to transport and inability to keep track of time often render them unable to commit to regular community service work. However, in Victoria, SA and Tasmania, attendance at rehabilitative programs, counselling and other self-development

activities can be credited to offenders as community service work for the purpose of a community service order. A reform such as this in Queensland would go some way towards ensuring that community service remains a viable sentencing option in relation to marginalised people who have committed minor offences. Alternatively, a sentencing option akin to the NSW intervention program order, or the Victorian and Western Australian (WA) community-based order (which are essentially orders to attend an approved program for rehabilitation purposes) could be introduced.

Fourth, in some jurisdictions, prison sentences of six months or less are discouraged. Indeed, in WA sentences of six months or less have been abolished. A reform along these lines would provide a means of preventing public space offenders from being imprisoned, and it may in turn encourage magistrates to consider imposing more appropriate alternative sentences. It would also demonstrate a true commitment to the principles and goals outlined in the *Aboriginal and Torres Strait Islander Justice Agreement.*

Fifth, as noted above, SPER lacks the discretion to waive fines, or remit the matter back to court, even if a person is incapable of paying and all other enforcement options are inappropriate in the circumstances. This is unique to SPER – other fine enforcement agencies (such as the State Debt Recovery Office in NSW and the Fines Recovery Unit in the Northern Territory (NT)) do have this power. In other states (such as Victoria, SA, Tasmania and WA), fine defaulters may have their matter remitted to the court for determination. Without the power to waive fines, or to remit the matter to the court where the interests of justice so require, SPER's operations may cause grave hardship to disadvantaged people.

Sixth, in Victoria, a specialist list, presided over by a specially trained magistrate, has been created to deal with people who have been judged unable to pay a fine due to 'special circumstances' including mental illness and substance misuse problems. Such cases are most commonly disposed of via discharges and adjournments, often with treatment and welfare conditions attached. The special circumstances list operates at no additional cost, and its establishment required no legislative amendments.

A diversion program for homeless people is currently being trialled in Queensland, and the creation of a 'special circumstances list' is being planned. If expanded beyond their pilots, these innovations have the potential to significantly reduce the costs associated with the prosecution of marginalised public space users by addressing the causes underlying defendants' offending behaviour.

What can we learn from jurisdictions around the world?

A number of innovative solutions to problems associated with penalising homeless people for public space offences may be found in the international literature.

Alternative methods of fine calculation

It is widely recognised that the main problem with imposing fines as a penalty is that they are inherently inequitable. The impact of the penalty on each individual offender will vary according to his/her means. Also, enforcement costs will often outstrip the fine amount, particularly in the case of indigent offenders who are, and perhaps always will be, incapable of paying their fines.

Perhaps the most promising innovation in relation to fine calculation is the day fine system. This system has been successfully applied around the world, particularly in Europe and Latin America. It provides a formula according to which realistic and just fine amounts may be calculated. First, the offence is allocated a certain number of units according to its gravity. Public space offences are typically placed at the lowest end of the scale. Next, each unit is allocated a value according to the offender's means to pay. Each unit may be valued at one day's pay (hence the name 'day fine'), or some other proportion of income. Finally, the number of units relating to the gravity of the offence is multiplied by the unit value to yield the fine amount. Thus, fines which result are proportionate to the gravity of the offence and relative to offenders' means to pay. It has been found that payment rates are higher, revenue is greater, and enforcement costs are lower under day fine systems.[15]

At the very least, there is a need to ensure that offenders' means are routinely taken into account before a fine is imposed. Indeed, this is a legislative requirement in Queensland (section 48 *Penalties and Sentences Act 1992* (Qld)) although it seems often not to be complied with. A more formal system for taking account of means could be established by creating a formula for calculating fines according to income and assets (eg. in Canada, a formula for calculating fines has been developed for use by magistrates, based on minimum wage levels), or by inserting a new section into the *Penalties and Sentences Act 1992* (Qld) which states that judges and magistrates must provide reasons if they fail to impose an alternative penalty instead of a fine on an indigent person.

Alternatively, a more equitable and realistic approach to calculating instalment amounts could be developed. For example, in the NT, weekly fine payments are calculated by reference to the total fine amount, so that the less the total fine, the less the weekly payment. The adoption of such a system in Queensland would increase capacity of indigent offenders to pay, and thus increase revenue and reduce enforcement costs.

Alternative sentences

A review of the international literature provides further suggestions on how homeless public space offenders might be more effectively dealt with. Diversion, for example, occurs in a number of international jurisdictions at the policing stage, the court stage and the fine enforcement stage. It is reported in the literature that, in Leeds, a police officer

[15] See particularly Andrew Ashworth, *Sentencing and Criminal Justice*, Second edition, Butterworths, London, 1995; Michael Tonry and Kate Hamilton (eds), *Intermediate Sanctions in Overcrowded Times*, Northeastern University Press, Boston, 1995; Sally T Hillsman and Judith A Greene, 'The use of fines as an intermediate sanction' in James M Byrne, Arthur Lurigio and Joan Petersilia (eds), *Smart Sentencing: The Emergence of Intermediate Sanctions*, Sage Publications, London, 1992.

must provide an explanation as to why he/she did not take a drunk and disorderly person to a welfare agency instead of charging them.[16] In Sweden, where an offence is trivial in nature, the interaction with the criminal justice system up to the point of sentencing is often considered punishment enough.[17] It has been reported that, in the US, courts may choose not to enforce fines imposed on those who do not have the capacity to pay[18] and in Canada, courts are prevented under legislation from enforcing fines unless they are satisfied that the offender had no reasonable excuse for failing to pay (*Canadian Criminal Code* section 734.7(1)).

The international literature also makes some suggestions as to how community service orders may be made suitable for marginalised offenders. They include:

- Tailoring 'community service work' to the offence committed, and the circumstances of the offender. In the context of public space offenders, this might involve referring a defendant to community service work which addresses the causes of their offending behaviour (including material need and joblessness) or allowing them to attend approved treatment and rehabilitative programs as part of the order. In the US and UK, defendants may be sentenced to complete a day treatment order at a specialist Day Treatment Centre which coordinates approved rehabilitation programs.
- Providing homeless persons with secure housing and other required supports while they carry out community service work. For example, in the US, Kenya and Japan, residential facilities (often known as 'halfway houses') have been established to provide shelter, meals and social support to marginalised people while they complete a community-based order.

Further, international best practice suggests that mandating treatment, such as drug treatment or psychiatric treatment, as part of an offender's sentence is often successful in preventing future offending behaviour. It should be noted, however, that mandated treatment will not always be appropriate and/or ethical particularly where the offence that has been committed is trivial in nature.

Alternative forums

Some experimentation has been done, particularly in the US, on moving summary proceedings out of the traditional court room into other venues and forums which are more accessible to the community. Indeed, under some models, decision-making powers have been transferred to community members, allowing for the development of

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[16] Geoff Wilkins, *Making Them Pay: A Study of Some Fine Defaulters, Civil Prisoners and Other Petty Offenders Received into a Local Prison*, NACRO, London, 1979 at 70.
[17] Yash Vyas, 'Alternatives to imprisonment in Kenya' (1995) 6(1) *Criminal Law Forum* 73; Pat Carlen, 'Crime, inequality and sentencing' in Pat Carlen and Dee Cook (eds), *Paying for Crime*, Open University Press, Milton Keynes, 1989.
[18] George F Cole, 'Monetary sanctions: The problem of compliance' in James M Byrne, Arthur Lurigio and Joan Petersilia (eds), *Smart Sentencing: The Emergence of Intermediate Sanctions*, Sage Publications, London, 1992 at 143

community-based and location-specific strategies to deal with particular kinds of offending behaviour. Two main innovations are discussed in the literature.

First, community courts, and homeless courts, have been established in a number of jurisdictions throughout the US to deal exclusively with offences committed in public space. These courts are presided over by specially trained magistrates, and are held at accessible community locations such as community halls and even within the premises of welfare agencies. Appropriate sentences aimed at addressing the causes of offending behaviour are imposed, including orders to attend treatment, counselling and life skills training. These courts have been heralded a great success, with high levels of community and defendant satisfaction being recorded.

Second, community conferencing models have been implemented to deal with minor offending behaviour and 'quality of life' offences in the US. These models entail a transfer of sentencing power from the courts to the community. A representative body hears the case from the perspectives of both the offender and the community, and decides on a penalty in consultation with all concerned parties, including local businesses, police, and the offender themselves. These kinds of decision-making bodies would seem most suited to small communities in rural and remote areas in Queensland. This restorative approach would allow such communities to deal with minor offending behaviour in a manner appropriate to the specific community. This in turn might go some way towards preventing legislative reform at the State level from responding merely to the concerns of one or two vocal communities at the expense of the remainder of the State. However, due to the power imbalances inherent in such forums, sufficient advocacy and support services would have to be available to marginalised people who participated in such hearings.

Conclusion

Queensland need not look far for suggestions on how the minor offending behaviour of homeless people could be more effectively dealt with. Indeed, successful methods of diversion and appropriate alternative sentences are already being utilised in Queensland and throughout Australia.

Reforms on a number of dimensions including the legislation, police practices, sentencing and fine enforcement would be welcome. They include:

- Reform of the legislation, so that Queensland's summary offences law is comprised of provisions which protect the safety and security of the community but do not result in hardship for vulnerable people;
- Reform at the policing stage, so that vulnerable public space offenders are diverted from the criminal justice system rather than arrested for trivial offences;
- Reform at the sentencing stage, so that defendants charged with trivial public space offences are discharged from the court, either unconditionally or subject to conditions. The community service order should be reformed to ensure that it remains a viable alternative penalty for marginalised people by including

attendance at approved programs in the definition of community service work. Alternatively, additional support could be provided to marginalised people subject to a community service order (or other court order) through the establishment of halfway houses and/or day treatment centres. Also, more accessible and restorative settings could be trialled for hearing public space offence cases; and

- Reform of the fine system so that fines imposed are equitable and proportionate to the offence committed, and so that marginalised offenders who are incapable of paying their fines can have them waived, where appropriate.

It is hoped that the Queensland government will demonstrate its commitment to ‘smart’ policies by considering trialling the alternatives outlined here, and by educating the public (including lawyers and magistrates) in relation to these issues.