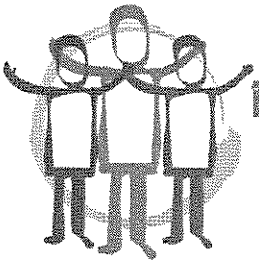

RIGHTS IN PUBLIC SPACE
ACTION GROUP

Submission to Minister for Police and Corrective Services

on the

Review of the *Vagrants, Gaming and Other Offences Act 1931* (Qld)

August 2004

Contents

Appendices

Summary

Opportunity for Reform

RIPS believes that the outdated *Vagrants Gaming and Other Offences Act 1931* (VGOO Act) should be repealed. Correspondence with former Minister for Police, Tony McGrady at the end of 2002 indicated that the VGOO Act was to be replaced by a new *Summary Offences Bill* (SOB). However, no social reform would be achieved if the VGOO Act were merely replaced by a SOB which reinforces and encourages the growth of traditional policing practices that cause more social harm than the offences themselves.

Rather, the SOB should respond to the complex issues surrounding the contested use of public space in modern Queensland society. Further, it should ease the burden placed on the Queensland Police Service (QPS) by these offences, and bring an end to the systemic traditional policing practices contributing to the marginalisation and imprisonment of Queensland's homeless, young and indigenous people and those with mental illness. It should also maintain consistency with other Government policy initiatives including *Smart State, Whole of Government* and the Aboriginal and Torres Strait Islander Justice Agreement.

The SOB drafting process should be informed by key stakeholders and recent research findings. It should not be drafted by the Queensland Police Service for the Queensland Police Service. Consultation should not be last minute or tokenistic, but meaningful and wide-ranging. In particular, there should be direct consultation with indigenous representatives, and DATSIP.

Balancing the Interests of Social Control vs Social Oppression

It is recognised that the QPS requires powers to regulate behaviour in public places. A tool for social control is clearly fundamental to any civilised society. However the stark reality of public order policing in Queensland (as reflected in QPS statistics) is that the wide discretionary powers provided to Police have become a tool for the oppression of marginalised people.

Whilst the word "oppression" may appear to be alarmist, the simple fact is that the offences are being policed in a way that discriminates against marginalised people, and in such a way as to impede their ability to enjoy the fundamental freedoms that the overwhelming majority of Queenslanders take for granted. This is demonstrated by a recent study conducted by Tamara Walsh which found that up to 60% of public space offenders are homeless or at risk of

homelessness, 41% are Indigenous, 39% are aged between 17 and 25 years, and 10% have impaired capacity.[1]

Ignorance of Indigenous Policy Imperatives

Should the SOB merely replicate key public order provisions in the VGOO Act, including public nuisance, begging and drunkenness, its introduction would effectively signal the Beattie Government's abandonment of the Aboriginal and Torres Strait Islander Justice Agreement under which it has committed to halving the rate of indigenous incarceration by 2011. Since signing the agreement indigenous incarceration rates have risen by at least 6.8%.[2]

The Justice Agreement also commits the Beattie Government to consulting with Aboriginal people meaningfully in relation to laws that clearly impact upon them. As is clear from the research findings outlined above, there are unlikely to be any laws passed by the Beattie Government that impact more on indigenous people in Queensland than the SOB.

Conflicting Policy Outcomes

Whilst the Queensland Government should be commended for its courageous approach to stemming the supply of alcohol to indigenous communities, the failure of the Government to adequately address the resulting migration of indigenous itinerants to regional centres is a marked failure of policy implementation. Ample anecdotal and empirical evidence suggests the success of the Alcohol Management Plans is resulting in greater numbers of indigenous homeless people falling foul of public order policing. Indeed, in the year 2002/03 the rate of arrests for street offences increased by 11%.[3]

It is nonsensical that the success of one policy should lead to the failure of another. Therefore, rather than increasing the role of the criminal justice system in responding to indigenous public drunkenness, reform of the VGOO Act would offer an ideal opportunity to compliment the Alcohol Management Plans by strengthening policies to divert indigenous offenders toward treatment and rehabilitation.

Political Will and Resources

For far too long, governments of all persuasions at local and state levels, have exploited marginalised people for electoral gain in what have come to be known as "law and order auctions". This has been achieved by perpetuating mistruths

[1] Tamara Walsh, *From Park Bench to Court Bench: Preliminary Report,* 2004. To obtain a copy of this report, email Tamara Walsh at tamara.walsh@qut.edu.au.
[2] *Justice Negotiation Group Progress Report,* January 2002 to June 2003 p 7
[3] Most of these offences are originating from areas of Northern Queensland with relatively high indigenous populations.

about the threat posed by homeless users of public space when in fact they are more likely to be victims of crime then perpetrators.[4]

It is high time that governments focused on providing real solutions to public space problems rather than adopting one-dimensional "tough on crime" approaches of providing greater resources to traditional policing methods that do not produce lasting results.

A socially responsible approach to public space regulation may appear to be more costly than the traditional policing model, and initially that may be the case. However the costs incurred by adequately funding diversion programs are more than likely to be offset by savings in processing public order offenders through the criminal justice system.

RIPS Proposals for Efficient and Fair Policing

RIPS believes that the following proposed principles should be implemented in any reform of the VGOO Act and/or drafting of a SOB.

- *Complaint-based offences*

A complaint-based system should be introduced for public nuisance offences. Police would remain empowered to act as complainants, however, if there is no evidence from a member of the public about the interference to that member's passage through or enjoyment of a public place, such complaints should be dealt with under section 19 of the *Penalties and Sentences Act 1992*, that is, the person should be released either unconditionally or subject to such conditions as the court sees fit in the circumstances.

- *Actual interference*

A public nuisance offence should not be made out without evidence of actual interference with a member of the public's enjoyment of, or peaceful passage through, a public place. Mere speculation that a person's behaviour is "likely to" cause such interference should not constitute grounds for an offence.

- *Language*

Only language that is offensive or threatening should constitute a public nuisance. Swearing alone should not constitute an offence as contemporary standards in relation to such language have changed in recent years. As NSW Magistrate David Heilpern has said "The word "fuck" is extremely commonplace now... it has become as common in [certain persons'] language as any other

[4] See Amanda Vanstone, Opening Address at the Children and Crime: Victims and Offenders Conference, convened by the AIC, 17-18 June 1999.

word and they use it without intent to offend, or without any knowledge that others would find it other than completely normal."[5]

- *Additional requirements for establishing public nuisance*

These should include:

- whether there is a reasonable excuse;
- all material circumstances, particularly the defendant's personal circumstances;
- contemporary community standards;
- whether the behaviour is sufficiently serious to warrant the intervention of the criminal law; and
- any other relevant circumstances.

- *Diversion*

The objects of the VGOO Act or the SOB should stipulate that, as far as practicable, vulnerable persons are to be diverted from the criminal justice system.

Prior to arrest, a police officer should be required to consider more appropriate alternatives including:

- taking no action;
- issuing a caution;
- using their move on powers;
- contacting welfare agencies for assistance; and
- in matters involving alcohol or chroming, taking the vulnerable person to a place of safety.

If a Magistrate considers that an arrest has been made in circumstances where it would have been more appropriate to divert the vulnerable person, the Court should dismiss the charge.

- *Begging*

Begging *per se* should not be a criminal offence. It is now well-established that the vast majority of those who beg do so for reasons of necessity – they have no other means of supplementing their inadequate income.[6] Further, international best practice (particularly in the US and Canada) suggests that only begging of

[5] See (1999) 24(5) *Alternative Law Journal* 238.
[6] Tamara Walsh, 'Defending begging offenders' (2004) *Queensland University of Technology Law and Justice Journal* (forthcoming); Michael Horn and Michelle Cooke, *A Question of Begging*, 2001.

an aggressive nature should be criminalised.[7] However, begging in a threatening manner could be incorporated into the existing public nuisance provision.

- *Public Drunkenness*

Again, being drunk in public *per se* should not be a criminal offence. Unless a drunk person exhibits behaviour which interferes with the enjoyment of, or passage through a public place by a member of the public, the existing objects of Part 2 Div 1 would not require that person's state of drunkenness to be criminalised.

Decriminalisation is also consistent with best practice principles. In NSW, the ACT and Tasmania, public drunkenness has been decriminalised. Instead, police officers must take intoxicated persons to a "safe place" while they recover. They cannot be charged, and often cannot be detained without their consent.[8]

- *Wilful Exposure*

Wilful exposure of genitals should not constitute an offence where there is a reasonable excuse. 'Reasonable excuse' may include public urination as a result of necessity (e.g. due to the absence or inadequacy of public toilet facilities) or mental illness.

- *Penalties*

Imprisonment should not be a sentencing option for public nuisance offences. Further, the fine maximums should reflect the differing nature of offences. For example, the maximum for offensive behaviour should be 2 penalty units whilst violent behaviour could attract a fine of 10 penalty units.

The maximum fine for threatening begging should be 10 penalty units.

Wilful exposure penalties should reflect the dichotomy in the nature of offences. For example public urination should incur a maximum of 2 penalty units whilst exposing genitals so as to offend another person should incur a maximum of 40 penalty units.

- *Crime and Misconduct Commission Review*

Section 7AA is to reviewed by the CMC at the end of 2005 (s7AA(6)). RIPS believes that in this review, the CMC should consider the impact of the use of public nuisance provisions on the ability of the Government to achieve its commitments under the Aboriginal and Torres Strait Islander Justice Agreement.

[7] Tamara Walsh, (2004) *QUTLJJ*, above.
[8] See Tamara Walsh, 'Waltzing Matilda One Hundred Years Later' (2003) 25(1) *Sydney Law Review* 75.

Introduction

The Rights in Public Space Action Group (RIPS) is a coalition of community agencies with an interest in promoting the rights of marginalised people in their use of Queensland's public spaces. RIPS is broadly representative of client groups who are most affected by the *Vagrants Gaming and Other Offences Act 1931* (VGOO Act) and related laws, and includes community legal centres, the Aboriginal and Torres Strait Islander Corporation for Legal Services (QEA), academics and community agencies that provide services to marginalised people. Members of RIPS are based in Brisbane and in a number of regional centres in Queensland where public space issues have been of most concern. Members of RIPS, through their role in providing legal and other support services to homeless people, young people and other marginalised people, have an extensive knowledge about how the policing of Queensland public disorder offences impacts upon them.

In 2003, RIPS undertook a consultation process with homeless people, and other marginalised people who use public space, to determine their views about the appropriate use of criminal sanctions to regulate behaviour in public space. The resulting report represented the first occasion in which marginalised users of public space in Brisbane have been afforded the opportunity to give voice to their views on how behaviour in public space should be regulated. These views are remarkable in their common sense approach to what should be deemed unacceptable behaviour and as to the types of behaviour which should constitute a public nuisance.[9]

In June 2004, RIPS convened the forum, *Legislated Intolerance? – Queensland's Public Order Laws* in the Banco Court. The forum attracted an audience in excess of three hundred people comprising members of the judiciary and magistracy, indigenous representatives, policy officers and community workers. We applaud Ministers Liddy Clark and Attorney General Rod Welford and other Members of Parliament for attending the forum and participating in the discussion. **The public response to, and interest in, the forum reflects the level of concern that is held in the community about the way in which our most vulnerable members of society are able to exercise their most fundamental freedoms.**

RIPS has struggled to attract funding for the valuable research it has undertaken, and the findings of this research should inform any changes made to public order law in Queensland. However, there is clearly a great deal more research that is required, and RIPS believes that it is the responsibility of the State Government

[9] See Monique du Briard, *Public Space... Public Rights: The Views of Marginalised People Who Use Public Space* (2003). The results are reported in Tamara Walsh, 'Who is the public in public space?' (2004) 29(2) *Alternative Law Journal* 81.

to deploy resources toward such research, to inform the development and implementation of policy and legislation.

RIPS considers that a whole of government approach is required in the development of public order legislation and policy, co-ordinated by the Office of Premier and Cabinet. Such an approach would more fairly strike a balance between the rights of all members of the community to access public space and the need to keep adequate control of that space.

History of the Act and Review Process

A review of the VGOO Act has been outstanding for more than a decade. The Act was criticised by several Members of the House upon its introduction during the height of the Great Depression. Many of the concerns raised by those Members have been realised, although the impact of the Act on Queensland's indigenous population was apparently an unforeseen consequence.

In March 1992, the Minister for Police and Emergency Services established a Committee to review the provisions of the VGOO Act. The Committee recognised that "many of the offence provisions contained in the Act are no longer suitable for enforcement in today's society" and that some were "more adequately dealt with through welfare agencies rather than the criminal justice system".[10] Since the Review Committee reported back to the Police Minister in 1993, there have been a number of unsuccessful attempts to reform the legislation.

In the meantime, five Ministers of the Beattie Government, including the current Police Minister in her previous role as Minister for Aboriginal and Torres Strait Islander Policy Development, have agreed to the Aboriginal and Torres Strait Islander Justice Agreement signed on 19 December 2000.

The Aboriginal and Torres Strait Islander Justice Agreement commits the State Government to a 50% reduction in the rate of Aboriginal and Torres Strait Islander people incarcerated in the Queensland criminal justice system by the year 2011. Since the signing of the Agreement there has been an increase of around 7% in the rate of incarceration of Aboriginal and Torres Strait Islander people in Queensland. Reform of the VGOO Act and/or the introduction of a SOB has clear implications for the State government's capacity to meet its commitments under the Agreement.

[10] *Final Report of The Vagrants Gaming and Other Offences Act Review Committee* p 1

Impacts of Public Order Policing

Discriminatory policing and its impacts on vulnerable people

It is recognised by RIPS that the QPS requires powers to regulate behaviour in public places. A tool for social control is clearly fundamental to any civilised society. However the stark reality of public order policing in Queensland (as reflected in QPS statistics) is that the wide discretionary powers provided to Police have become a tool for the oppression of marginalised people.

A study undertaken in the Brisbane Central Magistrates Court for the month of February 2004 revealed that of the 57 public space offenders to come before the court:

- 60% were very poor or homeless;
- 41% were Indigenous;
- 39% were aged 17 to 25 years; and
- 10% were stated to have a severe mental illness or intellectual disability.[11]

Further, statistics indicate that young people are still being dealt with by the police for trespassing and vagrancy offences at a significant rate. For example in 2001/2002, 1369 people under the age of 18 years were dealt with by the police for trespassing and vagrancy offences, and 3893 for other public order offences.

In June this year, the Attorney General, the Hon Rod Welford, made the following public comments at the RIPS *Legislated Intolerance* forum[12]:

> *Well, it is true that laws relating to public order do disproportionately affect people who are homeless and indigenous people. That is true. I think one of the things that has come through in all the discussion, particularly Phillip's, is the need for us to think again about the front end issues of how law enforcement agencies interact with people who are homeless, disadvantaged or indigenous. I think there are real issues about how police operate in some circumstances. To be fair, in schools and in other places there are some police who are very good. There are some police who in their liaison with people who are alienated from mainstream society in some way deal with the predicament of people in a sensitive and responsible way. It's true also that there is much more that can be done to better educate and train our police for these interactions, so that the laws relating to the protection of public order, what it is really about - peace and security for people using public space – is applied in a way that's intended for the*

[11] See Tamara Walsh, *From Park Bench to Court Bench*, above.
[12] *Legislated Intolerance? Public Order Law in Queensland* , 8 June 2004, Transcript, p 28

> *real purpose, only to protect people whose security is threatened.*

The candour of the Attorney General in acknowledging the discriminatory impact of Queensland's public order laws is to be welcomed. The former Police Minister had previously denied any such discriminatory effect.[13]

The Attorney General was also correct in identifying the need to address the "front end" issue of the interaction between police and vulnerable people. However RIPS and the Attorney General differ on two points. First, the Attorney General impliedly suggests that the answer is better police training. RIPS submits that selective enforcement (which results in discrimination) is made possible because the laws provide far too much discretion on the part of police in the course of their interactions with vulnerable people. Whilst improved training and education should be encouraged, the laws themselves must be changed to ensure that there is a genuine cultural shift in the way in which police deal with vulnerable people in public places. Second, the Attorney General remarked that s7AA is targeted at protecting the "safety and security" of members of the public, and will not subject vulnerable persons to charges for trivial offending behaviour. Both anecdotal evidence and recent research findings suggest that this is incorrect (see for example the Case Studies at the end of this report).

Impacts on Indigenous People

- Recent research has confirmed the existence of a clear link between the over-representation of Aboriginal and Torres Strait Islander people in public order charges (such as offensive language and disorderly behaviour) and broader indigenous contact with the criminal justice system and overall social and economic marginalisation of indigenous people.[14] As noted above, as many as 40% of public space offenders in Brisbane are Indigenous.[15]

- Indigenous people are charged with and convicted of vagrancy and public order offences at a disproportionately higher rate than the rest of the community. For example in 1999 almost 50% of prisoners incarcerated in Queensland for public order offences were indigenous[16].

- Public order offences are often followed by further criminal charges that arise as a result of interactions between Indigenous people and the police in the

[13] In a letter to Australians for Native Title and Reconciliation, dated 4 June 2002, then Police Minister Tony McGrady made the extraordinary and erroneous statement: "*claims that certain groups such as the homeless, young people and indigenous people are discriminated against by the Vagrants Gaming and Other Offences Act overlook the fact vagrancy provisions of the Vagrants Gaming and Other Offences Acts lapsed a long time ago.*"

[14] Policing Public Order; Offensive Language and Behaviour, The Impact on Aboriginal People – Aboriginal Justice Advisory Council (NSW)

[15] Tamara Walsh, *From Park Bench to Court Bench*, above.

[16] Office of Economic and Statistical Research

charging process (e.g. offences such as obstruct or assault police). In the recent study at Brisbane Magistrates' Court mentioned above, it was found that as many as 35% of those charged with public space offences were also charged with obstruct or assault police.[17]

- Breaches of bail undertakings with respect to public order offences often result in sentences of imprisonment. Thus the penalty ultimately imposed on indigenous public space offenders may be disproportionate to the offence committed.

- There is a clear link between over-representation of Indigenous people charged and over-policing of public order offences.

- Deaths in custody have occurred whilst an indigenous person has been arrested for a public order offence.[18]

Impacts on Public Safety

There is no real evidence that widely discretionary public order laws in any way increase the general safety of the community. In fact all evidence demonstrates that their greatest impact is to maintain the disadvantage of marginalised groups.[19]

Impacts on Treasury

The financial cost of public order policing must be taken into account when reforming the law. A cost analysis in relation to public order law reform would need to consider the financial burden borne by the following components of the criminal justice system:

- Queensland Police Service;
- Magistrates Court;
- Corrective Services;
- Legal Aid Queensland (duty lawyer service);
- Community Legal Centres;
- Aboriginal Legal Services;
- Department of Communities;
- Department of Justice;
- The State Penalties Enforcement Registry (SPER).

[17] See Tamara Walsh, *From Park Bench to Court Bench*, above.
[18] This fact was noted by the Final Report of the Royal Commission into Aboriginal Deaths in Custody.
[19] Policing Public Order; Offensive Language and Behaviour, The Impact on Aboriginal People – Aboriginal Justice Advisory Council (NSW)

RIPS notes that in other countries the high cost of enforcing, prosecuting and enforcing penalties for public order offences is persuading governments to adopt diversionary practices for minor offences.[20]

Distraction of Police Resources

In the year 2001/02, public order offences comprised 28% of all charges brought by Cairns police.[21] This extraordinary figure begs the question as to whether those police resources would be better directed toward serious unsolved crimes of far greater consequence to public safety, such as sexual assault and armed robbery.

Impacts on Queensland's Human Rights Record

The most significant human rights issue facing the Queensland Government is the grossly disproportionate rate of imprisonment of its indigenous people. If the Queensland Government fails to make any headway toward its commitments under the Aboriginal and Torres Strait Islander Justice Agreement when reforming the VGOO Act or drafting a SOB, international criticism of Queensland's human rights record may result.[22]

It is noteworthy that in stark contrast to Queensland, the West Australian Government has adopted targeted measures to significantly reduce the rate of incarceration of its indigenous people. This has led to an 8% reduction in the WA incarceration rate so far.

[20] Tamara Walsh, *From Park Bench to Court Bench,* above; *Seven million 'doing time' as US prisons overflow,* The Independent, 27 July 2004.
[21] QPS Statistics 2001/2002.
[22] See also Tamara Walsh, *SLR*, above.

RIPS Proposals for Efficient and Fair Public Order Policing

Background

RIPS is comprised of an array of service providers who deal day to day with the effects of the current over policing of public order offences. RIPS comes to the issue of reform of the legislative framework from a position of considerable 'on the ground' knowledge. In addition to this practical understanding, RIPS and its members have been involved in research and evaluation of policy developments in this area both here and in other jurisdictions.[23] Our arguments in relation to public order law are based on this intimate practical and policy knowledge.

We have developed some underlying principles that should guide any government efforts at reform in this area. We will discuss each in turn. It will be seen that they reflect the smart, progressive and socially aware state the Queensland Government claims to be seeking to create. As will become clear through the course of this analysis, we believe that some of the offences contained in the VGOO Act should not be offences at all. However it should be noted that the amendments and sections proposed in this report are not RIPS's first choice for public order regulation. They represent an attempt to provide a "saleable" product, rather than an un-vetted "wish-list". RIPS recognises the need for a mechanism to maintain order, but believes that this must be balanced against the rights of people to inhabit public space.

Objects

The 2000 – 2001 Action Plan for the Aboriginal and Torres Strait Islander Justice Agreement acknowledges the important role of diverting Aboriginal "offenders" at all stages, away from the criminal justice system. Unfortunately, the Government has not directed adequate resources to properly support the necessary diversionary practices. Instead the Government has preferred to expend substantially greater sums building new correctional facilities.

However, the State Government has taken commendable steps to remove reliance upon traditional sentencing options in relation to young people. The *Juvenile Justice Act 1992* makes a range of diversionary sentencing options available to police and the Courts.[24]

Available evidence confirms that diversionary strategies under the *Juvenile Justice Act 1992* are used extensively in relation to young people coming into contact with the police for trespassing and vagrancy offences and other public

[23] See those reports and articles by Tamara Walsh and Monique du Briard cited throughout this submission.
[24] Tamara Walsh, *From Park Bench to Court Bench,* above.

order offences.[25] The Queensland Government has also strengthened restorative justice principles in the legislation through recent amendments.

RIPS believes that such options could usefully be extended to adults in relation to public order offences – given that the adults in question are often dealing with disadvantages similar to those experienced by young people in contact with the criminal justice system.[26] There are also a range of programs in American jurisdictions that can also provide a useful model for responding to homeless people in contact with the criminal justice system in which misdemeanor adjudication is linked to social service intervention[27].

To ensure that vulnerable persons including indigenous people, homeless people, young people and those with impaired capacity are diverted from the criminal justice system the VGOO Act/SOB must include such an imperative in its objects.

Public means Public

In our view a "public order" offence should not occur unless there is a tangible and real disruption to the "public". The intent of these sections is to give the police powers to control public spaces to ensure that the general public is able to use these spaces without disruption.

RIPS submits that a "public nuisance" may only be considered a "nuisance" if a member of the public is prepared to act as the complainant. If however, the Government is determined to pursue a model that provides for police to act as complainants then a number of important changes are required to ensure that the objects of the VGOO Act/SOB are adequately met.

Case study 1 in Appendix 2 highlights the way in which offenders who are currently not disturbing the public's use of space are unfairly brought within the confines of this section. The complaint-based mechanism proposed in our amendment of s7AA requires that where a complaint is bought by a police officer without the supporting evidence of a member of the public, that offence should be dealt with in accordance with s19 of the *Penalties and Sentences Act* 1992 (that is, the defendant should be released either conditionally or subject to such conditions as the court sees fit).

[25] Queensland Police Service – Offenders, Queensland By type of Action by Age – 2001/2
[26] Tamara Walsh, *From Park Bench to Court Bench,* above.
[27] For example refer to Philip Lynch, "From Cause to Solution: Using the Law to Respond to Homelessness", (2003) 2 Alternative Law Journal; Tamara Walsh, *From Park Bench to Court Bench,* above.

Penalties

The penalties imposed on individuals for offences under the SOB are intended to discourage behaviour which impedes the ability of the public to enjoy access to its space. It is clear that the penalty provisions in the current VGOO Act will not affect the prevalence of these offences or increase the ability of the public to enjoy these spaces more peacefully. This is because these offences are often committed as a result of necessity. The indigenous, the mentally ill, the homeless and young people (vulnerable people) are often forced to live their lives in public spaces.[28] It is unjust to enact a penalty structure that will not only fail to respond to their needs but actively discriminate against them. Vulnerable people who are consistently charged with these types of offences are not assisted in any way by the criminal justice penalties currently meted out. Rather a progressive social welfare response is required. We discuss the possible shape of such a response below.

Imprisonment is far too harsh a response to minor offences under the VGOO Act and should be removed as a sentencing option for all public order offences. More serious offences where they occur are adequately dealt with under other legislation, for example threatened violence and assault under the *Criminal Code*. As indicated above the majority of public order charges do not involve any evidence from members of the public and in such situations it is inappropriate to imprison the offender.

The fine levels set out in the VGOO Act (particularly in s7AA) are too high considering the minor nature of the offences dealt with. Also, many of those charged will not be able to pay them, resulting in high fine enforcement costs which are borne by SPER.[29] In addition there is no evidence to suggest that these fines will in any way contribute to a reduction in the occurrence of public order offences.

RIPS submits that there is a clear distinction between conduct which is offensive or disorderly, and conduct which is violent and threatening. This distinction is reflected in our amended version of s7AA. In our view this level of penalty is more appropriate in view of the nature of the crimes committed.

A combination of reform of penalties and increased diversion of vulnerable persons will result in the development of a system that is much better able to achieve the goals it has been established to serve.

[28] Tamara Walsh, *AltLJ*, above.
[29] Tamara Walsh, *From Park Bench to Court Bench*, above.

Diversion

In RIPS's view, both at the arrest and sentencing stage, vulnerable people should be given the opportunity to be diverted from the criminal justice system. Currently, most vulnerable people who are brought before a court on charges under the VGOO Act are fined or imprisoned.[30] As our case studies indicate, this occurs despite the fact that in most cases the offences have in no way diminished the public's ability to enjoy its space.

If legislation such as our amended s7AA and s7AB were enacted, unrealistic and excessive fines and unjust terms of imprisonment would be avoided. This has a number of important flow-on effects. In the first instance a reduction in the number of incarcerations of vulnerable people will significantly assist the State to meet its obligations under the Aboriginal Justice Agreement. In addition there are genuine cost benefits in reducing the interactions of vulnerable people with the criminal justice system. It has been widely shown that members of these vulnerable groups get caught in the criminal justice system as a result of interactions over public order matters. Once in the system they find it very difficult to get out.

Our proposed s7AB requires a police officer to consider alternatives to proceeding against a vulnerable person (as defined in the section). It then sets out the alternatives which the police officer is to consider. It is submitted that this section will provide some protection for vulnerable persons from unnecessary arrest and over policing.

'Vagrancy'

Clearly, most of s4(1) of the VGOO Act should be repealed. These offences are archaic, they contravene international human rights law, they offend the rule of law, and they are selectively enforced against vulnerable persons.[31]

Begging

RIPS is strongly opposed to inclusion of the offence of begging without malice, and believes that s4(1)(k) should be repealed. It is unjust for a society to tolerate poverty and then criminalise the inevitable manifestation of that poverty.[32] If ever a social welfare response as opposed to a criminal law response was required, it is with regard to begging. It is well-established that those who beg do so because they feel they have no other choice; it is a demeaning exercise which they do as a result of necessity rather than choice.[33]

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[30] Around 78% are fined and 4% are imprisoned; Tamara Walsh, *From Park Bench to Court Bench*, above.
[31] Tamara Walsh, *SLR*, above.
[32] Tamara Walsh, *AltLJ*, above.
[33] Tamara Walsh, *AltLJ*, above; Tamara Walsh, *QUTLJJ*, above.

Begging without a further circumstance of aggravation should be decriminalised. We believe that the offence of begging in the VGOO Act should be repealed, and replaced by a provision which criminalizes "aggressive" begging. As you will see in our amended s7AA we have incorporated begging in a threatening manner under the general public nuisance definition to establish an appropriate trigger for criminal sanction. The linking of begging to threatening conduct better reflects community expectations about what should constitute punishable conduct in our state, and international best practice.[34]

The removal of the begging offence will not in any way alter police powers to exercise control over public spaces. The myriad powers granted to the police under the *Police Powers and Responsibilities Act 2000* are more than sufficient to control public space within community expectations. There is no reason to maintain this out-dated and unjust offence.

Public Drunkenness

Being drunk in public *per se* should not be a criminal offence, thus RIPS believes that s164 of the *Liquor Act 1992* and s4(1)(c) of the VGOO Act should be repealed.. This is consistent with both national and international best practice. In NSW, the ACT and Tasmania, for example, intoxicated persons cannot be charged with public drunkenness by police, but rather must be taken to a place of safety while they recover.[35] Unless a drunken person exhibits behaviour which interferes with the enjoyment of, or passage through a public place by a member of the public, the existing objects of Part 2 Div 1 would not require the person's state of drunkenness to be criminalised.

In excess of 12,000 arrests are made for public drunkenness in Queensland each year. It may be telling that no records are available as to what percentage of these offenders are indigenous. There is every reason to believe that the majority of offenders are indigenous, a stark illustration of the discriminatory effect of public order policing.

The selective enforcement of laws undermines the rule of law.[36] If police were to monitor Members of Parliament for breaches of public drunkenness, it is highly likely there would be several arrests made each week, for the offence could be made out each time a Member who had become lawfully drunk in a hotel stepped onto a footpath to make his or her way home. It is an absurd law which tends to be selectively enforced against Queensland's most vulnerable people.

The fact that police continue to arrest and take alcohol affected people into custody is significant for a number of reasons.

[34] Tamara Walsh, *QUTLJJ,* above.
[35] Tamara Walsh, *SLR*, above; Tamara Walsh, *From Park Bench to Court Bench,* above.
[36] Tamara Walsh, *SLR,* above.

Firstly it demonstrates that police are failing to utilise the diversionary measures set out in section 210 PPRA whereby people affected by alcohol can be "de-arrested" and taken to a safe place. This suggests that there is either a lack of safe places to take offenders to, or a lack of awareness or preparedness on the part of the police to divert alcohol affected persons. It also suggests that police require more stringent supervision (perhaps indirectly through the Courts) in order to effectively implement diversionary strategies.

Secondly, the arrest of an alcohol-affected person significantly increases the prospect of escalating an interaction between the offender and police and may often result in further more serious charges being brought.

Thirdly, there are significant health and safety issues arising out of the detention of alcohol affected offenders in watch-houses.

Fourthly the processing of many thousands of charges of public drunkenness each year is an unnecessary burden on Queensland's taxpayers which delivers none of the potential benefits of diverting the offenders toward treatment programs.

Public drunkenness should be decriminalised. Steps should be taken to ensure that police drastically alter their existing practices and are encouraged to use the existing diversion to safe places provisions. There should be a significant allocation of resources toward establishing and maintaining adequate safe places throughout Queensland.

Wilful Exposure

There may be a reasonable excuse for these offences, such as those involving public urination due to the lack of available toilet facilities, or mental illness. Section 4(1)(g)(iv) of the VGOO Act goes well beyond what is necessary to control wilful exposure in public as, if there is no one in the public place or no one who may be able to see the exposure, no harm is done to anyone. At the very least, a statutory defence of reasonable excuse is required (see our proposed amendment in Appendix 1)

Appendix 1

RIPS PROPOSED AMENDMENTS TO THE *VAGRANTS, GAMING AND OTHER OFFENCES ACT 1931*

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4 Repealed and replaced with:

Wilful exposure

(1) A person in a public place must not wilfully expose his or her genitals without reasonable excuse.

(a) In relation to offences involving exposure but no circumstances of aggravation Maximum penalty-2 penalty units.
(b) In relation to offences involving exposure with circumstances of aggravation Maximum penalty-40 penalty units or 1 year's imprisonment.

(2) A person who is so near a public place that the person may be seen from the public place must not wilfully expose his or her genitals so that the person's genitals may be seen from the public place without reasonable excuse.

(a) In relation to offences involving exposure but no circumstances of aggravation Maximum penalty-2 penalty units.
(b) In relation to offences involving exposure with circumstances of aggravation Maximum penalty-40 penalty units or I year's imprisonment.

(3) In this section a circumstance of aggravation means wilfully exposing his or her genitals so as to offend or embarrass another person.

PART 2A—QUALITY OF COMMUNITY USE OF PUBLIC PLACES

7 Object of pt2A

This division has, as its object, ensuring, as far as practicable –

(a) members of the public may lawfully use and pass through public places without interference from unlawful acts of nuisance committed by others; and
(b) vulnerable persons exhibiting public nuisance behaviour are diverted from the criminal justice system.

7AA Public nuisance

(1) A person must not commit a public nuisance offence without reasonable excuse.

(a) In relation to offences involving subsections (2) (i) and (ii)
Maximum penalty-2 penalty units.

(b) In relation to offences involving subsections (2) (iii) and (iv)
Maximum penalty-10 penalty units.

(2) A person commits a public nuisance offence if-

(a) the person behaves in-

(i) a disorderly way; or
(ii) an offensive way; or
(iii) a threatening way; or
(iv) a violent way; and

(b) the person's behaviour interferes with the peaceful passage through, or enjoyment of, a public place by a member of the public.

(3) Without limiting subsection (2)-

(a) a person behaves in an offensive way if the person uses offensive language; and

(b) a person behaves in a threatening way:
(i) if the person uses threatening language; or
(ii) if the person solicits or collects funds, subscriptions or contributions in a threatening way.

(4) It is not necessary for a person to make a complaint about the behaviour of another person before a police officer may start a proceeding against the person for a public nuisance offence.

(5) If the person making the complaint is a police officer and there is no evidence from a member of the public of the way in which the person's behaviour interfered with the member of the public's peaceful passage through, or enjoyment of, a public place a sentencing court shall deal with the proceeding under section 19 of the *Penalty and Sentences Act* 1992.

(6) In determining a prosecution under this section the court shall have regard to:

(a) all the circumstances pertaining at the material time, particularly the personal circumstances of the person charged;
(b) contemporary community standards;
(c) whether the conduct is sufficiently serious to warrant the intervention of the criminal law; and
(d) any other relevant circumstances.

(7) Also, in a proceeding for a public nuisance offence, more than 1 matter mentioned in subsection (2)(a) may be relied on to prove a single public nuisance offence.

7AB Vulnerable Persons

A Police officer to consider alternatives to proceeding against a vulnerable person

(1) For the purposes of this Act "vulnerable person" includes persons who-
(a) are indigenous;
(b) are homeless;
(c) are young;
(d) are drug or alcohol dependent; or
(d) have impaired capacity.

(2) Unless otherwise provided under this Act, a police officer, before starting a proceeding against a vulnerable person for an offence under this Act, must first consider whether in all the circumstances it would be more appropriate to do 1 of the following-

(a) to take no action;
(b) to administer a caution to the person;
(c) to use the move on powers under the Police Powers and Responsibilities Act 2000;
(d) to contact a welfare agency and request that a person attend and assist;
(e) to take the person to a place of safety if section 210 or 371C of the Police Powers and Responsibilities Act 2000 applies.

(3) The circumstances to which the police officer must have regard include-

(a) the circumstances of the alleged offence; and
(b) the circumstances of the person including whether their vulnerability contributed to the alleged offence.

(4) If necessary, the police officer must delay starting the proceeding in order to comply with a requirement under subsection (2) or (3).

(5) If, on complying with subsections (2) and (3), the police officer considers it would be more appropriate to act as mentioned in subsection (2)(a), (b), (c), (d) or (e), then the police officer must do so.

(6) If, on complying with subsections (2) and (3), the police officer considers it would not be more appropriate to act as mentioned in subsection (2)(a), (b), (c), (d) or (e), the police officer may start a proceeding against the person for the offence.

(7) The police officer may take the action mentioned in subsection (2)(a), (b), (c), (d) or (e) even though-

(a) action of that kind has been taken in relation to the person on a previous occasion; or
(b) a proceeding against the person for another offence has already been started or has ended.

(8) Subsection (2) does not prevent a police officer from taking the action mentioned in subsection (2)(a), (b), (c), (d) or (e) for a serious offence.

(9) If a vulnerable person appears before a court for an offence under this Act, the court may dismiss the charge if the court is satisfied that the person should have been dealt with under subsection (2).

7AC Review

(1) As soon as practicable after 1 October 2005, the Crime and Misconduct Commission must review the use of the public nuisance provisions and prepare a report on the review.

(2) The review must consider the impact of the use of the public nuisance provisions on the Aboriginal and Torres Strait Islander Justice Agreement of 19 December 2000.

(3) The conduct of the review and the preparation of the report is a function of the Crime and Misconduct Commission for the Crime and Misconduct Act 2001.

(4) The Crime and Misconduct Commission must give a copy of the report to the Speaker for tabling in the Legislative Assembly.

(5) In this section- public nuisance provisions means section 7AA.

Appendix 2

CASE STUDIES

The following case studies highlight the need for significant reform of Queensland's public order policing, including changes to the legislation and to the education and training of police officers.

In cases 1 to 5 it would have been more appropriate for the police to have exercised a discretion not to bring charges. Under RIPS proposals, where police continue to commence proceedings in inappropriate circumstances, any such charges would be dismissed by the court, thereby encouraging police to divert vulnerable people from the criminal justice system. Cases 6 to 8 demonstrate the systemic role played by public order policing in the further marginalisation of vulnerable people.

Case One[37]

At about 4.00 am in the backstreets of New Farm an indigent Aboriginal woman was confronted by four police officers. She was visibly intoxicated with alcohol. She gave her name to the first police officer on the scene, who she recognised. She said she was lost and sought some directions. A female officer who arrived shortly after asked for her full name and address, although her identity was, in truth, not in dispute, as one of the police officers at the scene knew who she was. Police also suggested that she go to the "Compound" – a place set up by Brisbane City Council to house itinerant indigenous people. Frustrated and intoxicated, the woman told the officer, "Fuck you cunt".

She was then arrested, taken into custody and charged for using insulting language under section 7(1)(d) of the Vagrants, Gaming and Other Offences Act.

The objective facts of this example are stark. It was early in the morning. There were no members of the public (but for the police) around. It was a backstreet of

[37] This case was tried at a summary hearing in December 2000. The woman was convicted and sentenced to 3 weeks' jail. On appeal the District Court reduced the sentence to 5 days jail (time already served). An application for leave to appeal to the High Court has been filed after a further unsuccessful appeal against conviction to the Court of Appeal.

New Farm, not a main road. The defendant was visibly drunk, dissociative and lacked any intention to cause insult. Notwithstanding these facts she was arrested and charged with a criminal offence.

Case Two[38]

A homeless indigenous person was arrested and charged for behaving in a disorderly manner pursuant to section 7(1)(e) of the Vagrants, Gaming and Other Offences Act. On this occasion the person was in an irritated state. She was yelling, swearing and screaming in a public place, namely a small park off Boundary Road, West End.

Only moments before, her sister had been taken away in the back of an ambulance with cut wrists. The woman charged had called the ambulance but was not permitted to go with her sister in it.

The police officer in this case arrested the woman without any regard for any possible explanation. He did not ask why she was upset, saying in evidence at summary trial that, "the explanation was that he had been called to a disturbance rather than the woman approaching him because of a problem".

With that attitude in hand the person was arrested and charged with a criminal offence.

Later in evidence the arresting officer said, "maybe I should have asked her what was wrong."

[38] This case was tried at a summary hearing in September 2001. The charge was dismissed by a Magistrate.

Case Three[39]

In January this year a group of people met in a boarding house at Woolloongabba for a social gathering. Early in the night police drove down the street past the house and claimed to have heard a woman yelling from inside the house, "you fucking cunts" "fuck off".

The police officer, who claimed to know the person got out of his car and approached the house. The person tried to hide from him in a cupboard. The officer sought the alleged offender out, arrested her and conveyed her to the Brisbane City Watchhouse. She was charged with disorderly behaviour and released.

In the early hours of the next morning the same police officer returned to the house where the woman had returned after her arrest and arrested her again for disorderly behaviour, after hearing her yelling "I'll get my brother onto you", "Fuck you fuckhead..." to a man she later told police, asked her to have sex with his friend.

Case Four[40]

A homeless indigenous woman and man were sleeping under a run down house in West End.

Police attended at the premises and told them to leave, at which point the woman approached the police and gestured that the man had been bashing her up and asking them to take her away from the location, instead of her having to stay with him. The police refused, saying that transportation was not part of their job. In

[39] Both charges are presently listed for summary hearing in August 2004.

order to secure her safe transportation away, the woman then spat on the vehicle and was arrested and charged with unlawfully remaining on land/in a building and doing an act that if done in public would constitute an offence under section 4A(2)(a) of the Vagrants, Gaming and Other Offences Act.

Case Five[41]

A homeless indigenous woman was charged with disorderly behaviour when police saw her push over a chair in a café in Boundary Street West End. She told police upon her arrest that a woman had attempted to stick a needle in her arm and that had caused her to push a chair between them as they walked down the street, but this did not circumvent the charge.

Case Six

In July this year an eighteen year old homeless indigenous male was sentenced to two months imprisonment for offences of using insulting words, contravening a move-on direction and breach of bail. His criminal history reveals that he had been fined a total of $1,925 over a period of 15 months for primarily *Vagrants Gaming and Other Offences Act* offences (disorderly behaviour, found on premises without lawful excuse) . The fines equate to approximately 20% of any social security payments he would have been entitled to receive during this period.

Case Seven

A 24 year old Aboriginal woman suffering from a personality disorder developed from a childhood of systematic sexual abuse, is suicidal and alcohol dependent. She has 17 pages of criminal history including:

[40] This matter was tried at a summary hearing in November 2001. The woman was convicted and fined $50. The conviction is under appeal to the District Court, pending the result of the High Court special leave application in Case 1.
[41] This matter was tried summarily in October 2001. The woman was discharged.

- 21 charges of insulting or threatening language;
- 18 charges of disorderly behaviour;
- 16 charges of obstruct police;
- 5 charges of assault police;
- 11 charges of disobeying a police direction;
- 2 charges under the new public nuisance provision; and
- 12 charges of using a telecommunication service to intimidate or harass.

The telecommunications offences arose after the woman rang ambulance services in relation to numerous suicide attempts. Sentences imposed against her have included fines, probation, suspended sentences and imprisonment.

Case Eight

A 40 year old Aboriginal man who is alcohol dependent has been charged over a twenty year period with the "ham, cheese and tomato" grouping of offences on multiple occasions. His history includes:

- 12 charges of obscene language;
- 35 charges of disorderly behaviour;
- 17 charges of resist arrest; and
- 13 charges of assault police.

In April this year he was charged with the new offence of creating a public nuisance and fined $150.