THE IMPACT OF *COLEMAN v POWER* ON THE POLICING, DEFENCE AND SENTENCING OF PUBLIC NUISANCE CASES IN QUEENSLAND

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[The High Court's decision in Coleman v Power *promised to provide the many defendants charged with offensive language, offensive behaviour and public nuisance with a means of contesting their charge. The majority of the Court stated that the purpose of such offences was to maintain public order and to protect the public from harm, and they interpreted the scope of such offences relatively narrowly. Therefore, it was expected that the policing, defence and sentencing of 'offensive' defendants would have changed since* Coleman v Power *was handed down. To test this assumption, the outcomes of public nuisance cases in Brisbane and Townsville in July 2005 (10 months after* Coleman v Power*) were compared with those from July 2004 (two months before* Coleman v Power*). It was found that while more public nuisance defendants were contesting their charge(s), more people were being charged with the offence, that situations leading to a charge did not accord with the standard of seriousness established in* Coleman v Power*, and that sentencing outcomes were no different. Thus, it appears that* Coleman v Power *is not being followed at the 'ground level' of policing, defending and sentencing public nuisance cases in Queensland.]*

CONTENTS

I INTRODUCTION

In September 2004, the High Court handed down its decision in *Coleman v Power*,[1] a case that examined the relationship between insulting language

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1 (2004) 220 CLR 1 ('*Coleman*').

and the implied constitutional freedom of political communication.[2] While it has been argued that the decision is of limited relevance to the constitutional interpretation of the implied freedom,[3] the Court's comments on the scope of 'offensive conduct' promised to provide a ray of hope to community lawyers who are routinely faced with the task of defending 'vulnerable'[4] clients against such charges.

A study conducted by the author in February 2004 and a further study in July 2004[5] revealed a high number of vulnerable people being charged with offensive language, offensive behaviour and 'public nuisance' in Queensland.[6] Additionally, it was found that many people were being charged with these offences for unavoidable behaviour such as vomiting, trivial behaviour such as arm waving, and conduct commonly considered to fall outside the scope of public nuisance, such as engaging in domestic disputes.[7] Further, around one-third of such charges were for conduct directed at a police officer.[8]

Coleman promised to put an end to this pattern for three reasons, each of which will be further explored in this article. First, a majority of the High Court agreed that the legitimate end which public order offences are intended to achieve is the protection of the public from harms including disorder, violence, intimidation and serious affront.[9] This provides police and magistrates with some guidance on how public order offences should be enforced. Second, a majority of the Court construed the offence of 'insulting words' narrowly.[10] The majority's comments imply that a certain level of seriousness is required before 'offensive' conduct will amount to a criminal offence. Third, several of the judges agreed that public order offences should be applied by the police for the protection of the public rather than as a means of defending themselves against dissention.[11]

On these bases, it would be expected that the policing, defence and sentencing of public nuisance offenders would have changed since the *Coleman* decision was handed down. To determine whether this was in fact the case, a further study

2 See especially *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, where the two-limbed test for determining whether a particular piece of legislation impinged upon the implied freedom of political communication ('the *Lange* test') was authoritatively consolidated.

3 See, eg, Roger Douglas, 'The Constitutional Freedom to Insult: The Insignificance of *Coleman v Power*' (2005) 16 *Public Law Review* 23, 37.

4 In this study, 'vulnerable' individuals were defined to include persons whose age, sex, indigenous status, socioeconomic status or impaired capacity marginalise their status in society.

5 See Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123; Tamara Walsh, 'Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) 17 *Current Issues in Criminal Justice* 217.

6 Most Australian jurisdictions prohibit 'offensive' behaviour and/or language: see, eg, *Summary Offences Act 1988* (NSW) ss 4, 4A; *Summary Offences Act 1953* (SA) s 7; *Summary Offences Act 1966* (Vic) s 17. However, in Queensland, the offence is now termed 'public nuisance': see *Summary Offences Act 2005* (Qld) s 6. See below n 21 for an explanation of the different uses of the term 'public nuisance' in this article.

7 Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5, 135–7; Walsh, 'Won't Pay or Can't Pay?', above n 5, 226–7.

8 Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5, 142.

9 See *Coleman* (2004) 220 CLR 1, 24 (Gleeson CJ), 74, 77 (Gummow and Hayne JJ), 86–7 (Kirby J).

10 Ibid 25 (Gleeson CJ), 73 (Gummow and Hayne JJ), 86–7 (Kirby J).

11 Ibid 26 (Gleeson CJ), 79 (Gummow and Hayne JJ), 99 (Kirby J).

was conducted in July 2005. Through a comparison of the July 2004 and July 2005 studies, it was found that *Coleman* had had some, albeit limited, impact on the kinds of cases that were prosecuted and on the rate of not guilty pleas, but had not resulted in significant differences in the policing or sentencing of public nuisance in Queensland.

II THE DECISION OF THE COURT IN *COLEMAN*

A *Overview*

Patrick Coleman appears to have been well-known to Queensland Police in Townsville.[12] On the occasion at issue in *Coleman*, he was protesting in a pedestrian mall by holding up placards and distributing pamphlets alleging that certain Townsville police officers were corrupt. Constable Brendan Power approached Coleman and asked for a pamphlet. In response, Coleman announced to passers-by: 'This is Constable Brendan Power, a corrupt police officer'.[13] Constable Power told Coleman that he was under arrest for using insulting language under s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) (since repealed).[14] Section 7(1) made it an offence to, inter alia, use threatening, abusive or insulting words, or to engage in riotous, violent, disorderly, indecent, offensive, threatening or insulting behaviour.

Coleman argued before the Queensland Court of Appeal,[15] and subsequently the High Court,[16] that s 7(1)(d) placed an unconstitutional restriction on the implied freedom of political communication enshrined in the *Constitution*.[17] Thomas JA, with whom Davies JA agreed, dismissed the appeal, holding that the offence placed only a slight or incidental burden on the implied freedom.[18] In any case, the majority found the burden was 'reasonably appropriate and adapted' towards the achievement of a 'legitimate end' consistent with the constitutionally prescribed system of representative and responsible government.[19] McMurdo P dissented, arguing that while s 7(1)(d) contributed towards a 'genuine regulatory scheme' aimed at fulfilling a legitimate governmental end, it was too broadly framed to be proportionate to achieving that end.[20]

12 See *Coleman v Greenland* [2004] QSC 37 (Unreported, Cullinane J, 5 March 2004); *Coleman v Kinbacher* [2003] QCA 575 (Unreported, McMurdo P, Davies JA and Chesterman J, 24 December 2003); *Sellars v Coleman* [2001] 2 Qd R 565.

13 See, eg, *Coleman* (2004) 220 CLR 1, 21 (Gleeson CJ).

14 Coleman was also charged with the offence of distributing printed matter containing insulting words under *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7A(1)(c), repealed by *Summary Offences Act 2005* (Qld). This section was declared invalid by the Court of Appeal and the conviction under that section was set aside: see *Power v Coleman* [2002] 2 Qd R 620, 648 (Thomas JA).

15 *Power v Coleman* [2002] 2 Qd R 620.

16 *Coleman* (2004) 220 CLR 1.

17 Section 7(1)(d) prohibited the use of 'any threatening, abusive, or insulting words to any person' in or near a public place.

18 *Power v Coleman* [2002] 2 Qd R 620, 645 (Thomas JA).

19 Ibid.

20 Ibid 630–1.

Seemingly in direct response to McMurdo P's comments, the Queensland Parliament repealed s 7 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) and replaced it with the offence of 'public nuisance'.[21] The *Vagrants, Gaming and Other Offences Act 1931* (Qld) was subsequently repealed in its entirety by the *Summary Offences Act 2005* (Qld). The public nuisance offence now appears in *Summary Offences Act 2005* (Qld) s 6. The use of 'insulting words' was not included as an example of legally unacceptable conduct in this revised offence: under *Summary Offences Act 2005* (Qld) s 6, language will be considered legally unacceptable *only* if it was 'offensive, obscene, indecent or abusive'.[22]

Special leave to appeal to the High Court was granted[23] regarding the constitutional validity of s 7(1)(d). The Court in a 6:1 majority concluded that the offence was 'reasonably appropriate and adapted' towards achieving a legitimate end consistent with the constitutionally prescribed system of representative and responsible government.[24] McHugh J dissented on this point, arguing that the offence was framed too widely to be considered 'reasonably appropriate and adapted' to the sufficient standard.[25]

Coleman provides some clarification regarding the definition of political communication, confirming that allegations of corruption against police officers may be considered an example of political communication,[26] and that insults fall within the scope of 'communication'.[27] It further confirms the applicability of the constitutional freedom to state legislation.[28] However, the case's constitutional implications have been dealt with in other articles.[29] The focus of this article is on the potential ramifications of *Coleman* on the policing, defence and sentencing of offensive behaviour, offensive language and related offences, and whether this potential has been realised in practice.

The relevance of *Coleman* to public nuisance and similar offences lies in the fact that, in its judgment, the High Court did not confine itself to the 'insulting words' aspect of the offence. On many occasions, the judges spoke generally

21 This new offence was first introduced as *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7AA by *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld) s 50. In this article the term 'public nuisance' will refer to a range of legally unacceptable conduct as prohibited in various Australian jurisdictions. By contrast, the term 'public nuisance offence' will refer to the specific legislative prohibition contained in *Summary Offences Act 2005* (Qld) s 6.

22 *Summary Offences Act 2005* (Qld) s 6(3)(b). The author has argued elsewhere that, in practice, the distinction between these terms is largely illusory: see Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5, 132.

23 *Coleman v Power* (Unreported, High Court of Australia, Gaudron and Gummow JJ, 15 November 2002).

24 *Coleman* (2004) 220 CLR 1, 32 (Gleeson CJ), 79 (Gummow and Hayne JJ), 99 (Kirby J), 112–13 (Callinan J), 127 (Heydon J).

25 Ibid 53–4.

26 See, eg, ibid 88 (Kirby J).

27 See, eg, ibid 122 (Heydon J).

28 See, eg, ibid 43 (McHugh J), citing *Levy v Victoria* (1997) 189 CLR 579.

29 See, eg, Douglas, above n 3; Elisa Arcioni, 'Developments in Free Speech Law in Australia: *Coleman* and *Mulholland*' (2005) 33 *Federal Law Review* 333; Graeme Hill, 'Freedom of Political Speech' (2005) 13 *Litigation Notes* 7; Tamara Walsh and Scott McDougall, 'Nuisance to the Public or Nuisance to the Police?' (2004) 24(9) *Proctor* 24.

about s 7,[30] 'offensive language and offensive behaviour',[31] and legislation creating 'public order offences'.[32] Indeed, Gummow and Hayne JJ explicitly stated that a provision such as s 7(1) should not be construed by divorcing the individual elements from the context in which they appear.[33] Thus, the comments by the Court are of continuing relevance to the new public nuisance offence in Queensland as well as to other public order offences throughout Australia.

Three aspects of the judgment have the capacity to impact on the way in which the public nuisance offence and other similar offences are policed, defended and disposed of by the lower courts: the Court's comments on the purpose of the offence; the scope of the offence; and the application of the offence in circumstances where the language or behaviour in question was directed at a police officer. Each of these will be discussed in turn.

B *The Purpose of the Offence*

In considering the second limb of the *Lange* test,[34] each of the seven High Court judges proffered examples of possible 'legitimate ends' to which offences such as s 7 might be directed.

Gleeson CJ, McHugh, Kirby, Callinan and Heydon JJ all agreed that the end to which the section was directed was 'public order'.[35] However, the judges differed widely in their definitions of this concept. For example, Callinan and Heydon JJ seemed to equate public order with the maintenance of 'civilised' standards of communication.[36] Heydon J outlined three specific sub-ends associated with public order to which the offence in question might be directed: the prevention of 'provocative statements of an insolent, scornful, contemptuous or abusive character';[37] to 'forestall the wounding'[38] of persons who would otherwise be insulted; and to prevent others who hear the insults from feeling 'intimidated or otherwise upset'.[39] Thus, on Heydon J's analysis, maintaining public order extends to preventing individuals' feelings from being wounded.[40]

Gleeson CJ noted that, in 1931, the 'breach of the peace' element was removed from the s 7 offence.[41] In light of this, his Honour stated that the intention of Parliament must have been to extend the scope of the offence to the prohibition of behaviour that posed no threat of a breach of the peace.[42] Gleeson CJ re-

30 See, eg, *Coleman* (2004) 220 CLR 1, 32 (Gleeson CJ), 41 (McHugh J), 73–4 (Gummow and Hayne JJ).
31 See, eg, ibid 24–6 (Gleeson CJ), 98–9 (Kirby J).
32 See, eg, ibid 32 (Gleeson CJ), 99–100 (Kirby J), 113–14 (Callinan J).
33 Ibid 72.
34 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
35 *Coleman* (2004) 220 CLR 1, 32 (Gleeson CJ), 33 (McHugh J), 98 (Kirby J), 112–14 (Callinan J), 122, 127 (Heydon J).
36 Ibid 111–12 (Callinan J), 122 (Heydon J).
37 Ibid 121.
38 Ibid.
39 Ibid.
40 Ibid 121–2, 124.
41 Ibid 22–4.
42 Ibid 22.

marked that it would be legitimate for an offence such as s 7 to be directed towards preventing any behaviour that 'may seriously disturb public order'[43] without causing a breach of the peace. His Honour concluded that the legitimate end of such legislation was 'the preservation of order in public spaces in the interests of the amenity and security of citizens'.[44]

Kirby J's conception of public order was somewhat narrower than that of Gleeson CJ, Callinan and Heydon JJ. Having identified 'public order' as the legitimate end to which the offence was directed, Kirby J went on to say that the legislation was confined to 'preventing and sanctioning public violence and provocation to such conduct.'[45]

Similarly, Gummow and Hayne JJ concluded that s 7 was aimed at ensuring that public places were free from violence. In coming to this conclusion, they attached some importance to the fact that the section created criminal offences punishable by imprisonment.[46] This implied that the section was intended to serve public, rather than private, purposes. Further, their Honours noted that, read as a whole, the section was mainly aimed at the prevention of violent behaviour (through the prohibitions on 'threatening', 'riotous' and 'violent' behaviour).[47] This conclusion was a necessary element in their Honours' finding that the section was 'reasonably appropriate and adapted' to achieving a legitimate governmental end. In Gummow and Hayne JJ's view, a section aimed at ensuring the civility of discourse could not be considered proportionate to the burden it placed on the common law right of free speech.[48]

Identifying a majority position on the definition of 'public order' is less than straightforward, as the seventh judge, McHugh J, did not engage in any detailed analysis on the point. His Honour rejected the Solicitor-General's submissions that the section was directed either at preventing breaches of the peace or preventing the intimidation of participants in political debates,[49] but otherwise provided little guidance on his conception of 'public order'.

Gleeson CJ's position is located somewhere in between that of Gummow, Hayne and Kirby JJ on the one hand and that of Callinan and Heydon JJ on the other. Thus, the narrower construction of 'public order' must prevail. It seems that a majority of judges — Gummow, Hayne and Kirby JJ and probably Gleeson CJ — would support the proposition that the purpose of laws in the nature of s 7 was to maintain public order, in the sense of ensuring the safety and security of members of the public accessing public spaces.

Incidentally, this conclusion is consistent with public statements of the former Attorney-General of Queensland, Rod Welford, regarding the legislature's intentions when creating the public nuisance offence. Mr Welford remarked that public order laws were directed towards promoting 'peace and security for

[43] Ibid 24.
[44] Ibid 32.
[45] Ibid 99.
[46] Ibid 73, 76–7.
[47] Ibid 73.
[48] Ibid 75, 76–9.
[49] Ibid 53–4.

people using public space',[50] and that their real purpose was '*only* to protect people whose security is threatened.'[51]

C *The Scope of the Offence*

The judges in *Coleman* also differed in their views on the scope of offences akin to s 7.

McHugh, Callinan and Heydon JJ favoured a wide interpretation of the s 7 offence. Although McHugh and Callinan JJ admitted that similar offences in other jurisdictions had been given a narrow construction based on the text of the specific legislation in question,[52] their Honours could see no reason for limiting the Queensland offence in a similar way.[53] All three judges concluded that the words of the offence should be given their ordinary meaning and none could justify the implication of a 'breach of the peace' requirement, or a requirement that the words used be likely or intended to provoke violence, into the section.[54]

In contrast, Gummow, Hayne and Kirby JJ favoured a narrow interpretation of the offence. As noted above, in delineating the scope of the offence, their Honours emphasised the fact that the section created criminal offences punishable by imprisonment.[55] Their Honours also noted that, read as a whole, the section was mainly aimed at regulating violent behaviour.[56] Thus, their Honours concluded that conduct must be intended, or reasonably likely, to provoke unlawful physical retaliation in order to be legally unacceptable.[57]

Having concluded that the 'legitimate end' of such legislation was the preservation of public order, Gleeson CJ added that the operation of the legislation must be confined 'within reasonable bounds'[58] — that is, the kind of conduct attracting a charge must be sufficient to 'justify the imposition of a criminal sanction.'[59] Therefore, to fall within the section, the conduct in question must, in all the circumstances, breach contemporary standards of good order.[60] While Gleeson CJ was not willing to provide an exhaustive list of such situations, his Honour said that it would include cases where there was an intention or likelihood of provoking violence, as well as the deliberate infliction of offence or humiliation, or intimidation or bullying, but that the mere infliction of personal offence would not be enough.[61] On more than one occasion, Gleeson CJ gave the example of a mother taking her children to a park and encountering threats or

[50] See the comments of Rod Welford in Rights in Public Space Action Group, *Legislated Intolerance? Public Order Law in Queensland* (2004) 29.
[51] Ibid (emphasis added).
[52] *Coleman* (2004) 220 CLR 1, 40 (McHugh J), 105 (Callinan J).
[53] Ibid 40 (McHugh J), 108–9 (Callinan J).
[54] Ibid 41 (McHugh J), 108–9 (Callinan J), 116–18 (Heydon J).
[55] Ibid 73, 76–7 (Gummow and Hayne JJ), 86–7 (Kirby J).
[56] Ibid 73 (Gummow and Hayne JJ), 86–7 (Kirby J).
[57] Ibid 74, 77 (Gummow and Hayne JJ), 87 (Kirby J).
[58] Ibid 25.
[59] Ibid.
[60] Ibid 26.
[61] Ibid.

abuse from a 'group of thugs'.[62] These threats or abuse would not be likely to provoke a breach of the peace, but should still be considered a legitimate target for a section of this nature.[63]

Gleeson CJ's judgment was pivotal in discerning a majority position in *Coleman*. A majority, comprised of Gleeson CJ, Gummow, Hayne and Kirby JJ, agreed that to come within the section, the conduct must be of an appropriate level of seriousness to attract the attention of the criminal law — that is, something more than mere wounding of feelings is required, but something less than the provocation of physical violence may suffice.[64]

D *Police and Public Order Offences*

Some of the judges in *Coleman* also commented on whether insulting language directed solely at a police officer could found a criminal charge under laws in the nature of s 7.

Gummow and Hayne JJ asserted that police officers are, by virtue of their 'training and temperament',[65] expected to 'resist the sting of insults directed to them'.[66] Indeed, their Honours explicitly stated that insults directed at police officers would not constitute an offence, unless others who might hear would be reasonably likely to be provoked to physical retaliation.[67]

Similarly, Kirby J stated that police officers are expected to be 'thick skinned and broad shouldered in the performance of their duties',[68] and thus there should be no prospect of police officers being provoked to act violently when insulting words are directed at them.[69] Further, Kirby J said:

> The powers under the Act were entrusted to police officers by the Parliament of Queensland for the protection of the people of the State. They were not given to police officers to sanction, or suppress, the public expression of opinions about themselves or their colleagues.[70]

Gleeson CJ did not go so far. His Honour remarked that police officers are not required to be 'completely impervious to insult'.[71] However, his Honour also said that in circumstances where offensive language is directed at a police officer, a criminal charge would probably be more difficult to justify, considering the absence of victimisation or a breach of the peace.[72]

62 See, eg, ibid 24.
63 Ibid 24–5.
64 Ibid 26 (Gleeson CJ), 77 (Gummow and Hayne JJ), 87 (Kirby J). Cf a differently constituted majority comprised of Gleeson CJ, McHugh, Callinan and Heydon JJ, which considered that something less than physical violence could suffice to bring behaviour within the scope of the offence: at 24 (Gleeson CJ), 41 (McHugh J), 108–9 (Callinan J), 116–18 (Heydon J).
65 Ibid 79.
66 Ibid.
67 Ibid.
68 Ibid 99.
69 Ibid.
70 Ibid.
71 Ibid 27.
72 Ibid 26.

Thus, a majority in *Coleman* comprised of Gleeson CJ, Gummow, Hayne and Kirby JJ, agreed that insulting words directed at police officers would most likely not, in the absence of aggravating circumstances, attract a criminal charge under provisions akin to s 7.

Coleman thus provides police officers, prosecutors, magistrates and legal or other representatives of defendants with guidance on the kinds of conduct that should be considered to be legally unacceptable. The key question, however, is whether the decision is being followed at the 'ground level' of policing, defending and sentencing defendants charged with such offences.

III EMPIRICAL STUDY

A *Rationale, Methodology and Hypotheses*

In July 2004, two months before *Coleman* was handed down, the author undertook a study on the public nuisance offence in Queensland.[73] At that time, the public nuisance offence was relatively new, having come into effect in April 2004.[74]

The results of the July 2004 study suggested that the public nuisance offence was being overused by police, as well as being selectively enforced against certain marginalised groups. People were being charged with the public nuisance offence for engaging in trivial behaviour that included having a verbal argument in public (generally with a neighbour or family member), drinking alcohol in public and even vomiting in public.[75] Many others were charged for urinating in public, even in circumstances where this had been the result of necessity and an attempt had been made to do so discretely.[76] Further, a disproportionate number of defendants were young, indigenous, mentally or cognitively impaired, homeless or of low income.[77]

At that time, the vast majority of public nuisance cases failed to accord with the standard of 'offensiveness' proscribed in *Coleman* — most did not amount to a serious disruption of the public order, and in only a small proportion of cases was the public's safety or security threatened. However, it seemed likely that post-*Coleman*, the policing, defence and sentencing of public nuisance defendants would have changed.

To test this, the court observation project undertaken by the author in the July 2004 study was repeated in the July 2005 study, 10 months after *Coleman* was handed down. Law students attended the Brisbane and Townsville Magistrates

[73] Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5. See also Walsh, 'Won't Pay or Can't Pay?', above n 5, which includes the results of an earlier study examining offensive language and offensive behaviour cases that came before the Brisbane Magistrates Court in February 2004, prior to the introduction of the public nuisance offence.

[74] Despite the newness of the offence, only one case observed within the 2004 study period was brought under the old *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7, and this charge was excluded from the study. The lack of other charges under s 7 was largely because the Magistrates Court system in Queensland works swiftly — in general, court appearances take place only days or weeks at most after a charge is laid.

[75] See Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5, 136.

[76] Ibid 135.

[77] Ibid 128–9.

Courts every day of sitting during the month of July and recorded detailed information regarding each public nuisance case that came before the courts. Information was collected on: the facts of the case; whether the defendant was represented by legal counsel; the penalty imposed; and the defendant's age,[78] sex, indigenous status, socioeconomic status,[79] and any signs of impaired capacity.[80]

The two studies were conducted in the month of July in 2004 and 2005, in an attempt to standardise the research design. Accordingly, the results in both studies could reasonably be compared, considering that extrinsic factors such as climate and holiday periods had been taken into account for both periods.[81]

There were three hypotheses for the July 2005 study. First, it was expected that the *policing* of public nuisance would have changed — that post-*Coleman*:

1 fewer people would be charged with committing a public nuisance (because fewer cases would be capable of coming within the narrow test for offensiveness outlined by the majority in *Coleman*);
2 the behaviour on which public nuisance charges were based would be less trivial (again, due to the narrow test in *Coleman*); and
3 fewer public nuisance cases would be founded merely on insulting words being directed at police officers (because of the comments of Gleeson CJ, Gummow, Hayne and Kirby JJ regarding offensive conduct directed at police officers).[82]

Second, it was expected that the *defence* of public nuisance cases would have changed — specifically, that the number of defendants entering a plea of not guilty to public nuisance charges would increase. This is because *Coleman* provided a greater level of certainty regarding the scope of the offence, and defendants whose conduct was not sufficiently serious to constitute an offence, consistent with the majority's construction of s 7, would more confidently be able to contest their charge.

Third, it was expected that the *sentencing* of public nuisance defendants would have changed. Even if police were still charging people with the public nuisance offence in a manner inconsistent with the majority's approach in *Coleman*, it was hypothesised that magistrates would dismiss a greater number of charges, or at least sentence defendants more leniently, in accordance with *Coleman*.

78 When not explicitly mentioned in court, age was estimated to be within an approximate range.
79 That is, whether the defendant was stated in court to be homeless or in receipt of social security benefits as their sole source of income.
80 That is, whether it was stated in court that the defendant suffered from psychological, emotional or cognitive impairment.
81 No other extrinsic factors or unique events took place around the time of either study period to explain any variance in the results.
82 See *Coleman* (2004) 220 CLR 1, 26–7 (Gleeson CJ), 79 (Gummow and Hayne JJ), 99 (Kirby J).

B *Findings regarding the Policing of Public Nuisance*

1 *The Number of Public Nuisance Charges*

Contrary to the first hypothesis, more people were brought before the court for public nuisance charges in July 2005 than in July 2004.[83] In July 2005, 111 people came before the Brisbane Magistrates Court charged with creating a public nuisance, compared with 77 in July 2004. Similarly, 58 people came before the Townsville Magistrates Court charged with public nuisance in July 2005, compared with 42 in 2004. This represents a 44 per cent and a 38 per cent increase in public nuisance cases in Brisbane and Townsville respectively as compared to the July 2004 study.[84] The first hypothesis was therefore found to be incorrect: *more* rather than less people were appearing in court for public nuisance charges in Queensland post-*Coleman*.

Notably, selective enforcement against vulnerable groups was still observed in July 2005.[85] Of most concern is the fact that the number of indigenous public nuisance defendants soared in both Brisbane and Townsville when the two studies were compared. In July 2004, 10 per cent of public nuisance defendants in Brisbane and 35 per cent of public nuisance defendants in Townsville were indigenous. By July 2005, this had risen to 27 per cent and 68 per cent respectively. Of further concern was the consistently high number of public nuisance defendants who suffered from a mental impairment. Around 15 per cent of public nuisance defendants observed during the 2004 and 2005 study periods were identified as suffering from mental impairment.[86]

Thus, not only were more people charged with creating a public nuisance in July 2005 than in July 2004, a greater percentage of the defendants were from marginalised groups.

[83] For the July 2004 statistics see Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5, 128.

[84] The change in Brisbane was statistically significant, however the change in Townsville was not. Consequently, it is likely that the change in Brisbane can be attributable directly to the decision in *Coleman*.

[85] See below Table 1.

[86] In actual fact, the rate of mental impairment amongst such defendants is likely to have been higher since, in lower court settings, the presence of mental impairment generally fails to be detected: see Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance', above n 5, 128–9.

Table 1: Public Nuisance Defendant Characteristics in Brisbane and Townsville — July 2004 and July 2005 Compared

	Brisbane 2004 (%)	Brisbane 2005 (%)	Townsville 2004 (%)	Townsville 2005 (%)
Characteristic				
Homeless	5	6	24	21
Homeless or low income	31	29	54	41
Indigenous	10	27	35	68
Male	91	84	75	86
Mental impairment	16	14	16	15
Age				
17–25	65	61	52	30
26–35	29	23	32	33
36–49	4	12	8	30
50+	1	3	8	7

2 *The Basis for Public Nuisance Charges*

There were some differences between the facts of public nuisance cases in the July 2005 study compared with those in the July 2004 study: some of these reflect, and may be explained by, the decision in *Coleman*.[87] For example, between the two studies, there was an increase in the proportion of public nuisance cases arising from situations where violence had occurred, or was at risk of occurring. In July 2004, only nine per cent of public nuisance cases in Brisbane arose out of a fight in a public place. In July 2005, this had risen to 27 per cent of cases. Further, in July 2004, 16 per cent of public nuisance defendants in Brisbane had been engaging in aggressive conduct in or around licensed premises. In July 2005, this had risen to 24 per cent of cases. There was also an increase in the proportion of public nuisance cases arising from instances of threatening conduct: such cases rose from three per cent to five per cent of all public nuisance cases in Brisbane, and from zero per cent to eight per cent of all public nuisance cases in Townsville.[88]

[87] See below Table 2.

[88] This finding lends some credence to the Queensland Government's public statements regarding the importance of central business district nightclub and hotel safety considerations to the 'reforms' of public order law over the 2004–05 period: see Judy Spence, 'Tough New Public Safety Laws Passed in Queensland Parliament' (Press Release, 28 February 2005).

Table 2: Percentage of Cases in which Certain Facts Contributed to a Public Nuisance Charge in Brisbane and Townsville — July 2004 and July 2005 Compared[89]

	Brisbane 2004 (%)	Brisbane 2005 (%)	Townsville 2004 (%)	Townsville 2005 (%)
Violence or threat of violence				
Assault	10	3	4	0
Fight	9	27	15	5
Nightclub related incident	16	24	11	8
Threatening behaviour	3	5	0	8
Creating a disturbance				
At a place of business or government agency	26	9	19	23
In the vicinity of public property	1	6	4	10
On a road	4	6	0	5
Offensive behaviour or language				
Offensive language (not at police)	4	35	26	45
Offensive language (directed at police)	23	22	30	20
Verbal argument (no threats; no risk of violence)	7	5	22	13
Waving arms around	0	3	0	3

89 Note that the columns do not add up to 100 per cent because there is significant overlap in fact scenarios giving rise to public nuisance charges. For example, a person might be charged for committing a public nuisance in circumstances where he or she had both engaged in a fight and used offensive language.

	Brisbane 2004 (%)	**Brisbane 2005 (%)**	**Townsville 2004 (%)**	**Townsville 2005 (%)**
Behaviour that amounts to a separate offence				
Begging	0	3	0	5
Wilful exposure	3	0	0	8
Urinating in public	22	15	4	26
Behaviour associated with drug or alcohol use				
Behaviour associated with drug or alcohol use	34	61	38	40
Chroming[90]	0	3	0	0

Notwithstanding these differences, there were many public nuisance cases that came before the Brisbane and Townsville Magistrates Courts in July 2005 in which the *Coleman* standard was clearly not met.

For example, in the July 2005 study, the majority of public nuisance charges were brought, at least in part, for offensive language. The use of offensive language contributed to the charge in 56 per cent of public nuisance cases in Brisbane and 58 per cent of public nuisance cases in Townsville. This represents an increase of 24 per cent and six per cent in Brisbane and Townsville cases respectively as compared with the July 2004 study.[91] While the reasons for this increase are not readily apparent, it clearly suggests that *Coleman* has not influenced police practices.

When the precise circumstances of these cases are examined,[92] it can be seen that the standard of seriousness established in *Coleman* was not being applied in the policing of offensive language in July 2005. In 64 per cent of the cases in which offensive language contributed to the charge, no other kind of 'nuisance' behaviour was observed: that is, the charge was based on the use of offensive language alone. There was no accompanying threat nor any apparent risk of physical violence. Considering the narrow circumstances in which *Coleman* sanctions an arrest on the basis of words alone,[93] it would seem that *Coleman* is not being followed in practice.

[90] That is, sniffing paint or another solvent.

[91] Note that these figures do not exactly match those in above Table 2 due to the possibility of overlap. Table 2 shows the percentage of cases in which those fact scenarios were present. However, in some cases, there was offensive language directed at both a police officer and another person in the same case. As such, discrepancies exist between the figures reported here and those in Table 2.

[92] See below Table 3.

[93] See *Coleman* (2004) 220 CLR 1, 26–7 (Gleeson CJ), 79 (Gummow and Hayne JJ), 99 (Kirby J).

Further, in the July 2005 study, many people were continuing to be charged with creating a public nuisance for engaging in trivial behaviour which could not reasonably be considered offensive to the requisite degree. For example, in July 2005, three per cent of public nuisance cases in both Brisbane and Townsville were based on the fact that the defendants had waved their arms around in public. Four people were charged with the public nuisance offence for kicking a street sign and three people were charged for knocking over a bin.

Engaging in a verbal argument, where there was no threatening conduct and no perceived risk of violence, was also a common factual scenario leading to a public nuisance charge. Indeed, in Townsville in July 2005, 22 per cent of all public nuisance cases arose out of a nonviolent, non-threatening verbal argument. In the majority of these cases, defendants were arguing with their spouse, neighbour or friend, either at home, in the street or in a mall.

Of additional relevance is the fact that during July 2005, many defendants were charged with creating a public nuisance, even though their behaviour would have been more appropriately dealt with under another section of the *Summary Offences Act 2005* (Qld). For example, 26 per cent of public nuisance cases in Townsville and 15 per cent of public nuisance cases in Brisbane were for public urination (a 22 per cent increase in Townsville as compared with the July 2004 study). This is despite the fact that a separate offence exists in the *Summary Offences Act 2005* (Qld) to deal specifically with behaviour of this nature. Section 9 of the *Summary Offences Act 2005* (Qld) creates the offence of wilful exposure, and states that where a person exposes their genitals without reasonable excuse, they commit an offence punishable by a maximum fine of $150, or $3000 or one year's imprisonment in circumstances of aggravation (for example, where there is an intention to cause offence). The Explanatory Memorandum states that the section aims to make a distinction between

> situations where a person wilfully exposes himself or herself for the purpose of urination and attempts to find a place out of public view for that purpose, as opposed to those persons who expose themselves for shock value or for sexual gratification.[94]

Despite this stated intention of the legislature and the comments of the High Court in *Coleman*, in July 2005 many people were still being charged with the public nuisance offence for urinating in public even where an attempt was made by them to do so discretely.

Additionally, in July 2005, five per cent of public nuisance defendants in Townsville and three per cent of public nuisance defendants in Brisbane were charged with committing a public nuisance for begging in public, despite the fact that a separate prohibition on begging exists under *Summary Offences Act 2005* (Qld) s 8.[95]

Further, in four per cent of public nuisance cases brought before the Brisbane Magistrates Court in July 2005, the defendants had been found chroming at the time of the offence, and this was stated in court to have contributed to the police

[94] Explanatory Memorandum, Summary Offences Bill 2004 (Qld) 5.
[95] See above Table 2.

officer's decision to charge them. This is despite the fact that in *Nelson v Mathieson*, it was held that chroming should not be considered to be 'offensive' within the meaning of public nuisance provisions.[96]

3 *Offensive Conduct Directed at Police Officers*

In July 2005, many people were still being charged with the public nuisance offence for acting 'offensively' towards a police officer. In 22 per cent of public nuisance cases in Brisbane and 25 per cent of public nuisance cases in Townsville, directing offensive language or offensive behaviour towards a police officer contributed to the charge.[97]

As can be seen in Table 3, in 45 per cent of those public nuisance cases where offensive language was present, a police officer was either one of the persons or the only person to whom the language was directed. Indeed, in 29 per cent of public nuisance cases in which offensive language was present, the language was directed solely at a police officer. Most commonly, police officers were called 'racist' or 'wankers', or were sworn at (one defendant said 'I don't give a fuck' when police threatened to arrest him). Another defendant called a police officer a 'tough bitch'.

Thus, it seems that many cases are still being founded only on insulting language being directed at a police officer, despite the precedent set by *Coleman*.

Table 3: Target of Offensive Language in Public Nuisance Cases where Offensive Language was Present — July 2005, Brisbane and Townsville Combined

Target of the offensive language	Percentage of cases
No specific target	19
Someone previously unknown to defendant	13
Someone known to defendant	23
Police only	29
Police and another	16

C *Findings regarding the Defence of Public Nuisance Charges*

Consistent with the second hypothesis, defendants charged with creating a public nuisance in July 2005 were significantly more likely to contest their charge than those charged in July 2004. In the July 2004 study, only four per cent of Brisbane defendants and eight per cent of Townsville defendants contested their public nuisance charge, compared with 18 per cent and 19 per cent respectively in July 2005. While the basis for these not guilty pleas cannot be ascer-

96 (2003) 143 A Crim R 148 (Victorian Supreme Court).

97 Again, these figures do not exactly equate with those in above Table 2 because in some cases, both offensive language and offensive behaviour were directed at a police officer.

tained without a detailed analysis of the legal arguments,[98] anecdotal evidence suggests that these contested charges are often based on an application of the narrow test of offensiveness established in *Coleman*.[99]

While no significant differences were observed between the two studies with regard to the level of legal representation of defendants, the growing trend in Townsville of hearing public nuisance cases ex parte is concerning. As illustrated in Table 4, there was a significant increase in the number of such cases in Townsville between the two studies: from 25 per cent to 43 per cent. Hearing such cases ex parte denies defendants the opportunity to raise arguments in their defence and thus, they are unable to make use of precedents such as *Coleman*.

Table 4: Representation of Public Nuisance Defendants in Brisbane and Townsville — July 2004 and July 2005 Compared

	Brisbane 2004 (%)	**Brisbane 2005 (%)**	**Townsville 2004 (%)**	**Townsville 2005 (%)**
Duty lawyer or legal aid	35	38	33	17
Aboriginal Legal Service	5	7	31	33
Self-represented	39	36	0	4
Private lawyer	10	6	8	4
Other (for example, a friend, service provider, public trustee)	0	2	3	0
Ex parte	10	11	25	43

98 This level of analysis was outside the scope of this project: cost prohibited the author from obtaining the transcripts of all public nuisance cases and it was not possible for research assistants to record so much detail for each case.

99 Based on interviews with various Aboriginal Legal Service staff in both Brisbane and Townsville.

D *Findings Related to the Outcomes of Public Nuisance Prosecutions*

It has been demonstrated that in July 2005 police officers did not restrict their public nuisance charges to situations where the *Coleman* standard of 'offensiveness' had been met. Yet despite this, magistrates were more likely to convict those charged with the public nuisance offence in July 2005 than in July 2004. In 2005, 43 per cent of public nuisance defendants in Brisbane and 42 per cent of public nuisance defendants in Townsville were convicted, compared with 34 per cent and 30 per cent respectively in 2004.

Further, no significant differences were observed between the penalties imposed for public nuisance in July 2004 and July 2005.[100] Although magistrates were slightly more likely to discharge public nuisance defendants in July 2005 than in July 2004, they also imposed more fines and fewer bonds. Indeed, in Townsville in July 2005, two public nuisance defendants were sentenced to imprisonment for public nuisance, one for seven days and the other for eight days. No one in either Brisbane or Townsville was sentenced to prison for public nuisance in July 2004.

Table 5: Penalties Imposed for Public Nuisance in Brisbane and Townsville — July 2004 and July 2005 Compared

	Brisbane 2004 (%)	**Brisbane 2005 (%)**	**Townsville 2004 (%)**	**Townsville 2005 (%)**
Fine	74	77	72	85
Bond recognisance or probation	14	3	6	0
Discharge	3	8	0	3
Suspended sentence	1	0	6	0
Prison	0	0	0	6
Community service order	0	2	3	0
Arrest warrant issued	0	0	6	0
Adjourned	6	11	11	9

Furthermore, no significant differences were observed in fine amounts, the time provided to pay the fine, or the default number of days of imprisonment between the two studies.[101] Average fines for the public nuisance offence generally remained at just over $200 in both Brisbane and Townsville; around

[100] See below Table 5.
[101] See below Table 6.

two months was still provided in which to pay; and a default period of around four days imprisonment was generally set.

Table 6: Average Fine Amounts, Time to Pay, Payment per Month and Default Periods Set in Brisbane and Townsville for Public Nuisance — July 2004 and July 2005 Compared

	Brisbane 2004	**Brisbane 2005**	**Townsville 2004**	**Townsville 2005**
Average fine ($)	202	212	208	223
Average time to pay (months)	1.8	2.0	2.3	2.4
Average payment per month ($)	112	104	90	93
Average default time in custody (days)	5	4	6	4

Thus, contrary to the third hypothesis, few differences in the sentencing of public nuisance defendants were observed between July 2004 and July 2005.

IV CONCLUSION

When the *Coleman* decision was handed down in September 2004, it seemed that Queensland's new public nuisance offence was constitutionally valid, and in all other respects lawful. Yet, the July 2005 study demonstrates that the offence of public nuisance is being unlawfully applied in practice. Further research will be required to determine why *Coleman* has not effected a change in the policing of the public nuisance offence, or the sentencing of public nuisance defendants. However some suggestions may be proffered as to how the situation might be rectified.

First, the wording of *Summary Offences Act 2005* (Qld) s 6 could be changed to explicitly reflect the findings of the majority in *Coleman*. A provision framed as broadly as this one provides too much discretion, and encourages selective and inconsistent enforcement. One option would be to insert a sub-section limiting the scope of 'nuisance' to those cases serious enough to attract the attention of the criminal law — that is, where the safety or security of a member of the public is threatened. Another would be to create a statutory defence of reasonable excuse, following the New South Wales model,[102] so that offences associated with status[103] and/or necessity could be successfully defended.[104]

[102] See *Summary Offences Act 1988* (NSW) ss 4, 4A.

[103] See, eg, a public urination case involving a homeless person with no access to amenities: Walsh, 'Won't Pay or Can't Pay?', above n 5, 220.

[104] See, eg, *Coleman* (2004) 220 CLR 1, 41–2, where McHugh J raised the lack of available defences to *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7 as a reason in support of

Second, the Queensland Police Service's *Operational Procedures Manual*[105] may need to be amended to incorporate the result in *Coleman*, and the continuing education of magistrates might also be required.

Either way, the current stance of the Queensland Government that the offence should remain intact but 'unenforced' in certain circumstances will not remedy the injustices being perpetrated. As Willis J said in *Stiles v Galinski*:

> I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that is as bad a ground for defending legislation as one could well have.[106]

his Honour's conclusion that the section was not 'reasonably appropriate and adapted' to the achievement of public order.

105 Queensland Police Service, *Operational Procedures Manual* (28th ed, 2006).

106 [1904] 1 KB 615, 625, as cited in *Power v Coleman* [2002] 2 Qd R 620, 639 (Thomas JA).