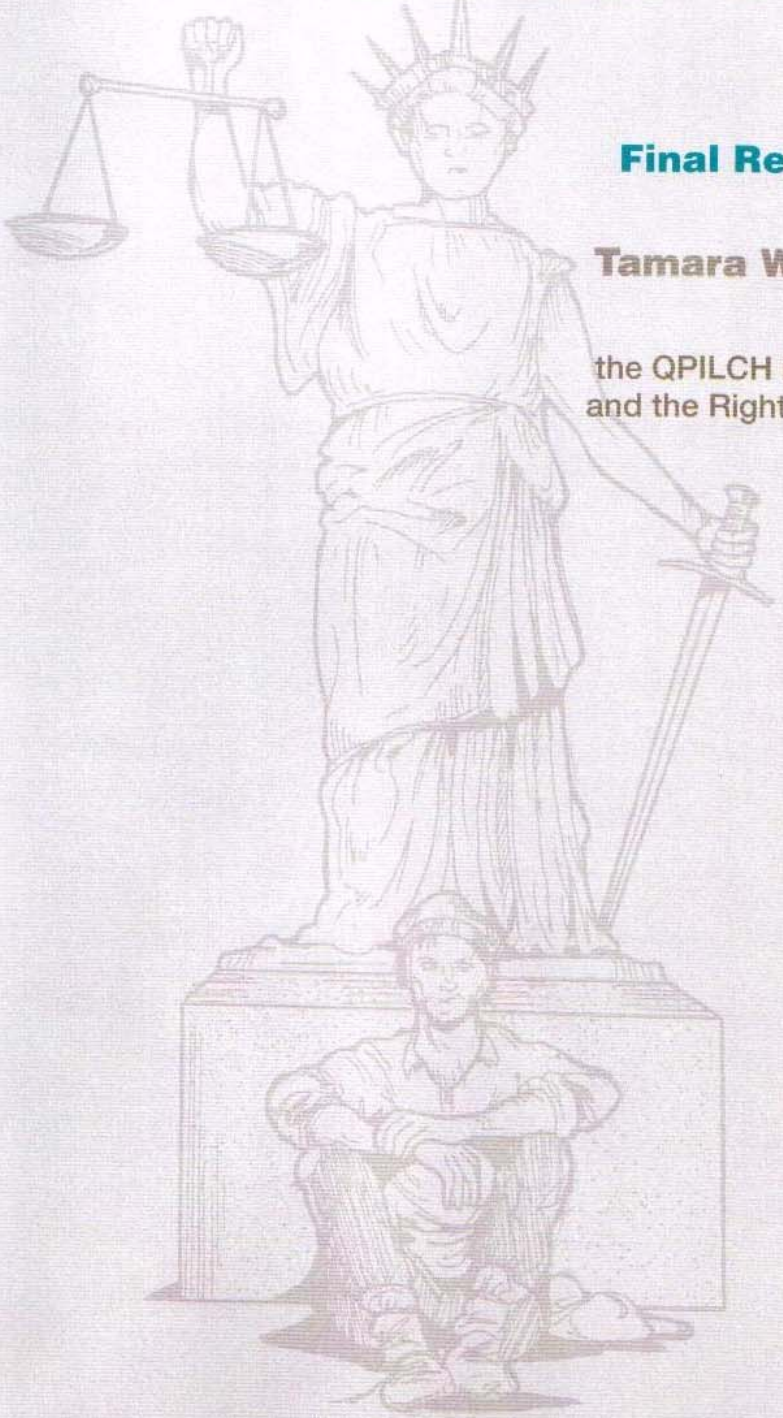
From Park Bench to Court Bench

Developing a response to breaches of public space law by marginalised people



Final Report – September 2004

Tamara Walsh Faculty of Law, QUT

in association with
the QPILCH Homeless Persons' Legal Clinic
and the Rights in Public Space Action Group

QUT

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Executive Summary

Introduction

Recent years have seen an increase in the number of people coming before the courts for public space offences. The majority of defendants in these cases are homeless, Indigenous, young and/or display signs of mental illness, intellectual disability and drug dependency (Walsh 2004c). Thus, it is the most vulnerable members of our society who tend to be charged with these offences.

Further, the most common penalty imposed in response to a public space offence is a fine. Marginalised defendants are generally unable to pay fines imposed upon them for public space offences due to their extreme poverty. It seems ridiculous, and indeed is more costly to enforce fines against people who are simply unable to pay. Yet, the Office of the Premier has suggested that a 'crack down' on people who default on payment of fines for public space offences may be planned for the near future (Office of the Premier and Trade 2003).

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

Homelessness and Public Space Law in Queensland

High levels of homelessness have been reported in Queensland (Chamberlain and MacKenzie 2003; MacKenzie and Chamberlain 2002) and homelessness service providers report being overwhelmed by demand. Far from engendering tolerance of and compassion for such people, Queensland's public space laws are among the most oppressive in the country.

Some criminal laws in Queensland are directly targeted at people who are homeless, for example, 'vagrancy' is still a crime in Queensland under s4 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). A person is deemed to be a 'vagrant' if, for example, they have insufficient lawful means of support, they are found begging in public, or they are an habitual drunkard. This is despite the fact that it is well-established that people who beg do so because they have no other means available to them to supplement their inadequate or non-existent income, and the fact that they very rarely, if ever, act in an aggressive or threatening manner (Horn and Cooke 2001).

Other laws impact disproportionately on people who are homeless because of their tendency to occupy public space more frequently than the remainder of the population. For example, people who are homeless are more likely to be charged with public nuisance under s7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) and public drunkenness (s164 of the *Liquor Act 1992* (Qld)) because they are forced to live out their lives in public space – they do not have a private space to retreat to in which to swear, shout, urinate, defecate, vomit or drink alcohol. Similarly, they are more likely to be charged with being in possession of a knife in public (s51 of the *Weapons Act 1990* (Qld)), being in possession of alcohol in public (s168B of the *Liquor Act 1992* (Qld)) and failing to move on when directed to do so by police (s445 of the *Police Powers and Responsibilities Act 2000* (Qld)).

Further, these laws tend to be selectively enforced against marginalised people, particularly those who are homeless, Indigenous, young, mentally ill or drug dependant. In recent surveys conducted in Brisbane (see Walsh 2004a, Walsh and Klease 2004), service providers and homeless people both commented that marginalised public space users are much more likely to have public space offences enforced against them than tourists or other 'legitimate' public space users. In relation to the offence of public nuisance, this is made possible by sub-s4 which states that a member of the public need not make a complaint for a police officer to commence proceedings for the offence. If a member of the public is not willing to make a complaint, it would seem that the behaviour is not really a public nuisance and should be ignored. Yet, because public space offences are all framed as strict liability offences, defendants most often plead guilty even if a defence may be available to them. Those cases that do lead to a summary trial are generally upheld (eg. the *Police v Melissa Jane Couchy*, Brisbane Magistrates' Court, 13 August 2004).

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

The fact that marginalised people are subjected to criminal charges for behaviour related to their poverty and homelessness has been met with censure in the judicial and academic communities. Judges have expressed their displeasure at having to enforce these laws (see *Police v Shannon Thomas Dunn* in Heilpern 1999; *Moore v Moulds* (1981) 7 QL 227), and have attempted to read down the offences (*Zanetti v Hill* (1962) 108 CLR 433), however they remain on Queensland's statute books. Further, it has been noted in the literature that such laws contravene international human rights law, and may offend the rule of law (see Lynch 2002; Walsh 2003a).

Also worthy of note is the fact that the offences contained in the *Vagrants, Gaming and Other Offences Act 1931* (Qld) are replicated to a certain extent in other criminal law legislation. For example, aggressive begging behaviour may be dealt with under s414 of the *Criminal Code 1899* (Qld) which prohibits demanding property with menaces; threatening violence and threatening assault are offences under the *Criminal Code 1899* (Qld) (ss75, 245) which renders the 'threatening' aspect of offensive language (under s7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld)) somewhat obsolete; and the offence of common nuisance in s230 of the *Criminal Code 1899* (Qld) seems at least in form to overlap considerably with s7AA. Further, police move-on powers (s39 of the *Police Powers and Responsibilities Act 2000* (Qld)) allow police to compel a person to move away from a place if they are causing anxiety or otherwise interfering with other persons' enjoyment of public space. Thus, it appears that much of the behaviour regulated by the *Vagrants, Gaming and Other Offences Act 1931* (Qld) may be dealt with under other criminal law provisions.

Recommendation 1

That one of the following two courses of action be taken:

1. That the provisions of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) which criminalise homelessness or disproportionately impact upon homeless people as a result of their presence in public space be repealed, on the basis that police have the power to deal with threatening or abusive behaviour conducted in public space under other Acts; and/or
2. That these offences be replaced by one 'catch-all' provision aimed at regulating public space. This provision could take the form of an amended s7AA which includes the following:
   - a requirement that a complaint be made by a member of the public before police can bring proceedings under the offence; and
   - a statutory defence of reasonable excuse (akin to that under ss4 and 4A of the NSW *Summary Offences Act 1988*) to ensure that those who are conducting 'offensive' behaviour as a result of necessity, or for reasons associated with mental illness, homelessness, etc. are not unfairly impacted by the provision; and
   - a safeguard which is similar to that in s39, that a person's right to peaceful assembly should not be interfered with by the exercise of police powers unless this is reasonably necessary in the interests of public safety, public order or the protection of the rights and freedoms of others.

Sentencing and Fine Enforcement for Public Space Offences in Queensland

Currently, the most common penalty imposed for a public space offence is a fine – around 80% of offenders coming before the courts for public space offences in Queensland are dealt with in this way (Walsh 2004c). Further, fine amounts are not substantially altered on the basis of defendants' means to pay. This results in high rates of fine default amongst public space offenders because they are simply unable to pay their fines.

This lack of creativity in sentencing public space offenders in Queensland is disappointing in view of the alternatives which are available to sentencers under current legislation. Instead of fining a public space offender, a court may instead discharge or release the offender subject to conditions (*Penalties and Sentences Act 1992* (Qld) s19). This allows the court to refer a marginalised person to welfare and other social services in an attempt to address the causes of their offending behaviour, yet this alternative is rarely used in relation to homeless public space offenders. Alternatively, the court may impose a probation order, which may also have conditions attached (*Penalties and Sentences Act 1992* (Qld) s91). This option is utilised more frequently, but not on a regular basis and not by all magistrates. A community service order may also be imposed instead of a fine (*Penalties and Sentences Act 1992* (Qld) s101), however people who are homeless are often judged to be unsuitable people to undertake community service work. Unfortunately (unlike other Australian jurisdictions) attendance at welfare agencies and participation in rehabilitative programs is not considered to be 'community service' in Queensland. Thus, appropriate sentencing alternatives do exist, but they are rarely utilised and are sometimes not appropriate or adapted to the needs of marginalised people. The majority of offenders receive a fine. Some (around 4%) are even sentenced to imprisonment. Many others end up in prison when they fail to pay their fine because the court has set a default period of imprisonment.[1]

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

Clearly, imposing fines on people who are poor and imprisoning people for minor public space offences is inappropriate, unjust and contrary to the aspirations of the 'Smart State' initiative and the *Aboriginal and Torres Strait Islander Justice Agreement*. It also makes no economic sense since it is extremely costly to prosecute,

[1] Where a default period has been set their case may still be referred to SPER but only at the discretion of the court.

sentence and enforce penalties against marginalised people. These costs are disproportionate when compared with the trivial nature of the offending behaviour in question. Diversion would be a much more appropriate response.

Queensland has already established three innovative and successful diversionary programs in relation to minor offences under s11 of the *Juvenile Justice Act 1992* (Qld), the Brisbane City Council Homelessness Strategy and the recent Volatile Substance Misuse Strategy. This expertise could be drawn upon in developing an appropriate alternative response to the minor offending behaviour of homeless people.

Recommendation 2
That Queensland draw upon its expertise in diversion, demonstrated by the successful diversionary strategies already in place, to develop an alternative response to the offending behaviour of homeless people in public space.

Recommendation 3
That diversion of homeless public space offenders occur at the policing stage – ie. that police officers be instructed to consider taking alternative courses of action rather than simply arresting a public space offender, eg. taking no action, using their move-on powers, phoning a welfare agency and asking them to attend to the person, or taking the person to a welfare agency or safe place. Referral protocols should be developed in partnership with relevant social services.

Recommendation 4
That the power to set default periods of imprisonment in relation to trivial offences be abolished.

What can we learn from other jurisdictions in Australia?

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

First, many jurisdictions in Australia have established diversionary schemes to better deal with offending behaviour conducted in public space at the level of policing. For example, in NSW, ACT and Tasmania, people found to be intoxicated and acting in a disorderly manner in public places are to be taken to a ‘place of safety’ by police rather than being charged with an offence. Such persons may be detained in a police

cell while they recover for no more than eight hours, or they may be taken to a welfare agency. A like scheme could be established in Queensland to deal with people who are homeless who are found to be breaching public space law. If this were implemented, we could expect a massive reduction in the number of summary offences coming before the courts, and in turn, huge cost savings to the court, corrections and fine enforcement systems. Under s210 of the *Police Powers and Responsibilities Act 2000* (Qld), taking an intoxicated person to a place of safety instead of arresting them is an option available to police, however many defendants still end up in the watchhouse for alcohol-related offences.

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

Third, various jurisdictions have expanded the content of their community service orders beyond mere community service work. As noted above, homeless people in Queensland are generally judged to be unsuitable for a community service order; this is because their chaotic lives, lack of access to transport and inability to keep track of time often render them unable to commit to regular community service work. However, in Victoria, SA and Tasmania, attendance at rehabilitative programs, counselling and other self-development activities can be credited to offenders as community service work for the purpose of a community service order. A reform such as this in Queensland would go some way towards ensuring that community service remains a viable sentencing option in relation to marginalised people who have committed minor offences. Alternatively, a sentencing option akin to the NSW intervention program order, or the Victorian and WA community-based order (which are essentially orders to attend an approved program for rehabilitation purposes) could be introduced.

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

Fifth, SPER lacks the discretion to waive fines, or remit the matter back to court, even if a person is incapable of paying and all other enforcement options are inappropriate in the circumstances. This is unique to SPER – other fine enforcement agencies (such as the State Debt Recovery Office in NSW and the Fines Recovery Unit in NT) do have this power. In other states (such as Victoria, SA, Tasmania and WA), fine

defaulters may have their matter remitted to the court for determination. Without the power to waive fines, or to remit the matter to the court where the interests of justice so require, SPER's operations may cause grave hardship to disadvantaged people.

Sixth, in Victoria, a specialist list, presided over by a specially trained magistrate, has been created to deal with people who have been judged unable to pay a fine due to 'special circumstances' including mental illness and substance misuse problems. Such cases are most commonly disposed of via discharges and adjournments, often with treatment and welfare conditions attached. The special circumstances list operates at no additional cost, and its establishment required no legislative amendments. The creation of a specialty court or docket either for public space offences or for homeless defendants in Queensland would not require a significant cost outlay. Indeed, it may lead to significant cost reductions by addressing the causes underlying defendants' offending behaviour.

Recommendation 5
That the diversion of homeless public space offenders occur at the court stage – ie. that magistrates be instructed in legislation to release offenders charged with 'trivial' offences, either unconditionally or with appropriate conditions attached, if they pose no danger to the safety and security of the community. Magistrates should be encouraged to make greater use of court support staff when devising appropriate conditions. The recruitment of additional court support staff may be required.

Recommendation 6
1. That community service work under a community service order be extended to include attendance at approved programs including life skills training, drug education and treatment, psychiatric treatment and other rehabilitative programs as is the case in Victoria, SA and WA; or
2. That a new sentencing alternative be created along the lines of the intervention program order in NSW, and the community-based order in Victoria and WA, which allows the court to sentence people to attend approved programs to promote rehabilitation.

Recommendation 7
That sentences of six months or less be discouraged (eg. by creating a requirement that sentencers provide reasons for imposing a short prison sentence rather than an alternative penalty) or abolished.

Recommendation 8

1. That SPER be given the discretion to cancel fines in the event that they cannot be repaid and existing fine enforcement options are inappropriate in the circumstances; or
2. That, if a person is unable to pay their fine(s) and the fine enforcement options available to SPER are inappropriate in the circumstances, that person's case be remitted to the Magistrates' Court for determination.

Recommendation 12

That the establishment of a trial specialty court or docket for public space offences (Public Space Court), or homeless people (Homeless Court), be considered. This court should be presided over by a specially trained magistrate, and should impose sentences which are appropriate in the circumstances.

What can we learn from jurisdictions around the world?

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

Alternative methods of fine calculation

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

Perhaps the most promising innovation in relation to fine calculation is the day fine system. This system has been successfully applied around the world, particularly in Europe and Latin America. It provides a formula according to which realistic and just fine amounts may be calculated. First, the offence is allocated a certain number of units according to its gravity. Public space offences are typically placed at the lowest end of the scale. Next, each unit is allocated a value according to the offender's means to pay. Each unit may be valued at one day's pay (hence the name 'day fine'), or some other proportion of income. Finally, the number of units relating to the gravity of the offence is multiplied by the unit value to yield the fine amount. Thus, fines which result are proportionate to the gravity of the offence and relative to offenders' means to pay. It has been found that payment rates are higher, revenue is greater, and enforcement costs are lower under day fine systems (Ashworth 1995; Tonry and Hamilton 1995; Hillsman and Greene 1992).

At the very least, there is a need to ensure that offenders' means are routinely taken into account before a fine is imposed. Indeed, this is a legislative requirement (s48 *Penalties and Sentences Act 1992* (Qld)). This could be done by creating a formula for calculating fines according to income and assets (eg. in Canada, a formula for calculating fines has been developed for use by magistrates, based on minimum wage levels), or by inserting a new section into the *Penalties and Sentences Act 1992* (Qld) which states that judges and magistrates must provide reasons if they fail to impose an alternative penalty instead of a fine on an indigent person.

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

Recommendation 9
That a more equitable and proportionate system of fine calculation be introduced in Queensland.

Recommendation 10
1. That a day fine system be trialled in Queensland; or
2. That the need to tailor fines to offenders' means be more firmly entrenched in legislation either by:
   (a) creating a formula for fine calculation for use by magistrates based on income level; or
   (b) inserting a new provision in the *Penalties and Sentences Act 1992* (Qld) requiring magistrates who impose a fine on an indigent person to provide reasons as to why they did not apply an alternative sentence; or
   (c) adopting the NT model whereby monthly payments are tailored to the total fine amount, so that the less the total amount of the fine, the less the monthly repayment.

Alternative sentences

A review of the international literature provides further suggestions as to how homeless public space offenders might be more effectively dealt with. Diversion, for example, occurs in a number of international jurisdictions at the policing stage, the court stage and the fine enforcement stage. In Leeds, a police officer must provide an explanation as to why he/she did not take a drunk and disorderly person to a welfare agency instead of charging them (Wilkins 1979:70). In Sweden, where an offence is trivial in nature, the interaction with the criminal justice system up to the point of sentencing is often considered punishment enough (Vyas 1995:87-88; Carlen 1989:25). In the US, courts may choose not to enforce fines imposed on those who do

not have the capacity to pay (Cole 1992:143) and in Canada, courts are prevented under legislation from enforcing fines unless they are satisfied that the offender had no reasonable excuse for failing to pay (*Canadian Criminal Code* s734.7(1)). These strategies applied internationally reinforce **Recommendations 3, 5 and 8** above.

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

- Tailoring 'community service work' to the offence committed and the circumstances of the offender. In the context of public space offenders, this might involve referring a defendant to community service work which addresses the causes of their offending behaviour (including material need and joblessness) or allowing them to attend approved treatment and rehabilitative programs as part of the order. In the US and UK, defendants may be sentenced to complete a day treatment order at a specialist Day Treatment Centre which coordinates approved rehabilitation programs (see **Recommendation 6(2)** above).
- Providing homeless persons with secure housing and other required supports while they carry out community service work. For example, in the US, Kenya and Japan, residential facilities (often known as 'halfway houses') have been established to provide shelter, meals and social support to marginalised people while they complete a community-based order.

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

Recommendation 11

1. That some trial halfway houses be established in Queensland to provide shelter and material and social support to defendants throughout the duration of their community service order or other court order.
2. That the possibility of establishing Day Treatment Centres be considered to provide case management and referral services to marginalised offenders subject to community service orders and other court orders.

Alternative forums

Some experimentation has been done, particularly in the US, on moving summary proceedings out of the traditional court room into other venues and forums which are more accessible to the community. Indeed, under some models, decision-making powers have been transferred to community members, allowing for the development of community-based and location-specific strategies to deal with particular kinds of offending behaviour. Two main innovations are discussed in the literature.

First, community courts, and homeless courts, have been established in a number of jurisdictions throughout the US to deal exclusively with offences committed in public space. These courts are presided over by specially trained magistrates, and are held at accessible community locations such as community halls and even within the premises of welfare agencies. Appropriate sentences aimed at addressing the causes of offending behaviour are imposed, including orders to attend treatment, counselling and life skills training. These courts have been heralded a great success, with high levels of community and defendant satisfaction being recorded. This reinforces **Recommendation 12** above.

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

Recommendation 13
That trial community boards, including adequate advocacy and support services for marginalised participants, be established in some select rural communities in Queensland to deal with the offending behaviour of homeless people in public space.

Conclusion

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

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

- Reform of the legislation, so that Queensland's summary offences law is comprised of provisions which protect the safety and security of the community but do not result in hardship for vulnerable people;
- Reform at the policing stage, so that vulnerable public space offenders are diverted from the criminal justice system rather than arrested for trivial offences;

- Reform at the sentencing stage, so that defendants charged with trivial public space offences are discharged from the court, either unconditionally or subject to conditions. The community service order should be reformed to ensure that it remains a viable alternative penalty for marginalised people by including attendance at approved programs in the definition of community service work. Alternatively, additional support could be provided to marginalised people subject to a community service order (or other court order) through the establishment of halfway houses and/or day treatment centres. Also, more accessible and restorative settings could be trialled for hearing public space offence cases; and
- Reform of the fine system so that fines imposed are equitable and proportionate to the offence committed, and marginalised offenders who receive fines are capable of paying them.

It is hoped that the Queensland government will demonstrate its commitment to 'smart' policies by considering trialling the alternatives outlined in this report, and by educating the public in relation to these issues in order to gain their support.

Recommendation 14
That a public education campaign which:
- informs the public that homeless people are more likely to be victims of crime than perpetrators of crime; and
- educates the public regarding the effectiveness of diversion and creative sentencing alternatives

be launched in Queensland as a joint initiative between the Office of the Premier, the Department of Justice and the Attorney-General and the Department of Police and Corrective Services.

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be launched in Queensland as a joint initiative between the Office of the Premier, the Department of Justice and the Attorney-General and the Department of Police and Corrective Services.

1. Introduction

Prosecutions for public space offences (or street offences) tend to be concentrated amongst society's most vulnerable groups. Numerous studies, including some recent Queensland research, suggest that those most likely to be prosecuted for such offences are people who are homeless or at risk of homelessness. Other vulnerable groups are also overrepresented in arrest and prosecution rates for public space offences, including Indigenous people, young people, and people with mental, cognitive and behavioural disorders (see for example Walsh 2004c; Walsh and Klease 2004; Spooner 2001; Middenforp 2000; NSW Bureau of Crime Statistics and Research 1999; Carcach and McDonald 1995).

It is therefore a matter of concern that the number of these offences dealt with by police increased significantly between 2001/02 and 2002/03. The number of good order offences (including offensive behaviour, offensive language and disorderly conduct) increased by 11%; the number of liquor offences (not including drunkenness) increased by 23%; and the number of trespass and vagrancy offences increased by 14% (Queensland Police Service 2004: 4, 6, 7). Of further concern is the fact that the most common penalty imposed in response to offending behaviour committed in public space is a fine (Walsh 2004c). Those who are most likely to be prosecuted for these offences are also those most unable to pay a fine. This makes the system appear farcical, inefficient and unfair, to defendants and also to tax payers, since the costs of attempting to enforce such fines are high. One would expect government to inquire into these issues with a view to preventing undue hardship to society's most vulnerable groups and unreasonable cost outlay.

The Queensland government has taken action, although it seems likely that such action will fail to address these issues. In November 2003 an amendment to the *Vagrants, Gaming and Other Offences Act 1931* (Qld) was introduced (with minimal community consultation)[2] which amounted to a re-write of the old s7, the offensive language and offensive behaviour provision. The offence is now called 'public nuisance', a further dimension having been added to the burden of proof: that the offensive behaviour/language in question interfered, or was likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public. While this seems promising, sub-s4 destroys any protective effect the new section might have had, by specifying that a member of the public need not make a complaint for a police officer to commence proceedings for public nuisance. This section allows for the continued selective enforcement of the provision and it has led to a dramatic increase in the number of prosecutions for offensive language and offensive behaviour. Between February 2004 and July 2004 (the new section having

[2] The Police Commissioner's office has indicated that consultation did take place. However, on their advice, this consultation involved only key Ministers and a small number of Indigenous people at a summit in Townsville. The Rights in Public Space Action Group, a key stakeholder group representing a variety of different organisations concerned with the regulation of public space in Queensland, was refused access to the consultation process.

come into effect in April), prosecutions increased by around 200%. Remarkably, behaviours such as yelling, vomiting and engaging in a verbal dispute with a family member or neighbour in public have been prosecuted under this offence. This is despite the recent remarks of the Attorney-General that the new public nuisance offence is aimed only at behaviour which is 'tantamount to a pending assault.'[3] An additional cause for concern is that the maximum monetary penalty for the offence was increased from $100 to $750, and as a result, fine amounts imposed for offensive language and offensive behaviour have increased by around 35% since the amendment, and monthly payments have increased by around 100%.

The Queensland government has indicated that further reforms to the laws relating to the regulation of public space and fine default are to be introduced, however the announcements seem to herald a 'crack down' rather than substantial improvements to the system. For example, it has been indicated that the 'flagrant and repeated refusals' of some people to pay fines for 'public nuisance type offences' will be addressed (see Office of the Premier and Trade 2003). Also, a new *Summary Offences Bill* is expected to be introduced in the near future, but personal correspondence with former Police Minister McGrady indicated that certain antiquated offences, such as begging, offensive language and offensive behaviour, will be retained.[4]

Such 'reforms' are incapable of addressing the underlying bases of the problems which exist within the system, and indeed, they demonstrate a misunderstanding of the key issues related to offending behaviour committed in public space and fine default. The key issues which must be addressed are:

- The selective enforcement of public space offences against the most vulnerable groups within society. The fact that selective enforcement occurs indicates that the provisions are framed in such a way which allows for this selectivity.
- The absence of diversionary strategies to more effectively deal with marginalised public space offenders; infringement notices and notices to appear are routinely issued in response to trivial 'offending' behaviour.
- The tendency of public space offenders to plead guilty and incur a penalty rather than contest the charge, even when there is a clear defence available to them.
- The lack of creativity amongst those who impose sentences on public space offenders – the penalty of choice is a fine, which people experiencing disadvantage are simply unable to pay.
- The inability of the State Penalty Enforcement Registry (SPER), the agency responsible for enforcing fines, to exercise meaningful discretion in dealing with indigent fine defaulters.

These issues span four dimensions: the legislation; the policing of public space offences; the sentencing of offenders; and the enforcement of fines subsequently imposed. This report aims to address each of these dimensions, exploring the strategies utilised by jurisdictions around Australia and the world. Part 1 of the report will discuss the relationship between public space offences and poverty, with a particular emphasis on Queensland law. Part 2 will outline sentencing and fine

[3] This comment was made by Queensland's Attorney-General at a forum entitled *Legislated Intolerance? Public Order Law in Queensland*, held on 8 June 2004 at the Banco Court in Brisbane.
[4] The Hon Tony McGrady MP, Personal correspondence, October 2002.

enforcement law, policy and practice in Queensland, reporting on field research which highlights the extent of the problem for marginalised public space users. Part 3 will examine sentencing and fine enforcement law and policy around Australia, identifying some key lessons which policy makers in Queensland may draw from other jurisdictions. Part 4 will explore sentencing and fine enforcement practices around the world, with a view to distilling best practice. Finally, Part 5 will draw together some key principles, and will outline the recommendations for reform.

2. Homelessness and Public Space Law in Queensland

2.1 Homelessness in Queensland

2.1.1 Defining homelessness

The most widely accepted definition of homelessness in Australia is that advanced by Chamberlain and MacKenzie (1992, 2003). It is this definition which has been applied by the Australian Bureau of Statistics in its 'Counting the Homeless' projects, conducted on census night in 1996 and 2001, and it is this definition which will be adopted in this report.

Chamberlain and MacKenzie's definition of homelessness was originally threefold; a person is considered homeless if they fit into one of the following catgeories:

1. primary homelessness – when a person is without conventional shelter, eg. living on the streets, sleeping in parks, 'squatting', using a vehicle as shelter, or living in another improvised dwelling;
2. secondary homelessness – when a person moves from one temporary shelter to another, eg. refuges, boarding houses, hostels, or homes of family/friends;
3. tertiary homelessness – when a person lives in a boarding house on a medium to long-term basis.

A fourth tier, those who are 'marginally housed', was added to this definition in the most recently released 'Counting the Homeless' report (Chamberlain and MacKenzie 2003). This category refers to those who are living in caravan parks on a permanent basis because they are unable to afford alternative accommodation.

The *Supported Accommodation and Assistance Act 1994* (Cth) provides an alternative definition of homelessness. Section 4 of the Act defines a homeless person as one who has inadequate access to safe and secure housing, that is, where housing to which the person has access:

(a) damages or is likely to damage the person's health;
(b) threatens the person's safety;
(c) marginalises the person by failing to provide access to:
    (i) adequate personal amenities;
    (ii) the economic and social support that a home normally affords;
(d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

Chamberlain considers this definition to be a 'service delivery' definition, and argues that the Chamberlain and MacKenzie definition of homelessness is more inclusive, because for example, it incorporates residents of boarding houses who would not be considered homeless under the SAAP definition (Chamberlain 1999).

However, the shortcomings of the Chamberlain and MacKenzie definition must not be ignored. For example, it could be argued that the SAAP definition is actually more inclusive in that it recognises that not feeling 'at home' is an important feature of homelessness. Catherine Robinson (2000) has argued that individuals' subjective experience should be taken into account when determining whether or not they are homeless. For example, some young people who live with their parents are not '*house*-less', yet the feelings of insecurity or fear associated with the house in which they live may lead them to consider themselves *home*less (Robinson 2000). Also, an Indigenous person who has adopted an itinerant lifestyle out of choice may not consider themselves to be homeless, despite the fact that they sleep out, and thus come within the Chamberlain and MacKenzie definition (Goldie 2002; Drew and Coleman 1999; Day 1999). As Memmott et al note, not all people who live in public space desire alternative accommodation; many Indigenous people socialise in public spaces, and may or may not camp out there overnight, and others have another place of residence but choose to live in the 'starlight motel' because they have a social or spiritual connection with that space (Memmott, Long, Chambers, Spring 2003).

The Chamberlain and MacKenzie definition will be applied here because it is those who lack secure, conventional housing who are negatively impacted upon by public space law – whether the person feels at home or not is largely irrelevant. For example, an Indigenous person who sleeps in a park but does not subjectively consider themselves to be homeless is nonetheless adversely affected by public space law, while a young person who lives with his/her parents but does not feel at home will not be adversely impacted upon by these laws any more than a young person who does feel at home. Thus, the Chamberlain and MacKenzie definition is the most appropriate one for the purposes of this research.

2.1.2 Homeless people in Queensland

Census data from 2001 reports that Queensland had the second highest rate of homelessness in Australia at the time the census was conducted, with 69.8 per 10,000 of the population experiencing homelessness (Chamberlain and MacKenzie 2003:5). Similarly, Queensland had the second highest rate of homeless school students in Australia, with 15 out of every 1000 students experiencing homelessness (MacKenzie and Chamberlain 2002).

In Queensland, 24,569 people were counted as being homeless in the 2001 census; 9% were residing in SAAP accommodation services, 16% were living in improvised dwellings (including tents, sheds, converted vehicles or 'sleeping out'), 22% were living in boarding houses, and 53% were living with temporarily friends or relatives. A further 7,989 persons were 'marginally housed' (Chamberlain and MacKenzie 2003: 6, 46).

In 2002/03, SAAP provided approximately 36,400 periods of support to people who are homeless in Queensland (AIHW 2003a: 24). This comprised 21.2% of all SAAP support periods in Australia, despite the fact that the Queensland population makes up only 18.7% of Australia's population. A total of 18,850 clients were serviced by SAAP in Queensland in 2002/03 (AIHW 2003b: 10). In addition, approximately 900 valid requests for SAAP assistance remained unmet each week (AIHW 2003c: 36).

2.2 Homeless people and public order offences

People who are homeless in Queensland are disproportionately impacted upon by various aspects of the criminal law. While it is a central tenet of our legal system that all people should be equal before the law, people who are homeless are confronted with many criminal law difficulties which the remainder of the population rarely or never encounter. There are a number of reasons for this inequality of treatment.

2.2.1 Laws directly targeted at homeless people

First, some laws are directly targeted at people who are homeless and/or destitute. The offence of 'vagrancy' has been used to regulate the behaviour of people who are homeless for centuries, and in Queensland, vagrancy is still a criminal offence (s4 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld)). 'Vagrancy' is defined to include behaviour such as having insufficient lawful means of support, begging and being an 'habitual drunkard' (for a thorough discussion of s4, see Walsh 2003a). Former Police Minister McGrady indicated in October 2002 that the offence of vagrancy was to be repealed, but that many of the behaviours previously considered to amount to vagrancy, such as begging and drunk and disorderly behaviour, would be retained. This would amount to a change in form but not substance.

2.2.1.1 Insufficient lawful means of support

Queensland is one of only two jurisdictions in Australia that criminalise having insufficient lawful means of support.[5] Higher courts have attempted to restrict the offence of having insufficient lawful means of support to cases where the police might reasonably suspect that the person is deriving their means from illegal sources, such as drug trafficking or illegal prostitution (see particularly *Zanetti v Hill* (1962) 108 CLR 433), however in practice, arrests for insufficient lawful means have been based on behaviour such as sleeping out and eating out of garbage bins (*Moore v Moulds* (1981) 7 QL 227; *Parry v Denman* (West 2000)).

2.2.1.2 Begging

Begging is still a criminal offence under the vagrancy provisions in Queensland despite the fact that it is well-established that the overwhelming majority of people who beg do so because they are destitute and have no other option for raising money to pay for the necessities of life (Horn and Cooke 2001; Walsh 2004b). The offence of begging was repealed in NSW in the 1970s and while begging remains an offence in

[5] Western Australia is the other; see s65(1) of the *Police Act 1892* (WA).

most Australian States and Territories, many governments have indicated a willingness to reform such laws (see for example Hulls 2004).

2.2.1.3 Habitual drunkenness

The 'habitual drunkenness' aspect of vagrancy is clearly aimed at chronic alcoholics, and since it is those who are homeless who are most visible in their alcoholism, it is they who are most likely to be targeted under this provision. This provision is not consistent with best practice in Australia – alcoholism is now generally accepted to be a health issue rather than a crime. Instead of arresting intoxicated persons, police officers in NSW, ACT and Tasmania are required to take the person to a place of safety until they have recovered.[6] While s210 of the *Police Powers and Responsibilities Act 2000* (Qld) provides the police with the option of dealing with intoxicated people in a similar way, many people still end up in the watchhouse, and before the courts, for alcohol-related offences. The NSW, ACT and Tasmanian model is preferable to the current law and practice in Queensland.

2.2.1.4 Local laws

There are a number of local laws in Queensland that prohibit behaviour directly associated with homelessness. For example, begging is prohibited in Brisbane[7] and Ipswich.[8] Sleeping out, either in parks, malls or public transport shelters, is prohibited under local law in Brisbane,[9] Mount Isa,[10] Townsville,[11] Cairns,[12] the Gold Coast,[13] Ipswich[14] and Toowoomba.[15] And storing goods in public places is prohibited under local law in Brisbane,[16] the Gold Coast[17] and Ipswich.[18] The applicable penalty for each of these offences is a fine, and such laws can be enforced either by police or council officers.

Thus in Queensland, homeless people are vulnerable to prosecution for behaviours which are directly associated with their state of homelessness under both State and local laws.

2.2.2 Laws which disproportionately impact upon homeless people

Second, some aspects of the criminal law disproportionately impact upon people who are homeless as a result of their housing status. Since homeless people by definition lack secure housing tenure, they tend to occupy public space more frequently than the

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[6] see *Intoxicated Persons Act 1979* (NSW); *Intoxicated Persons (Care and Protection) Act 1994* (ACT); *Police Offences Act 1935* (Tas) ss4A, 4B.
[7] Brisbane City Council Ordinances Ch 19 s11, Ch 21 s8.
[8] Local Law No. 32 s15.
[9] Brisbane City Council Ordinances Ch 9 s37, Ch 10 s9
[10] Local Law No. 25 s15.
[11] Local Law No. 15 s520.
[12] Local Law No. 3, Local Law No. 7 s13, Local Law No. 26 s20, Esplanade Interim Local Law s24.
[13] Local Law No. 9.1 s16
[14] Local Law Policy No. 17 s15
[15] Local Law No. 17 s15.
[16] Brisbane City Council Ordinances Ch 19 s11, Ch 21 s8.
[17] Local Law No. 11 s47.
[18] Local Law No. 32 s15.

remainder of the population, and as a result, they are more visible to police than other members of the community. Homeless people are forced to live their lives in public, and must by necessity publicly engage in behaviours which the majority of the population prefer to conduct in private, including urinating, defecating, vomiting, drinking alcohol and socialising with friends. Also, they are often forced to keep all their belongings with them rather than being able to store them in a safe place. As a result, they are more vulnerable to being charged with:

- offensive behaviour and offensive language (now 'public nuisance' under the new s7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld));
- possessing or drinking alcohol in public (ss164, 168B and 173A of the *Liquor Act 1992* (Qld));
- acting in a disorderly manner while under the influence of alcohol in a public place (s164 of the *Liquor Act 1992* (Qld));
- being in possession of a knife in a public place (s51 of the *Weapons Act 1990* (Qld));
- failing to move on when directed by a police officer to do so (s445 of the *Police Powers and Responsibilities Act 2000* (Qld));
- obstructing and/or assaulting police (s444 of the *Police Powers and Responsibilities Act 2000* (Qld)) – charges for these offences often accompany charges for other public space offences, arising out of the same facts often as a result of the precipitating interaction between the police officer and the defendant.

In addition to these state laws, there are a number of local laws which create similar offences. For example, the use of obscene or indecent language in a public place is prohibited under local law in Brisbane[19] and Cairns,[20] and drinking alcohol in public is prohibited in Brisbane,[21] Townsville[22] and Cairns.[23]

The problem with these offences is that they can and frequently do catch people conducting 'offensive' behaviours as a result of necessity, or indeed those engaging in behaviour which is only arguably offensive. It may be that this effect is unintended, but it does occur. For example, people have been prosecuted under s7AA for urinating and vomiting in public (even when the person did not have access to public toilet facilities), and for yelling or having a verbal argument in public (see Part 2.5 below).

The NSW legislature has developed a more appropriate and sophisticated provision to regulate the same kinds of behaviour. In NSW a statutory defence of 'reasonable excuse' exists in relation to the offences of obscene language and offensive behaviour (see ss4, 4A of the *Summary Offences Act 1988* (NSW)). This defence has the capacity to prevent undue hardship being caused to certain individuals charged with offensive conduct or offensive language by allowing them to advance an argument as to why they behaved in the manner they did. In Queensland, the offence is essentially a strict liability offence, and defendants in almost all cases plead guilty because there is seemingly no basis upon which they can argue their innocence.

[19] Brisbane City Council Ordinances Ch 9 s28, Ch 10 Part 2 s9
[20] Local Law No. 3
[21] Brisbane City Council Ordinances Ch 9 s28
[22] Local Law No. 51 s4
[23] Local Law No. 7 s13

2.2.3 Lack of access to legal services

Third, homeless people generally lack access to legal services, and as a result, they tend to plead guilty to the public space offences they are charged with, and incur a penalty (Walsh 2003a, Walsh 2004c). Due to the lack of legal services available to indigent people, public space law remains largely underdeveloped, despite the fact that a number of defences may be available to defendants. For example:

- The necessity or emergency defence (s25 *Criminal Code 1899* (Qld)) has not been tested in relation to public space offences committed by homeless people in Australia, yet it could be advanced in circumstances where a person occupies public space due to homelessness and/or engages in behaviour such as urinating, defecating or vomiting as a result of necessity.
- The offence of begging may be open to constitutional challenge on the ground that it offends the freedom of political communication, however this has not been tested (Walsh 2004b).
- Insulting a police officer may, in some circumstances, no longer amount to an offence according to the recent decision of the High Court in *Coleman v Power* [2004] HCA 39.
- Offences related to public drinking, storing goods and sleeping in parks may be open to challenge on the basis that they are directly or indirectly discriminatory under the *Racial Discrimination Act 1975* (Cth).
- The defence of mental illness is generally not raised in relation to public space offences, but it may be relevant in up to 16% of cases (see Part 2.4.4 below).

The duty lawyer scheme operating in Magistrates' Courts throughout Queensland, as well as Aboriginal Legal Services' court support schemes, have gone some way towards remedying this problem. However, defendants must often plead guilty in order to obtain representation and since these lawyers only have a matter of minutes in which to acquaint themselves with the defendant and the case (due to high levels of demand for their services), the quality of representation may be compromised.

The Homeless Persons' Legal Clinic in Brisbane is aimed at addressing some of these concerns. The Clinic, a project of the Queensland Public Interest Law Clearinghouse (QPILCH), was established in December 2002 and provides free legal services to homeless people at six community organisations in inner-city Brisbane. Legal advice is provided by volunteer lawyers from ten Brisbane law firms on various civil and administrative law matters including fines, social security, housing and tenancy, guardianship and administrative law issues, and debt and loan agreements. The Clinic plans to eventually run test cases on these points of law, however, the Clinic does not yet provide assistance in relation to criminal law matters. Efforts are being made to train volunteer lawyers to undertake this work Also, despite the high demand for Clinic services,[24] it is largely reliant on volunteers and donations, and as a result, its capacity for expansion is limited.

[24] From December 2002 to June 2003, the Clinic provided assistance to 114 people. Over 650 hours of service was provided by over 154 lawyers at a commercial value of over $195,000.

2.3 The criminalisation of homelessness?

The criminalisation of behaviours conducted in public space which are routinely and lawfully conducted by the vast majority of Australians in private space is manifestly unjust. Such laws are archaic, they contravene international human rights law, they result in the targeting of vulnerable groups and they offend the rule of law.

2.3.1 Public space laws as archaic – judicial commentary

Many modern public space regulations are based on legislation which is antiquated and outdated. For example, the *Vagrants, Gaming and Other Offences Act 1931* (Qld) was based on English legislation which dates back to the fourteenth century, and has only been amended in minor ways since its inception in 1931. Also, move-on powers (and other means of regulating public spaces) are comparable to laws introduced in colonial Australia to exclude Indigenous people from white settlements. For example, the modern move-on powers under the *Police Powers and Responsibilities Act 2000* (Qld), in substance, design and practice, mirror the 1934 amendments to the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) which stated:

> 'The Minister may from time to time cause any aboriginal or half-caste… to be removed from any reserve institution, or district to any other reserve, institution or district and kept there.'

Judges have called for the repeal of vagrancy laws for decades. For example, in 1962 Dixon CJ considered the offence of vagrancy in the case of *Zanetti v Hill* (1962) 108 CLR 433. He noted that modern vagrancy offences are based on laws which date back many hundreds of years, and said (at para 3):

> '[I]t is obvious that to transfer the application of such provisions from rural England in Tudor times and later, to the very different conditions of city life in Perth and give it a just and respectable operation must involve many difficulties.'

In *Moore v Moulds* (1981) 7 QL 227, Shanahan DCJ said of the crime of vagrancy:

> 'It is not or should not be a criminal offence to be poor. It is not nor should it be a criminal offence per se to sleep on the river bank nor to adopt a lifestyle which differs from that of the majority… [such persons] do not, as a rule, commit criminal offences but are regarded as "nuisances" and their appearance is an affront to the susceptibilities of those members of the public who do not suffer from their disabilities.'

Concerns have also been raised within the judiciary regarding offensive language provisions. Magistrate David Heilpern noted in *Police v Shannon Thomas Dunn* that standards in relation to offensive language have changed in recent years. He said (in Heilpern 1999):

> 'The word "fuck" is extremely common place now and has lost much of its punch… In court, I am regularly confronted by witnesses who seem physically unable to speak without using the word in every sentence – it has become as common in their language as any other word and they use it without intent to offend, or without any knowledge that others would find it other than completely normal.'

Thus, the criminalisation of offensive language, to the extent that this involves the use of words only traditionally considered obscene, would seem to be out of touch with modern community standards.

More generally, there is a level of consensus amongst members of the judiciary and academic commentators that a greater level of tolerance should be fostered within our community; that the 'reasonable person' should be endowed with such characteristics as understanding and compassion, and that behaviour should only be punished where it involves conduct against which society needs to protect itself (see for example *Police v Shannon Thomas Dunn* in Heilpern 1999 and *Parry v Denman* in West 2000). The Queensland Attorney-General has made comments to this effect. At a recent forum in Brisbane, he said:

> '[T]here is much more that can be done to better educate and train our police… so that the laws relating to the protection of public order, what is really about peace and security for people using public space, is [sic] applied in a way that's intended for that real purpose, only to protect people whose security is threatened.'

2.3.2 Public space regulations and international human rights law

Laws which aim to regulate public spaces in Queensland potentially violate a number of provisions of international human rights law including the right to equality before the law, the right to be presumed innocent until proven guilty and the right to freedom from discrimination.

2.3.2.1 The right to equality before the law

The right to equality before the law is recognised in art 7 of the *Universal Declaration of Human Rights 1948* (UDHR) and arts 14 and 26 of the *International Covenant on Civil and Political Rights 1976* (ICCPR). Australia has ratified the ICCPR, yet offences which criminalise acts conducted in public which are lawful if conducted in private (such as sleeping, urinating, defecating, vomiting, swearing, drinking alcohol) necessarily result in the differential treatment of people who are homeless. This results in inequality before the law, and thus contravenes these provisions (see Walsh 2004b).

2.3.2.2 The right to be presumed innocent until proven guilty

The right to be presumed innocent until proven guilty (recognised under art 11(1) of the UDHR and art 14(2) of the ICCPR) is also contravened by these public space offences. As noted above, in Queensland, public space offences are generally strict liability offences, that is, only the criminal act must be proven in order for guilt to be

established – no inquiry need be made into the state of mind of the offender at the time the act was committed. As a result, the onus of proof is shifted to the defendant, and the person is considered guilty of the offence unless they are able to prove that the relevant conduct did not occur.

2.3.2.3 The right to non-discrimination

Article 2 of the UDHR and art 26 of the ICCPR state that a person should not be discriminated against on the basis of their race, colour, sex, language or *any other status*. Provisions which criminalise behaviour directly associated with homelessness may be considered to amount to discrimination on the basis of housing or socio-economic status. Further, the use of move-on powers by police may, in practice, amount to discrimination against Indigenous people on the basis of race where these powers are used to move Indigenous people from one public space to another in an attempt to exclude them from certain areas.

2.3.3 Public space regulations and the rule of law

The rule of law requires that all people be treated equally before the law and have equal access to justice, and that laws be practicable, prospective, clear and public (Raz 1977; Finnis 1980: 270-1). Public space offences offend the rule of law, which has been held to be assumed by our constitution (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1, per Dixon J at para 35).

Those charged with public space offences are generally not afforded equal access to justice. For example, in a recent study conducted by the author at Brisbane Magistrates' Court, it was found that around 50% of those charged with failure to appear are homeless or at risk of homelessness (Walsh 2004c). It is common sense that people who are homeless would find it extremely difficult to appear in court on the right date and at the right time due to their chaotic lifestyle, their priority of finding of food and shelter, and their inability to keep track of time. Also, public space defendants tend to plead guilty. Indeed, in February 2004, not one public space offender who came before Brisbane Magistrates' Court entered a not guilty plea (Walsh 2004c). Further, the most marginalised of defendants tend to be afforded less time in court, with those represented by private barristers being afforded significantly more time than those who are forced to rely on Legal Aid or Aboriginal Legal Service lawyers, or represent themselves (see Walsh 2004c). Thus, the reduced ability of homeless people to ensure that they appear in court on time, the reduced quality of representation, and the reduced amount of court time afforded to them, results in contraventions to the rule of law requirement of equality of access to justice.

Public order offences are not always practicable. It is completely unreasonable and unrealistic to expect people who do not have access to private space to refrain from sleeping, urinating, defecating, vomiting, swearing and drinking alcohol in public spaces. If they are to engage in these activities at all, they necessarily must occur in public space (Lynch 2002). Similarly, if a person is destitute, prohibitions against not having sufficient lawful means of support and prohibitions against asking members of the public for financial assistance are simply not practicable. This was clearly articulated by one homeless person in a survey conducted by the Rights in Public Space Action Group (RIPS) in inner-city Brisbane. He said 'We have to do it [ie.

beg]. We have to survive' (see Walsh 2004a). Thus, many public space offences do not conform to the rule of law requirement of practicability.

It is generally accepted that a charge of vagrancy may be (and is) used as a holding charge by police; indeed, the offence of vagrancy has been classified as a 'preventative offence' which allows for the arrest and detention of people merely on suspicion of their involvement, or possible future involvement, in some unspecified wrong doing (Law Reform Commission of Western Australia 1992). This is not consistent with the rule of law requirement of prospectivity.

Many people who live on the streets are unaware that these kinds of behaviours are criminal offences. This is particularly the case in relation to the offences of sleeping out and begging. In the survey of homeless people conducted by RIPS, one homeless person said in relation to begging 'I didn't know it was illegal. You have freaked me out' (see Walsh 2004a). In relation to the offence of having insufficient lawful means of support, even the courts have struggled to interpret what the offence actually means (see particularly *Ledwith v Roberts* (1936) 3 All ER 589). Thus, many public space laws violate the rule of law requirements of clarity and publicity.

2.4 Selective enforcement against vulnerable groups

In addition to contravening human rights law and the rule of law, public space offences have the effect of causing further disadvantage to the most marginalised people within our society. Police officers are given wide discretionary powers in deciding who and when to prosecute for these offences. Thus, police can, and do, tend to selectively enforce these laws against some population groups more than others.

2.4.1 Homeless people

In a survey of homeless people and homelessness service providers conducted by RIPS in Brisbane, a number of homeless respondents commented that they were being treated differently to other public space users whose behaviour was identical to theirs (see Walsh 2004a). One homeless respondent said:

> 'Sometimes the police would come down on you all the time just `cos you were homeless. They shouldn't be able to pick on you just `cos you haven't got shoes or a wallet or you are not clean. It's not your fault.'

Another stated:

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

Service providers expressed agreement with these comments. One service provider remarked:

> ‘ It’s a class issue… If you can afford to go to a restaurant that has outdoor dining, you can drink til your heart’s content…but what if you can’t afford it and you are homeless?… where do you go?’

Another said:

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

In another survey of homeless people in Brisbane, many respondents commented that they were being ‘picked on’ by police as a result of their Indigenous or homeless appearance (Walsh and Klease 2004). The result is that those who are most marginalised in our society are most vulnerable to prosecution under these offences.

2.4.2 Indigenous people

Indigenous people are significantly over-represented in custody and charge rates for public order offences. In 2003, Indigenous people comprised 20-30% of all defendants charged with offensive language and offensive behaviour in Queensland[25] despite the fact that Indigenous people comprise only 3% of the Queensland population. The most recent national police custody survey found that 14% of police incidents involving Indigenous people were for public order offences, compared with 5% for the non-Indigenous population (Carcach and McDonald 1995:32-33). Further, in a recent study conducted by the author, it was found that 41% of public space offenders who came before Brisbane Magistrates’ Court in February 2004 were Indigenous. This means they were overrepresented by more than 13 times (Walsh 2004c). Clearly, these high rates of overrepresentation undercut the government’s commitment in the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* (2001: 11) to significantly reduce the rate of Indigenous people coming into contact with the Queensland criminal justice system.

2.4.3 Young people

Young people are also more likely to be arrested and charged for public space offences than members of the general population. In 2002/03, 44% of good order offenders dealt with by police were aged between 15 and 19 years; also, 19% of arrests for trespass and vagrancy and 6% of arrests for good order offences involved juveniles (Queensland Police Service 2003: 76, 89). Further, in February 2004, 39% of public space offenders who came before the Brisbane Magistrates’ Court were aged between 17 and 25 years, and in July 2004, 65% of public nuisance defendants brought before Brisbane Magistrates’ Court and 52% of public nuisance defendants brought before Townsville Magistrates’ Court were aged between 17 and 25 years (most of whom were at the younger end of this age bracket). Further, the kinds of behaviour which founded the basis for these public nuisance charges were trivial, victimless, and generally related to peer pressure and risk taking behaviour, rather than malice or delinquency. For example, one young person was arrested for public nuisance because he and his friends were behaving loudly in a park at night. Another

[25] Statistics provided by the Police Commissioner’s Office to the Aboriginal and Torres Strait Islander Legal Service.

was arrested for public nuisance for climbing onto the roof of a McDonalds restaurant.

The over-representation of young people in prosecutions for public space offences is a cause for concern as it has the effect of reversing the positive initiatives contained in the *Juvenile Justice Act 1992* (Qld) which are aimed at protecting young people from the harmful effects that excessive interference by the criminal justice system may have in their lives.

2.4.4 People with mental illness

It is well established that there is a strong positive association between mental illness and homelessness, indeed the rate of mental illness amongst people who are homeless may be as high as 80% (Kamieniecki 2001). This is generally considered to be the direct result of the deinstitutionalisation of people with mental illness which commenced in the 1980s – many people with mental illness who previously occupied institutions must now reside in public space, and community services are unable to meet the demand for services. People with severe mental illness or intellectual disability made up 10% of public space offenders who came before the Brisbane Magistrates' Court in February 2004 (Walsh 2004c). Mental impairment was implicated in 31% of offensive language and offensive behaviour cases brought before the Brisbane Magistrates' Court in February 2004, and 16% of all public nuisance cases brought before the Brisbane and Townsville Magistrates' Courts in July 2004. Further, these figures are likely to be underestimates as they only include those whose disability was explicitly noted by the court, and mental illness is routinely under-diagnosed in court proceedings (Walsh 2003c).

Thus, what was once addressed as a health and welfare issue is now being dealt with by the criminal justice system.

2.4.5 People with drug or alcohol dependency

There is a clear link between criminal activity and drug and alcohol dependency (see for example Victorian Parliament Drug and Crime Prevention Committee 2000; Cornish 1985), and also between drug and alcohol dependency and homelessness (Kermode et al 1998). Thus, people with drug and alcohol dependency are particularly vulnerable to arrest and prosecution for public space offences. Indeed, in more than 50% of public space offences which came before the Brisbane Magistrates' Court in Feburary 2004, drugs, alcohol or chroming were implicated in the defendant's offending behaviour (Walsh 2004c). Alcohol and other drugs were implicated in 54% of offensive language and offensive behaviour cases brought before Brisbane Magistrates' Court in February 2004, and around 36% of all public nuisance cases brought before Brisbane and Townsville Magistrates' Courts in July 2004.

Again, this behaviour should be dealt with as a health and/or welfare issue rather than as a crime. Intoxicated persons should not be arrested, but rather taken to a safe place while they recover.

Public space law in Queensland adversely affects the most vulnerable members of our society. In many cases it directly targets those who are homeless, and it also tends to

be selectively enforced against Indigenous people, young people, people with mental illness and people with drug and alcohol dependency. If our laws are to be perceived as just, and if undue hardship to disadvantaged people is to be prevented, the retention of these offences must be questioned and debated. What we need instead is a set of provisions that enable police officers to protect the safety and security of the public, but which do not adversely affect vulnerable groups.

2.5 The *Vagrants, Gaming and Other Offences Act 1931* (Qld) – seeing double?

2.5.1 Duplication of Offences

It has been established that public space offences in Queensland result in further hardship to already disadvantaged groups, they breach international human rights law and the rule of law, and they are read down as far as possible by members of the judiciary. In addition to this, many of the offences used to prosecute people for public space offences, particularly those located in the *Vagrants, Gaming and Other Offences Act 1931* (Qld), are actually duplicates of similar offences in other pieces of legislation.

For example:

- Aggressive begging behaviour can be dealt with under s414 of the *Criminal Code 1899* (Qld) which creates an offence of 'demanding property with menaces'. Thus, there seems little need for a separate offence of begging under the *Vagrants, Gaming and Other Offences Act 1931* (Qld).
- Threatening violence is an offence under s75 of the *Criminal Code 1899* (Qld) and threatening assault is an offence under s245. On this basis, there seems no need for a separate offence of threatening or abusive language under the *Vagrants, Gaming and Other Offences Act 1931* (Qld).
- With regard to 'public nuisance' (s7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld)), much of the behaviour which such a provision is aimed at regulating may be dealt with under various provisions of the *Criminal Code 1899* (Qld), such as the prohibition against indecent acts (s227) and assault (s245). Also, the offence of 'common nuisance' which appears in s230 of the *Criminal Code 1899* (Qld), overlaps significantly with 'public nuisance' as it too prohibits behaviour which compromises the safety or health of a member of the public.

In addition, some cases are prosecuted under s7AA even though they would be more appropriately dealt with under other provisions, such as consuming alcohol in public, wilful exposure and wilful damage. Presumably, police choose to prosecute such defendants under s7AA due to the high maximum penalty.

2.5.2 'Public nuisance' and police move-on powers

Further, the kinds of behaviour which are commonly dealt with under the *Vagrants, Gaming and Other Offences Act 1931* (Qld) could be dealt with via police move-on powers. Section 39 of the *Police Powers and Responsibilities Act 2000* (Qld) gives

police the power to instruct people to move away from a particular location if they are considered to be causing another person anxiety, interfering with trade or business or disrupting any event or gathering in a public place. Section 39 states that a person's right to peaceful assembly should not be interfered with through the use of police move-on powers unless this is reasonably necessary in the interests of public safety, public order or the protection of the rights and freedoms of others. This is an important safeguard as it prevents police from interfering with people on the grounds that *had* someone else been present they *might* have been offended by the person's conduct.

Unfortunately, it seems that the recent amendment to s7 of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) has had the (seemingly unintended) effect of discouraging police from using their move on powers, or indeed any other alternative course of action to arrest. Recent research conducted by the author has shown that since the amendment came into effect in April, prosecutions under the section have increased by more than 200%. In February 2004, 26 people appeared in Brisbane Magistrates' Court charged with offensive behaviour or offensive language under the old s7 offence, while in July 2004, 77 people came before Brisbane Magistrates' Court charged with public nuisance under the new s7AA. It seems that the police may be choosing to utilise their powers of arrest under s7AA in situations where they might previously have exercised their move-on powers, or turned a blind eye.

What ever the explanation, this massive increase in prosecutions for such minor offending behaviour is worthy of further investigation by the Queensland government.

2.5.3 The 'trifecta' is alive and well

Of course, the duplication of similar offences in legislation may also have the effect of multiplying charges laid against public space offenders. The resultant effect is the 'trifecta' or 'ham, cheese and tomato sandwich' where a defendant is charged with multiple offences based on the same facts. Court observation research at Brisbane Magistrates' Court demonstrated that this does indeed occur. In February 2004, over 35% of public space charges were accompanied by an obstruct or assault police charge. Failure to follow a police direction and offensive language were those offences most likely to be accompanied by an obstruct or assault police charge (56% and 50% of all charges respectively). In July 2004, 17% of public nuisance offences were accompanied by an obstruct and/or assault police charge.

2.5.4 Conclusion

Where a person is engaging in behaviour which does not of itself threaten the security or safety of members of the public, asking them to move and/or diverting them to social services as required, rather than arresting and charging them with multiple offences, would seem to be a more appropriate response. It has the benefit of eliminating the trauma associated with arrest, and reducing costs associated with court appearances and fine enforcement, and since failure to follow a police direction is an offence, (s445 of the *Police Powers and Responsibilities Act 2000* (Qld)) the police are not rendered impotent.

2.6 Conclusion

Public space law in Queensland is in need of reform. It results in the criminalisation of homelessness, it adversely affects vulnerable groups, it offends international human rights law and the rule of law, it is repetitive between Queensland Acts, and it lags behind developments implemented in other jurisdictions in Australia. Furthermore, it does not represent an evidence-based approach to dealing with trivial offending behaviour committed by marginalised groups, and it is not at all well-targeted towards its objective of ensuring the safety and security of members of the public.

Recommendation 1
That one of the following two courses of action be taken:

1. That the provisions of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) which criminalise homelessness or disproportionately impact upon homeless people as a result of their presence in public space be repealed, on the basis that police have the power to deal with threatening or abusive behaviour conducted in public space under other Acts; and/or
2. That these offences be replaced by one 'catch-all' provision aimed at regulating public space. This provision could take the form of an amended s7AA which includes the following:
    - a requirement that a complaint be made by a member of the public before police can begin proceedings under the offence; and
    - a statutory defence of reasonable excuse (akin to that under ss4 and 4A of the NSW *Summary Offences Act 1988*) to ensure that those who are conducting 'offensive' behaviour as a result of necessity, or for reasons associated with mental illness, homelessness, etc. are not unfairly impacted by the provision; and
    - a safeguard which is similar to that in s39, that a person's right to peaceful assembly should not be interfered with by the exercise of police powers unless this is reasonably necessary in the interests of public safety, public order or the protection of the rights and freedoms of others.

3. Sentencing and Fine Enforcement for Public Space Offences in Queensland

3.1 Sentencing for public order offences in Queensland

3.1.1 Goals of sentencing in Queensland

The goals of the State in sentencing are outlined in ss3 and 9 of the *Penalties and Sentences Act 1992* (Qld). They include:

- punishment in a way that is just in the circumstances; s3(b), 9(1)(a)
- rehabilitation; s3(b), 9(1)(b)
- deterrence; s9(1)(c)
- denunciation of the relevant conduct; s9(1)(d)
- community safety; s3(b), 9(1)(e)
- consistency; s3(c)
- fairness; s3(c)

It is added in s9(2) that a sentence of imprisonment should only be imposed as a last resort, and that a sentence which allows an offender to remain in the community should be considered preferable. However, despite these broad ideals, sentencing alternatives for public order offences in State legislation and under local law are generally restricted to the imposition of a fine and/or a term of imprisonment.

3.1.2 Prescribed penalties for public space offences in Queensland

3.1.2.1 State Law

The prescribed penalties for relevant public space offences under State law are listed below:

Offence	Maximum prescribed penalty
Vagrancy	$100 fine or 6 months imprisonment
Public nuisance	$750 fine or 6 months imprisonment
Drinking alcohol in a public place	$75 fine
Public drunkenness	$75 fine
Drunk and disorderly	$1875 fine
Possessing a knife in a public place	$500 fine or 6 months imprisonment
Failing to move on	$1000 fine

3.1.2.2 Local Law

Under local law, the penalty for public order offences is generally a fine, issued via an infringement notice. The maximum dollar amounts prescribed in local law instruments are listed below:

Offence	Maximum fine:						
	Bris-bane	**Mount Isa**	**Towns-ville**	**Cairns**	**Ipswich**	**Toow-oomba**	**Gold Coast**
Sleeping in a public place	$5000[+]	$1500	Arrest	$3750	$1500	$750	$1500
Begging	$1000						
Obscene or indecent language	$5000[+]			$3750			
Storage of goods in a public place	$1000			$3750	$3750		$3750
Drinking alcohol in public			$750	$3750			
Public drunkenness	$5000[+]						

[+] = For a local law, only a maximum fine of $3750 (50 penalty units) can be enforced by SPER

The *State Penalties Enforcement Act 1999* (Qld) sets out a scale which dictates the maximum fine amount which can be imposed by an infringement notice issued under local law. Those amounts are as follows:

Maximum penalty under local law	Maximum infringement notice amount
$450-750 (6-10 penalty units)	$75 (1 penalty unit)
$751-1500 (11-20 penalty units)	$150 (2 penalty units)
$1501-2250 (21-30 penalty units)	$225 (3 penalty units)
$2251-3000 (31-40 penalty units)	$300 (4 penalty units)
$3001-3750 (41-50 penalty units)	$375 (5 penalty units)

Thus, fines for breaches of public space law under local law may be quite high.

3.1.3 Available alternatives

Despite the fact that legislation and local law instruments restrict penalties for public space offences to a fine or imprisonment, alternative sanctions may be substituted for these under the *Penalties and Sentences Act 1992* (Qld) by the courts.

3.1.3.1 Discharge and release

A charge may be dismissed by the court, or the offender may be discharged with or without a conviction being recorded either unconditionally or subject to conditions including a requirement to be of good behaviour, or to attend drug assessment and education under s19 of the *Penalties and Sentences Act 1992* (Qld). In view of the triviality of the kinds of offences at issue here, this is often the most appropriate penalty.

3.1.3.2 Probation order

Any person convicted of an offence punishable by imprisonment may instead receive a probation order for no more than three years (s91). Such an order must include a requirement that an offender attend counselling or other programs directed by the court (s93). Thus, under current legislation, the option is available to the court to refer a homeless public space offender to a treatment or welfare service instead of imposing a fine or a sentence of imprisonment.

3.1.3.3 Community service order

A community service order (of between 40 and 240 hours) may be imposed instead of a fine or a prison sentence in relation to any offence punishable by imprisonment (s101 of the *Penalties and Sentences Act 1992* (Qld)). In order to be eligible for a community service order, the defendant must be adjudged a 'suitable person to perform community service' (ss57(1) and 101 of the *Penalties and Sentences Act 1992* (Qld)). Homeless people are often judged to be unsuitable as a result of their lack of access to transport, their inability to keep close track of time, as well as mental illness, drug and alcohol addiction, and general health difficulties, so this is often an inappropriate penalty for them.

3.1.3.4 Intensive correction order

Intensive correction orders are available as a sentencing alternative where a sentence of imprisonment of less than one year is imposed on an offender (s112). Such an offender is taken to be serving a sentence of imprisonment, however they remain in the community during this time. The order may require an offender to attend medical, psychological or psychiatric treatment, perform community service or make restitution, and it must require an offender to report to and receive visits from an authorised corrective services officer at least twice a week for the duration of the sentence (ss114, 115 of the *Penalties and Sentences Act 1992* (Qld)). This provides sentencers with another avenue for ensuring that homeless defendants receive the treatment and assistance they require. However, this sentencing option may be located too high up the sentencing tariff to be appropriate for most public space offenders. Also, homeless people are forced to relocate frequently, so reporting requirements under an intensive correction order may prove too onerous for them to meet.

3.1.3.5 Drug court orders

Queensland's Drug Courts were introduced on trial in June 2000, and they have resulted in the supervision of many hundreds of people on intensive drug

rehabilitation orders who have pled guilty to drug-related offences. However, the alternative sentences imposing treatment for drug addicted offenders may only be handed down by the Drug Court, and they are only available to offenders who would otherwise likely have gone to prison (*Drug Rehabilitation (Court Diversion) Act 2000* (Qld) s7). Due to the triviality of the offence, public space offenders are less likely to appear before the Drug Court or benefit from the alternative sentences available to it.

3.1.4 Actual sentencing practice for public order offences

3.1.4.1 Statistics

Despite the fact that a range of alternative sanctions are available to magistrates and judges when imposing a sentence for public space offences, the statistics demonstrate that judges and magistrates tend to impose a penalty of either a fine or imprisonment.

In 2002/03, 2,636 people were convicted of offensive language, 793 were convicted of offensive behaviour, 879 people were convicted of drunkenness, 43 were convicted of begging, and eight were convicted of having insufficient lawful means of support. Penalty outcomes are listed in the table below.

Offence	Penalty outcome - % convicted charges 2002/03*					
	Convicted but not punished	Fine	Imprisonment	Bond or Probation Order	Community Service Order	Other[+]
Drunkenness	88 (10%)	686 (78%)	14 (2%)	11 (1%)	6 (1%)	66 (8%)
Begging	3 (7%)	34 (79%)	3 (7%)	0 (0%)	0 (0%)	3 (7%)
Offensive language	80 (3%)	2143 (81%)	78 (3%)	112 (4%)	15 (0.5%)	208 (8%)
Offensive behaviour	20 (3%)	571 (72%)	20 (3%)	41 (5%)	9 (1%)	132 (17%)
Insufficient lawful means	2 (25%)	3 (38%)	1 (13%)	1 (13%)	0 (0%)	1 (13%)

* Note that these statistics do not allow for global penalties – a more serious charge may have contributed to the penalty outcome

[+]includes restitution, reparation, suspended sentence, and 'other'

It is clear from the table that the most common penalty imposed for these public order offences is a fine. Around 78% of people convicted of these offences in 2002/03 received a fine. A further 4% were imprisoned. Only small numbers of offenders escaped punishment altogether; even those charged with insufficient lawful means most often received a fine.

3.1.4.2 Sentencing at Brisbane Magistrates Court

Of course, the extensive use of fines as a penalty for public space offences may not be a cause for concern in and of itself. The *Penalties and Sentences Act 1992* (Qld) confers broad discretionary powers on magistrates to tailor fines to the circumstances of the individual. For example under s48, the court is required to take an offender's means, and the nature of the burden that payment of the fine would impose on him/her, into account when imposing a fine. The court has the power to impose a fine

that is less than the amount prescribed in legislation under s47. Magistrates also have the power to give permission for a fine to be paid by instalments, or provide extra time in which to pay the fine (ss50, 51) (Walsh 2004c).

All these provisions allow magistrates to reduce the amount of hardship caused by a fine to an indigent person. However there is no accessible data demonstrating whether these provisions are actually utilised by magistrates when imposing fines for public space offences. To fill this void, a court observation study was undertaken by the author at Brisbane Magistrates' Court in February 2004 (see Walsh 2004c) and at Brisbane Magistrates' Court and Townsville Magistrates' Court in July 2004.

Almost half (48.1%) of those who came before the Brisbane court in February charged with public space offences received a fine as a penalty. Around 30% received a probation order or good behaviour bond, but the majority of these were imposed by the same magistrate, who was only one of six magistrates who presided over the court during the study period. Only this magistrate routinely attempted to address the health and welfare needs of offenders by referring them to programs, and only this magistrate routinely utilised the services of the Court Liaison Officer, who is employed by the Brisbane Magistrates' Court to arrange social service assistance for defendants at magistrates' request. Around 10% of defendants were discharged and around 4% received bail. A conviction was recorded in 40% of cases.

The average fine imposed on public space offenders was $186. Notably, the average fine for those who were either homeless or at risk of homelessness was higher at $194.28. Those who were homeless or at risk of homelessness were given slightly more time in which to pay their fine (2.94 months compared with 2.65 months overall), however they were still required to pay an average of $66 per month. This is an extremely onerous amount for a person who already cannot afford life's necessities.[26]

Of even greater concern is the fact that since the amendment to s7AA of the *Vagrants, Gaming and Other Offences Act 1931* (1931) came into effect in April 2004, fine amounts for offensive language and offensive behaviour have increased by 35% and payments required per month have increased by 100%. In July 2004, the average fine imposed for public nuisance at the Brisbane Magistrates' Court was $202, with an average of 1.8 months to pay, and the average fine imposed for public nuisance at Townsville Magistrates' Court was $208, with an average of 2.3 months to pay.

Further, since the amendment, courts have begun imposing default periods of imprisonment (whereby a person is sentenced to a custodial term in the event that they fail to pay the fine within the time period set by the court) in many more cases. In July 2004, a default period of imprisonment was imposed in 74% of public nuisance cases which came before the Brisbane Magistrates' Court. The average default period of imprisonment was five days. There is no legislatively prescribed arithmetic relationship between the default period set and the fine amount, and magistrates do not adopt a consistent approach.

[26] Also, this is 10% more than the minimum payment rate required by SPER.

The results of this research demonstrate that despite the provisions in legislation which enable magistrates to tailor penalties to the circumstances of the individual, homeless people still generally receive onerous fines for these offences which will be impossible for them to pay, and which may lead to their serving a prison sentence in the event of default. The following section of this report details what happens to those who are unable to pay their fines where the court has not set a default period of imprisonment.

3.2 Enforcing fines in Queensland

In Queensland, the State Penalties Enforcement Registry (SPER) is the administrative agency responsible for collecting unpaid fines. SPER has jurisdiction over all fines ordered to be paid under the *Penalties and Sentences Act 1992* (Qld), either by a court or via an infringement notice (ss8, 9 *State Penalties Enforcement Act 1999* (Qld)), as well as fines issued under local law for offences which are not against the person and which are punishable by a fine of no more than 50 penalty units ($3750) (s12).

If an infringement notice is served on a person, they can elect to have the matter dealt with in the Magistrates' Court within 28 days of receiving the notice (s22 *State Penalties Enforcement Act 1999* (Qld)). If a person is unable to pay, they may apply to pay the fine in instalments under s23 as long as the fine is for an amount of $150 or more (s30 of the *State Penalty Enforcement Regulation 2000* (Qld), hereafter 'the Regulations'). The minimum repayment amount is $30 per fortnight, unless the defendant defaults and receives social security benefits as their sole source of income, in which case the fine may be repaid at a minimum amount of $20 per fortnight (this amount will be directly debited from the person's Centrelink payment). This is an important concession, however default attracts a $44 fee which is added to the fine and due to their lack of access to information and advice, many homeless people do not become aware of this payment option until they have already attracted a second default fee of an additional $75. If a person elects to pay the fine in instalments, they thereby waive their right to have the matter dealt with by the Magistrates Court (s26). Of course, since those who are homeless generally lack access to timely legal advice, they generally fail to take advantage of this opportunity anyway.

If a fine is imposed by a court, the court may order that the fine be paid in instalments or that additional time be given to pay the fine (*Penalties and Sentences Act 1992* (Qld) ss50,51), however there is nothing in the Act to compel this in circumstances where an offender is otherwise unable to pay. When a fine is imposed by the court, the defendant has the right to apply for a fine option order under Part 4 Division 2 of the *Penalties and Sentences Act 1992* (Qld), that is, to have the fine converted into a certain number of hours' community service (no more than five hours per $75; ss5(1)(b),69). However, as with a community service order, a person must be judged a 'suitable person' to perform community service work before such an order may be imposed (s48 *State Penalties Enforcement Act 1999* (Qld)). As noted above, this requirement is often prohibitive for homeless people.

If a person fails to pay a fine issued via an infringement notice within 28 days, or a court-ordered fine within the time period specified by the court, their case is referred to SPER under ss33 and 34 of the *State Penalties Enforcement Act 1999* (Qld). SPER

then becomes responsible for collection of the unpaid amount. The person is given a further 28 days to pay, and a registration fee of $44 is added to the fine amount (s35(2)(a), and s29 of the Regulations). This registration fee is also payable by a person if they fail to pay two consecutive instalments under their instalment plan (s36).

At this time, a person may apply to SPER for an extension of time to pay (of no more than an additional 28 days) or for approval to pay by instalments if they have not already done so. The person may also apply for a fine option order if they have not already done so.

If no action is taken, SPER will impose a further fee of $75 on the fine defaulter (a 'civil enforcement fee'; s63(5)), and will commence enforcement action including suspension of driver's licence (ss104-108), seizure of property (ss63-74), or the issue of a fine collection notice (which provides for the redirection of earnings or the redirection of monies from a financial institution account; s75-103). Technically an arrest warrant may be issued if the fine cannot be collected in this way (ss119-121), although, if the registrar is satisfied on the basis of a report from a doctor that for medical or psychiatric reasons imprisonment is not an appropriate means of enforcing payment of the fine amount, a good behaviour order for a period of no longer than three years may be issued instead (s118). No arrest warrants have yet been issued under the Act, however it is feared, based on recent statements made by the Office of the Premier, that this may change in the near future (Office of the Premier and Trade 2003).

The $44 registration fee and the $75 civil enforcement fee once attracted cannot be waived by SPER. Further, SPER does not have the power to withdraw or waive fines (s28). The only substantial discretion that SPER has to prevent hardship to persons who are unable to pay fines imposed upon them is the power to impose a good behaviour bond in lieu of imprisonment for medical or psychiatric reasons (s118). This means that, as a matter of law, SPER has only very limited capacity to ensure that injustices to people who are homeless and unable to discharge their fines for this reason are avoided. As will be demonstrated in Part 4, this lack of discretion is unique to SPER – other fine enforcement agencies in Australia do have the capacity to cancel fines (and enforcement fees), or at least refer the matter back to court, if this is necessary to avoid hardship to offenders and their dependents.

3.3 Fines and imprisonment: an inappropriate response

Neither a fine nor imprisonment is an appropriate way of dealing with the minor victimless offences committed by people who are homeless. These penalties fail to meet the goals of sentencing outlined in the *Penalties and Sentences Act 1992* (Qld) and are not proportionate to the offences committed. If any penalty is imposed at all, it should aim to address the causal factors underlying their 'offending' behaviour.

3.3.1 The problem with fines and fine enforcement

The main problem with imposing fines on homeless people who have committed public space offences is that they will almost certainly be unable to discharge them. Social security benefits are pegged at a level well below the poverty line and those in receipt of government benefits struggle to provide themselves with the necessities of life (Walsh 2003b). Approximately 82% of homeless people are in receipt of social security benefits, and an additional 10% have no source of income at all (AIHW 2002: 30), so at least 92% of homeless people are living well below the poverty line.

Further, the goals of sentencing outlined in ss3 and 9 of the *Penalties and Sentences Act 1992* (Qld) will not be met by fining a person who is homeless. Imposing a fine on someone who is already struggling to meet their daily living expenses certainly does not meet the goals of 'just punishment' or 'fairness'.

Fining a homeless person for a public space offence, or increasing the fine when they default on their payments, will not meet the sentencing goal of rehabilitation. Rather, this will have the effect of perpetuating the person's state of poverty and homelessness by further depriving them of the necessities of life, and they may be forced to turn to more serious forms of criminal activity to meet their fine payments (DeJong and Franzeen 1993). Also, having a criminal record will further reduce their chances of finding employment in the future. In order to promote rehabilitation, offenders should be provided with secure housing and sufficient financial resources; only this will address the causes of their offending behaviour.

Similarly, imposing a fine as a penalty for a crime committed by necessity will not successfully deter the offender in question, or other offenders in similar circumstances, from engaging in the behaviour. Rather, the best method of deterrence is to remove the need to engage in the offending behaviour in the first place.

The sentencing goals of denunciation and promoting community safety may be considered inapplicable in relation to public space offences and fine default. It seems absurd that a community that allows poverty to continue should feel justified in denunciating outward expressions of it. Also, contrary to perceptions fuelled and encouraged by the media and government (see for example Munroe 2001), people who are homeless do not pose a safety threat to the community; indeed, homeless people are far more likely to be victims of crime than perpetrators (Vanstone 1999; Walsh 2003:83).

Finally, the goal of consistency in the *Penalties and Sentences Act 1992* (Qld) can never truly be met through the imposition of a flat-rate fine. Fines are necessarily an inequitable sentencing option, as each offender's means to pay varies.

Any attempt at enforcing fines imposed on homeless people is a waste of both time and resources. The imposition of fines for public space offences does not meet the goals of sentencing outlined in the *Penalties and Sentences Act 1992* (Qld), and does not address the issues which underlie the offending behaviour in question.

3.3.2 The problems with imprisonment

Despite the stated legislative intention that imprisonment for fine default should be avoided (*Penalties and Sentences Act 1992* (Qld) s3(f)), the imposition of a fine on a homeless person may lead to their imprisonment both under the *State Penalties Enforcement Act 1999* (Qld) and if a default period of imprisonment is set. Also, incarceration is listed in legislation as a sentencing option for many public space offences, so sentencers who lack creativity in sentencing, or do not have a thorough understanding of the issues involved, may sentence a homeless public space offender to prison particularly if they have a lengthy offence history. Further, many of Queensland's alternative sentencing options are not suitable for homeless people. As noted above, people who are homeless are generally not considered 'suitable' to perform community service due to mental illness, drug and alcohol addiction, or their unpredictable and transient lifestyle. Those homeless persons who do receive a non-custodial sanction may still ultimately end up in prison as they are more likely to breach a probation, community service or intensive probation order than members of the community who enjoy secure housing tenure, mental health and a stable income.

Incarcerating people for public space offences is not consistent with the goals of sentencing outlined in ss3 and 9 of the *Penalties and Sentences Act 1992* (Qld). It will never be a 'just' or 'fair' punishment in the circumstances because it is disproportionate to the nature of the offence committed. Public space offences are generally considered to be amongst the least serious of all crimes (Greene 1988; Wilkins 1979), and thus, the most appropriate penalties are those at the lower end of the sentencing tariff. In almost all societies in the world, the deprivation of liberty is considered to be at the highest end of the sentencing tariff, if not the most severe penalty available (Wasik and Von Hirsch 1988: 559). It seems nonsensical that a person who has committed one of the least serious of all crimes should receive the most severe penalty available in our criminal justice system.

Also, a sentence of imprisonment for a public space offence will certainly not assist in rehabilitating the offender. Indeed, it is more likely to have the opposite effect. It is well recognised that prisons may act as 'colleges of crime' (Osterdahl 2002) and that offenders serving only short prison sentences are unlikely to be able to participate in, or benefit from, treatment and rehabilitation programs offered in prison (Petersilia 1995:5; Walsh 2003c). People who are homeless will emerge from prison with even fewer community links, even less financial resources, and even fewer housing options than they had prior to their incarceration, all of which are predictors of re-offending and re-incarceration (Baldry, McDonnell, Maplestone, Peeters 2003; Osterdahl 2002).

Further, as noted above with regard to fines, no punishment can deter people from committing offences out of necessity. Thus, incarceration of petty offenders and fine defaulters will not meet the sentencing goal of deterrence.

The imprisonment of public space offenders amounts to a 'costly and fruitless policy of despair, which achieves nothing more positive than to remove them for a short period of time from the society which they offend against or annoy' (Wilkins 1979: 69). It is extremely cost ineffective, and does not address the causal factors that have contributed to the commission of the offence.

Fines and imprisonment are wholly inappropriate penalties in response to public space offences committed by homeless people.

3.4 Diversion – existing models in Queensland

Despite the legislature and the courts' general adherence to traditional methods of disposition with regard to public space offenders, Queensland is not devoid of innovative alternatives. Queensland boasts three diversionary schemes which accord with, and indeed inform, best practice with regard to minor offending behaviour committed by young people and homeless people. They are the diversion of young people under the *Juvenile Justice Act 1992* (Qld), the diversion of Indigenous public space users under the Brisbane City Council Homelessness Strategy, and the diversion of those affected by volatile substances under the new 'VSM Strategy'. In view of this, it is disappointing that such best practice principles are not applied to adult public space offenders who have breached State law.

3.4.1 The *Juvenile Justice Act 1992* (Qld)

The *Juvenile Justice Act 1992* (Qld) establishes an innovative mechanism for diverting young offenders away from the criminal justice system. A key provision in the Act is s11, which states that before commencing proceedings against a child, a police officer should consider whether in the circumstances it would be more appropriate to:

- take no action;
- issue a caution;
- refer the matter to a conference (ie. an alternative forum for disposition, where the conduct may be dealt in a more informal and restorative way); or
- provide the young person with an opportunity to attend drug treatment.

The court may dismiss a charge brought before it where it is satisfied that alternative action should have been taken by the police officer in the circumstances (s21). This scheme allows for young people to be diverted from the criminal justice system in recognition of the fact that contact with the system will not facilitate positive outcomes in terms of recidivism, reintegration into the community or rehabilitation. Potentially, therefore, it provides a useful model for dealing with indigent persons who have committed public space offences, since often the same considerations apply.

3.4.2 The Brisbane City Council Homelessness Strategy

Another successful diversionary scheme already in existence in Queensland is that applied by Brisbane City Council under its Homelessness Strategy. Brisbane City Council employs an Indigenous Public Space Liaison Office who liaises with public space users, police, park staff and social service providers to minimise coercive interference in the lives of public space users. The Public Space Liaison Officer

explains local laws to public space users in an effort to bring about compliance without criminal charges or penalties being imposed and, where necessary, links indigent individuals with professional services. This represents an innovative approach to the regulation of public space, where disadvantage is recognised and dealt with as a welfare issue rather than a criminal justice issue (see Memmott et al 2003).

3.4.3 'VSM' Strategy

In addition to these existing programs, Queensland's Department of Communities is currently embarking on a new diversionary scheme, the 'Volatile Substance Misuse' Strategy, aimed at allowing for the temporary and non-punitive detention of people affected by volatile substances in public space.

The *Police Powers and Other Responsibilities and Other Legislation Amendment Act 2003* (Qld) introduced new powers for police to deal with people found or suspected of 'chroming' – in particular, it gave police the power to seize 'potentially harmful things' including solvents (new s371A of the *Police Powers and Responsibilities Act 2000* (Qld)), and to remove affected individuals from public space to a 'place of safety' (other than a police station) including their home or a hospital (s371B, C). The Department of Communities has announced an intention to establish and trial facilities offering such 'places of safety' in each major city and regional centre in Queensland. These places of safety will provide persons affected by volatile substances with a comfortable environment where they can be supported in the short term, and given the option of case management and referral to other social services where required (see Department of Communities Queensland 2004). This initiative is welcome, and it provides a model upon which a strategy aimed at homeless public space users might be based.

3.5 Developing a response to the minor offending behaviour of homeless people

Despite its adherence to traditional penalties such as fines and imprisonment, Queensland had some experience with, and has accumulated knowledge regarding, alternative strategies aimed at dealing with disadvantaged public space users and petty offenders. The remainder of this report canvasses the approaches of other jurisdictions both nationally and internationally to the offending behaviour of homeless people. It will be argued that Queensland should build upon its existing knowledge and expertise in diversion and develop a holistic response to trivial offending behaviour of homeless people conducted in public space.

The only strategies for dealing with marginalised people who commit public space offences which will meet Queensland's legislative goals of sentencing are those which address the underlying causes of the offending behaviour. The social causes of the offending behaviour of homeless people, including extreme poverty, lack of secure housing, mental illness, substance addiction and lack of access to education and employment must be acknowledged and addressed in order for the behaviour to cease. The alternative is the current revolving-door syndrome, whereby the same offenders are constantly re-arrested and presented before the courts on charges for

minor, victimless offences which do no more damage than offend the delicate sensibilities of some members of the population. The individual circumstances of an offender must form the basis for their treatment and any penalty imposed if the legislative goals of sentencing in Queensland are to be realised (Benn 2002: 44; Wilkins 1979: 78).

Recommendation 2
That Queensland draw upon its expertise in diversion, demonstrated by the successful diversionary strategies already in place, to develop an alternative response to the offending behaviour of homeless people in public space.

Recommendation 3
That diversion of homeless public space offenders occur at the policing stage – ie. that police officers be instructed to consider taking alternative courses of action rather than simply arresting a public space offender, eg. taking no action, using their move-on powers, phoning a welfare agency and asking them to attend to the person, or taking the person to a welfare agency or safe place. Referral protocols should be developed in partnership with relevant social services.

Recommendation 4
That the power of the court to set default periods of imprisonment in relation to trivial offences be abolished.

4. What can we learn from other jurisdictions in Australia?

4.1 Sentencing and fine enforcement in Australian States and Territories

Each State and Territory in Australia offers different sentencing alternatives and applies different fine enforcement procedures. Much may be learned from examining each of these practices.

4.1.1 Australian Capital Territory

4.1.1.1 Sentencing alternatives for minor offences

Under s341 of the *Crimes Act 1900* (ACT) a sentence may only be imposed upon an offender for the following purposes:

- to punish an offender to an extent and in a way that is just and appropriate in the circumstances;
- deterrence;
- rehabilitation;
- to denounce the behaviour; and/or
- to protect the community from the offender.

A sentence of imprisonment may only be imposed where the court considers that no other available penalty is appropriate considering all the circumstances of the case (s345 *Crimes Act 1900* (ACT)). If a court does impose a sentence of imprisonment, the court must state and record the reasons for its decision that no other sentence is appropriate, however failure by the court to comply with this requirement does not invalidate a sentence (s346). Alternative sentences include:

- *Conditional release without conviction* **–** An offender may be released on a good behaviour bond, or subject to other conditions imposed by the court, where the court is satisfied that the offence was trivial in nature, committed under extenuating circumstances, or where the nature and antecedents of the offender are such that it is inexpedient to inflict any punishment (s402).

- *Conditional release or suspended sentence with conviction* – An offender may be convicted but released and ordered to be of good behaviour or comply with any other condition imposed by the court. Also, the court may order a sentence of imprisonment but release the offender under the condition that he/she be of good behaviour or comply with any other condition imposed by the court (s403).

- *Community service order* – Community service orders are only available as an alternative penalty if the court is satisfied that the person is suitable to perform such work, and that the work is of a suitable nature. The number of community service hours imposed must be a multiple of eight, between 24 and 208, and must cease after 12 months unless it is extended (ss408-419).

- *Periodic detention* – Periodic detention is available as an alternative to full-time incarceration under the *Periodic Detention Act 1995* (ACT).

- *Diversion of intoxicated persons* – Under the *Intoxicated Persons (Care and Protection) Act 1994* (ACT), a person who is intoxicated (by reason of the ingestion of alcohol, solvents or illicit drugs) and behaving in a disorderly manner may be taken by a police officer into custody and detained at a police station if there is no reasonable alternative for their care and protection. The person may be released by a police officer to a 'licensed place' (ie. a 'caring' service), where the carer is to inform the person that they may leave at any time. The person must be released when they cease to become intoxicated or after eight hours, which ever is earlier (see particularly s4).

4.1.1.2 Fine default

Courts may impose their own time limits for fines to be repaid, but this period must not be less than 14 days. Also, the court has a discretion to allow a person who has been fined additional time to pay (s148 *Magistrates Court Act 1930* (ACT)). Section 154A of the *Magistrates Court Act 1930* (ACT) states that a registrar *may* take an offender's means into account when imposing or enforcing a fine, however under s348 of the *Crimes Act 1900* (ACT) a court is compelled to inquire into the financial circumstances of an offender before a fine is imposed. Under s353, a court may impose a fine of a lesser amount than that provided for in legislation.

A person issued with an infringement notice in the ACT is generally given 28 days in which to pay however the issuing authority has the discretion to extend this time limit (s122(1)(d), s123 *Magistrates Court Act 1930* (ACT)). The person may elect to have the matter dealt with in the Magistrates' Court within this 28 day period (s122(1)(b),(e), s132), or may apply to the issuing authority to have the infringement notice withdrawn (s126). If the person fails to pay the fine, a reminder notice will be served on the person; in the notice, the person is reminded of their right to have the matter dealt with in court, the person is given an additional 28 days in which to pay the fine, and the costs of issuing the notice are added to the fine (s122(1)(g),(h), ss129,130).

If a person fails to pay a fine imposed upon them, the Magistrates' Court will issue them with a default notice, and an administration fee will be added to the existing fine amount (ss150, 151). At this time, the person may apply to the registrar for a special payment arrangement, ie. payment of the fine by instalments (s152). If the person remains in default, the registrar will order that their licence and/or vehicle registration be suspended (s153). If the registrar is satisfied that the person does have the means to pay, he/she may issue a garnishee order or an order for seizure and sale of goods (s154B).

Once the registrar is satisfied that all reasonable action has been taken to secure payment of the fine, and that there is no reasonable likelihood of the outstanding fine being paid, the registrar may issue a warrant of commitment (ss154D, 186). The length of the sentence is either six months imprisonment or one day for every $100 owed (ss154D(2), 158). Under s159, 'the executive' has the power to remit the fine at any time.

ACT innovations in brief

- Courts are directed to release a defendant if the offence was trivial in nature, committed under extenuating circumstances, or where it is inexpedient to inflict any punishment on the offender. This is the most appropriate response to minor offending behaviour committed by homeless people in public space and should be replicated in Queensland.
- Drunk and disorderly behaviour has been decriminalised, and intoxicated persons causing a 'disturbance' are to be taken to a safe place while they recover, rather than arrested. This diversionary strategy is consistent with best practice, and should be implemented in Queensland.

4.1.2 New South Wales

4.1.2.1 Sentencing alternatives for minor offences

The purposes of sentencing outlined in s3A of the *Crimes (Criminal Procedure) Act 1999* (NSW) are as follows:

- punishment;
- deterrence;
- protection of the community;
- rehabilitation;
- to make the offender accountable for his/her actions;
- denunciation; and/or
- to recognise the harm done to the victim of the crime and the community.

The court must not impose a sentence of imprisonment unless it has considered all possible alternatives and yet it is satisfied that no penalty other than imprisonment is appropriate (s5(1)). Further, when a court sentences a person to prison for six months or less, it must indicate and make a record of its reasons for doing so, including its reasons for deciding that no other penalty is appropriate and its reasons for not allowing an offender to participate in an intervention program or other program for treatment or rehabilitation (s5(2)).

There is a wide range of penalties available to magistrates and judges in addition to fines and custodial sentences.

- *Absolute and conditional discharges* – Under s10, a person may be discharged unconditionally, or on the condition that they enter into a good behaviour bond

where it is considered inexpedient to inflict any punishment (other than nominal punishment) on the person, or on the condition that they comply with an intervention plan. When making a decision of this nature, the court may have regard to the trivial nature of the offence and/or the circumstances under which the crime was committed.

- *Good behaviour bonds* – Under s9, courts may impose a good behaviour bond instead of imposing a sentence of imprisonment on an offender. Such bonds must not exceed five years' duration.

- *Community Service Orders* – Community services orders are available as an alternative sanction under s8. Under s86(1), a court must not impose a community service order unless the court is satisfied that the offender is a suitable person for community service work, that it is appropriate in all the circumstances that the offender perform community service work, that arrangements to perform community service work exist in the area in which the offender resides, and the offender has signed an undertaking agreeing to comply with the order. In determining whether the offender is a suitable person to perform community service work, the court must take into account an assessment report on the offender and any evidence from a probation and parole officer the court considers necessary (s86(2)). However, the court may decline to make a community work order regardless of the contents of the assessment report (s86(4)). The court may impose additional conditions upon a community service order, including a requirement to attend a personal development, educational or other program, or a drug treatment program; however, attendance at such programs should not exceed 15 hours per week (s90).

- *Non-association and place restriction orders* – A non-association or place restriction order may be imposed in relation to any offence that is punishable by imprisonment for six months or more (s17A).

- *Intervention program orders* – Where a court finds a person guilty of an offence, it may adjourn proceedings to allow the defendant to participate in an intervention program (s11(1)(b2)). Intervention programs are programs whose purpose is to promote the treatment or rehabilitation of offenders; promote respect for the law and the maintenance of a just and safe community; encourage and facilitate the provision by offenders of appropriate forms of remedial actions to victims and the community; promote the acceptance by offenders of accountability and responsibility for their behaviour; or promote the reintegration of offenders into the community (see *Criminal Procedure Act 1986* (NSW) s347). An intervention program order may not be made unless the court is satisfied that an offender is eligible to participate in the program (according to the terms of the program), the offender is a suitable person to participate in the program, and the program is available in the area in which the offender resides (s100N).

- *Periodic detention and home detention* – In addition, periodic detention and home detention are available as custodial alternatives to full-time imprisonment (ss6-7, 65-67, 76-79, 102-106)

- *Diversion of intoxicated persons* – Under the *Intoxicated Persons Act 1979* (NSW), an intoxicated person who is behaving in a disorderly manner may be detained by a police officer (in a police station or detention centre, but separate from those who are being detained for the commission of an offence) or, if possible, released into the care of a responsible person. The person must be released by police once they cease to become intoxicated, and a responsible person may not detain an intoxicated person against their will.

4.1.2.2 Fine default

In NSW, fines issued by either the court or via a penalty notice are collected and enforced by the State Debt Recovery Office (SDRO).

Persons issued with a penalty notice must elect either to pay the fine within the time specified, or to have the matter dealt with in court (s35 *Fines Act 1996* (NSW)). If a person is unable to pay the fine, they may apply to pay the fine by instalments and for an extension of time in which to pay (s100(3)). If they fail to pay within 21 days of the service of the penalty notice, a penalty reminder notice may be sent to the person by the issuing authority. If the fine still remains unpaid, the SDRO may issue an enforcement order against the person (Part 3 Division 4 of the *Fines Act 1996* (NSW)).

A person who is ordered by the court to pay a fine is generally given 28 days in which to pay, although the court may order payment sooner. In fixing the fine amount, the court must take the offender's means to pay into account (s6). A person who is unable to pay the fine upfront may apply to the registrar of the court for an extension of time, or for permission to pay the fine in instalments (s10). If the fine remains unpaid, an enforcement order will be issued by the SDRO.

When the SDRO issues an enforcement order on a person, a $50 'enforcement order cost' is added to the fine, and the person is provided with another 28 days to pay. A person may apply to have this additional $50 fee waived on the grounds that they did not know they had been issued with a fine; circumstances beyond their control (such as accident or illness) prevented them from paying the fine; or in the circumstances of the case there is some other good reason why fee should be waived (s49).

In the event that the person fails to pay within this period of time, their driver's license may be revoked and/or their vehicle registration cancelled, or if the person does not have a driver's license or a registered vehicle, a property seizure order (PSO) may be issued. Under a PSO, a sheriff is empowered to take and sell goods owned by the person to the value of the fine. In addition, or in the alternative, a garnishee order can be issued whereby the fine is withdrawn from the person's pay check or bank account. A further $50 is added to the fine amount for each of these actions taken and the person may be ordered to pay the sheriff's costs (see Part 4 of the *Fines Act 1996* (NSW)).

If the fine is still not recovered, a community service order may be issued; $15 is deducted from the fine for each hour of work (see ss78-86 of the *Fines Act 1996* (NSW)). A community service order may not be issued if the SDRO is satisfied that the person is not capable of performing work under the order, or is otherwise not

suitable to be engaged in such work (s79(3)). Non-compliance with a community service order may result in imprisonment (s87). A period of imprisonment for fine default is not to exceed three months, and $120 will be deducted from the fine for every day in prison (s90).

It is recognised that a person who is homeless may not be considered capable of completing, or suitable for, a community service order, due to mental illness, drug or alcohol addiction or other disabilities faced by them. In such cases as these, the SDRO has the power to write-off the unpaid amount (s101(2)). The Governor also has the power to cancel fines under s123. If this occurs, no further enforcement action will be taken in relation to the fine.

NSW innovations in brief

- Courts imposing custodial sentences of six months or less must provide reasons for why they did not impose an alternative sanction. If the Queensland government takes its commitments under the *Aboriginal and Torres Strait Islander Justice Agreement* seriously, it should consider introducing a like requirement in Queensland.
- A person should be discharged by a court where the offence is trivial in nature. This is the most appropriate response to minor offending behaviour committed by homeless people in public space and should be replicated in Queensland.
- A sentencing alternative available to NSW courts is the intervention program order, which enables the court to sentence a defendant to mandatory participation in approved programs to ensure they receive the treatment or assistance they require. This is an innovative sentencing alternative, and in the event that Queensland continues to exclude attendance at programs from the definition of community service (under a community service order), it should consider establishing a like sentencing alternative.
- Drunk and disorderly behaviour has been decriminalised, and instead, intoxicated persons must be taken to a place of safety while they recover. This diversionary strategy is consistent with best practice and should be implemented in Queensland.
- The SDRO has the power to cancel fines and waive administration fees in the event that a person is incapable of paying. This is the most appropriate way of dealing with people who are unable rather than unwilling to pay a fine, and SPER should have the same powers.

4.1.3 Northern Territory

4.1.3.1 Sentencing alternatives for minor offences

The only purposes for which an offender may be sentenced in the Northern Territory are outlined in s5 of the *Sentencing Act* (NT):

- punishment;
- rehabilitation;

- to discourage the offender and others from committing the same or a similar offence;
- to make it clear that the community does not approve of the conduct;
- to protect the community; or
- a combination of the above offences.

Very few alternative sanctions have been introduced in the Northern Territory. Other than imprisonment or the imposition of a fine, sentencing alternatives include:

- *Unconditional discharge* – If a person is found guilty of an offence, they may be discharged without punishment by the court with or without a conviction (ss10, 12).

- *Release on bond* – A person is may be released on a good behaviour bond and may be required to comply with any condition imposed by the court with or without a conviction being recorded (ss11, 13).

- *Community work order* **–** The stated purpose of a community work order is to ensure that a person who commits an offence makes amends to the community for the wrong by performing work that is for the benefit of the community (s33A). The court is not empowered to make a community work order unless it has been notified that arrangements have been made for the offender to participate in an approved project, and the offender is a suitable person to perform the work under the order (s35).

- *Suspended sentence* **–** The court may impose a suspended sentence if the sentence does not exceed five years (s40).

- *Home detention* – A home detention order not exceeding 12 months may include such terms and conditions as the court sees fit (s44).

4.1.3.2 Fine default

When imposing a fine, the court must take into account the financial circumstances of the offender and the nature and burden it will impose on the offender, however a court is not prevented from imposing a fine on an offender simply because such information was not available to it (*Sentencing Act* (NT) s17). Where a person is found guilty of two or more offences which are founded on the same facts or make up a series of offences, the court may impose one fine in respect of all the offences (s18). The fine must be paid within 28 days (s19), and a court may order that if the fine is not paid within that period of time, the offender should be imprisoned (s26(2)). If the court does not make such an order, the fine will be enforced by the Fines Recovery Unit (FRU) under the *Fines and Penalties (Recovery) Act 2001* (NT).

Penalties imposed via an infringement notice are also enforceable by the FRU, however an interim step must be completed. A 'courtesy letter' must be sent to a person who has not paid a penalty under an infringement notice within the specified time period, reminding them of their entitlement to elect for the matter to be dealt with by a court, giving them an additional 28 days to pay the fine plus enforcement costs (which may be no more than $20; *Fines and Penalties (Recovery) Regulations*

s5, hereafter 'the Regulations') and warning them of action which may be taken in the event of non-payment (ss15-16).

Once an unpaid fine is referred to the FRU, the person may apply for additional time in which to pay the fine, or to pay the fine by instalments (ss25, 26). The minimum weekly repayment is proportionate to the total fine amount: the less the total fine, the less the minimum weekly repayment, eg. a fine of between $101 and $180 may be paid at a rate of $12 per week, while a fine of $1000 must be paid at a minimum rate of $24 per week (see Schedule 2 of the Regulations). If no such application is made, or if a person defaults on their periodic payments, the FRU may issue an enforcement order, at which time enforcement costs (amounting to a maximum of $50; Regulations Schedule 3) are added to the fine (s38). A person subject to an enforcement order may apply for the order to be annulled on the basis that they were hindered by accident, illness or misadventure from taking action in relation to the infringement notice, or that in the circumstances of the case there is just cause why the application should be granted (s44). If such an application is granted, the matter is then referred to the Court of Summary Jurisdiction (s48).

If a further 28 days passes and the person has still not paid the fine, enforcement action may be taken (s56). Enforcement options include suspension of license or vehicle registration (ss59-61), property seizure (ss70), or the garnishing of wages (s72). If the Director of the FRU is satisfied that enforcement action under these sections will not be effective in satisfying the order, a community work order may be issued (s77). A community work order will require the person to perform a certain number of hours' unpaid community work, and the fine will be discharged at a rate of $12.50 per hour (Regulations s14). However, the order must be revoked if the Director of Correctional Services forms the view that the person is not suitable to be engaged in such work (s84). Imprisonment is available as a penalty of last resort; a person may be imprisoned for fine default at a rate of one day per $100 outstanding (s88).

Notably, the FRU has broad powers of discretion in cancelling fines and warrants. The FRU may cancel a warrant of commitment on application of the fine defaulter or on their own initiative (s93). Also, unpaid fines may be written off by the FRU (s96).

NT innovations in brief

- Weekly fine payments are tailored to the total fine amount, so that the lower the fine, the less the weekly repayments. If this were applied to fines in Queensland, it might increase the capacity of a marginalised person to pay a fine for a minor offence committed in public space.
- The FRU has the power to cancel fines and warrants of commitment where the person has failed to pay the fine as a result of incapacity rather than unwillingness. SPER should also have this power.

4.1.4 South Australia

4.1.4.1 Sentencing alternatives for minor offences

Under s10 of the *Criminal Law (Sentencing) Act 1988* (SA), the court is instructed to have regard to the following purposes of sentencing when determining an offender's sentence:

- the need to protect the community;
- deterrence;
- punishment;
- rehabilitation; and/or
- the need to protect the security of lawful occupants of the home from intruders (this is the 'primary policy of the criminal law').

A defendant is not to be imprisoned unless he/she has shown a tendency towards violence to persons; is likely to commit a serious offence if allowed to go at large; has previously been convicted of an offence punishable by imprisonment; any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or a sentence of imprisonment is necessary to give proper effect to the 'primary policy' (s11(1)). Section 16 provides that where the court finds a person guilty of an offence, but the defendant is unlikely to commit such an offence again, and having regard to the characteristics of the defendant and the fact that the offence was trifling, a conviction should not be recorded.

Sentencing alternatives available to judges and magistrates in addition to fines and imprisonment include:

- *Discharge* – A court may discharge a defendant it has found guilty with or without a conviction where the offence is so trifling that it is inappropriate to inflict any penalty, despite any minimum penalty stated in an Act (s15).

- *Bonds* **–** Under Part 5 of the Act, a court may discharge a defendant with or without recording a conviction on the condition that they enter into a bond to be of good behaviour and to comply with any conditions included in the bond (s39).

- *Community service* **–** Under Part 6 of the Act, community service is available as an alternative sanction. Section 47 states that no less than 16 hours and no more than 320 hours of community service may be imposed, over a period of up to 18 months. Defendants cannot be required to perform community service for a continuous period of more than eight hours, nor to perform community service for more than four continuous hours without a one hour meal break. A person may not be required to perform community service at a time when they are required to:
    - perform renumerated work;
    - attend a course of training likely to assist them in obtaining work;
    - care for dependents; or
    - practice a rule of religion.

  Also, attendance at any approved education or recreational course will be taken to be performance of community service.

4.1.4.2 Fine default

In South Australia, expiation notices are often issued in relation to petty criminal offences. Under s6(ha) of the *Expiation of Offences Act 1996* (SA), expiation notices should not be issued in relation to 'trifling offences'.

A person has 28 days in which to pay a fine issued under an expiation notice. If a person is unable to pay on the basis of potential hardship to themselves or their dependents, he/she may apply to a registrar to pay the fine in instalments (the minimum amount of each instalment being $50) or to be given an extension of time (of no more than six months) in which to pay (s9). Also, the person may apply to the issuing authority for a review of the notice on the grounds that the offence for which it was imposed is 'trifling' (s8A). If the issuing authority is satisfied that the offence is trifling, the notice must be withdrawn (s8A(5)).

If the fine remains outstanding, the expiation notice may be lodged with the Magistrates' Court for enforcement, and an 'expiation fee' will be added to the existing fine. A notice of enforcement of order is then sent to the person, and he/she is given an additional 28 days in which to pay (s5-6) or 30 days in which to apply to the court for a review of the decision (s14). If the fine remains unpaid, a reminder notice will be sent to the person, an additional fee of $13.40 will be imposed, and the person will be given a further 14 days in which to pay or to make arrangements for payment with the Fines Payment Unit (FPU) (s11). If the person fails to do this, he/she will be summonsed to appear before the FPU. His/her drivers' license may be suspended (s70E of the *Criminal Law (Sentencing) Act 1988*), his/her wages may be garnished (s70H) and his/her land and personal property may be seized and sold to satisfy the debt (s70G). If the FPU is satisfied that the person does not have the means to pay, the person may be referred to the court for alternative sentencing.

Notably, under s66 of the *Criminal Law (Sentencing) Act 1988* (SA), an authorised officer (which includes officers of the FPU; s3) may investigate an offender's means to pay a fine. If a registrar is satisfied that the person does not have sufficient means to pay, the matter may be remitted to the court for reconsideration. The court may remit the fine, revoke the order imposing the fine, make an order for community service, or confirm the original order (s70I the *Criminal Law (Sentencing) Act 1988* (SA)).

SA innovations in brief

- A conviction should not ordinarily be recorded where the offence is trifling in nature. This should apply in Queensland to prevent public space offenders who have not threatened the safety or security of members of the public from receiving a conviction.
- A court should ordinarily discharge a defendant where the offence is so trifling in nature that it is inappropriate to inflict any penalty. This, also, should apply in Queensland, as it would prevent many public space offenders from receiving unrealistic fines and unjust custodial sentences.
- Attendance at approved programs is considered 'community service' for the purposes of a community service order. This should be replicated in

Queensland as it is consistent with the therapeutic jurisprudence movement, and would enable marginalised offenders to receive the treatment and assistance they require to prevent future re-offending.

- If the FPU is satisfied that a person does not have the means to pay a fine imposed on them, it can refer the matter back to the sentencing court for determination. A like system in Queensland would be an improvement on the current system, whereby those who have received a fine are unable to access a discretionary decision-maker to have this reconsidered.

4.1.5 Tasmania

4.1.5.1 Sentencing alternatives for minor offences

Section 3 of the *Sentencing Act 1997* (Tas) states that the purposes of the Act include:

- promoting the protection of the community (as the primary consideration);
- crime prevention and the promotion of respect for the law;
- deterrence;
- rehabilitation;
- denunciation; and
- recognising the interests of victims of offences.

In Tasmania, the court has the power to order a number of alternative sentences, including:

- *Community service orders* – An offender subject to a community service order must comply with the following conditions while the order is in force; he/she must (s28):
    - not commit an offence punishable by imprisonment;
    - report within one working day to a probation officer;
    - satisfactorily perform community service;
    - comply with reasonable directions of a probation officer or supervisor;
    - notify a probation officer of any change of address or employment within two working days;
    - not leave Tasmania without permission; and
    - attend educational or other programs as directed; such programs are taken to be performance of community service under the order (s32).

  The maximum number of hours' community service which may be imposed on an offender at any one time is 240 hours (s31).

- *Assessment and continuing care orders* – If the court is of the opinion that a person is suffering from a mental illness for which treatment is available in an institution, it can make an order requiring that person to be assessed as to their suitability to be detained in an institution (ss72, 73). If a person is found to be suffering from mental illness, the court may impose a continuing care order as an alternative sentence, which will result in them being detained in a psychiatric hospital (s76).

- *Probation orders* **–** An offender sentenced to probation must comply with the following conditions for the duration of the order; he/she must (s37):
    - not commit an offence punishable by imprisonment;
    - report to a probation order within one working day;
    - submit to the supervision of a probation officer;
    - report to a probation officer as required by that officer;
    - not leave Tasmania without permission;
    - comply with lawful directions given by an officer; and
    - notify a probation officer of change of address or employment within two working days.

  A probation order may also require an offender to:
    - undergo assessment and treatment for alcohol or drug addiction;
    - submit to testing for alcohol or drug use;
    - submit to medical, psychological or psychiatric assessment or treatment; or
    - any other special conditions the court thinks fit.

  A probation order must not be made for a period exceeding three years (s39).

- *Diversion of intoxicated persons* – Under ss4A and 4B the *Police Offences Act 1935* (Tas), if a person is intoxicated and behaving in a disorderly manner, a police officer may take the person into custody and either release them into the care of a responsible person, or, if this is not possible, hold that person in custody for no more than eight hours. The person is not to be questioned by a police officer, nor are their fingerprints to be taken.

4.1.5.2 Fine default

In Tasmania, fines are enforced through the court system. Once a fine has been imposed, the offender has 21 days in which to pay the fine, or apply to the court for more time to pay, or to pay the fine in instalments (ss44, 46 *Sentencing Act 1997* (Tas)); otherwise, enforcement proceedings will commence. A warrant of apprehension will be issued by a clerk of petty sessions and the costs of issuing the warrant will be added to the fine (s47).

Once the person is brought before a magistrate, the magistrate has the discretion to vary the order. The magistrate may substitute the order for a community service order, a suspended sentence or a sentence of imprisonment, or the court may order that the fine be enforced by civil proceedings (s47). Under s58, the court may dismiss the claim in order that rehabilitation may be provided; to take account of the trivial or minor nature of the offence; to allow for circumstances in which it may be inappropriate to inflict any punishment on the defendant; or to allow for exceptional circumstances that may justify the court showing mercy to the defendant. This provision provides some hope that indigent people who are fined for public space offences may be able to persuade the court to show them ‘mercy’ on the basis of their inability to pay the fine, or the trivial nature of the offence.

Tasmanian innovations in brief:

- Attendance at approved educational and personal development programs are included within the definition of 'community service work' for the purpose of a community service order. This should be introduced in Queensland as it would make this sentencing option a more realistic alternative for homeless and other marginalised minor offenders.
- Drunk and disorderly behaviour has been criminalised, and instead, an intoxicated person causing a disturbance is to be taken to a place of safety to recover. This approach represents best practice, and should be implemented in Queensland.
- Fine enforcement is dealt with by the courts rather than an administrative agency. A claim against a person who is unable to pay a fine may be dismissed by the court so that rehabilitation may be provided and to take account of the trivial nature of the offence. This is a more appropriate way of dealing with fines associated with trivial offending behaviour, and may be considered a viable alternative for Queensland.

4.1.6 Victoria

4.1.6.1 Sentencing alternatives for petty offences

Under s5(3) of the *Sentencing Act 1991* (Vic), courts in Victoria are instructed not to impose a sentence that is more severe than that which is necessary to achieve the purposes for which the sentence is imposed. For example, a court must not impose a sentence that involves confinement of the offender unless it considers that the purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve confinement (s5(4)). Section 5(1) states that the only purposes for which sentences may be imposed are:

- punishment;
- deterrence;
- rehabilitation;
- denunciation of the type of conduct in which the offender engaged;
- protection of the community; or
- a combination of two or more of the above purposes.

An extremely wide range of sentencing alternatives are available to magistrates and judges other than fines and custodial sentences:

- *Adjournment with or without condition* – An offender may be released on 'adjournment' with or without a conviction, and may be required to be of good behaviour and/or comply with any special conditions imposed by the court (ss72, 75). The offender may be called upon to come before the court again at a later date, but at that time if the court is satisfied that the offender has complied with the conditions imposed, it must dismiss the charge (ss72, 75).

- *Unconditional discharge* – A court may dismiss someone convicted of an offence unconditionally (s73).

- *Intensive Correction Orders* – This sentencing alternative is available to a judge considering imposing a sentence of imprisonment on an offender (s19). The order involves a high level of supervision by correctional staff, who visit the offender at least twice per week. Offenders are also required to undertake unpaid community service work and attend counselling, psychiatric treatment, or drug and alcohol treatment (s20). During the course of the order, the offender must not leave the State without permission.

- *Drug Treatment Order* – This order is only available through the Drug Court (s18Y). It requires an offender to participate in a judicially-supervised, therapeutically-oriented drug or alcohol treatment and supervision regime, aimed at bringing about their rehabilitation and diverting them from custody (s18X). A sentence of imprisonment must be imposed for a drug treatment order to be made (s18ZD), however the custodial part of the order will only be activated if the defendant breaches the drug treatment order (ss18ZL(1)(f), 18ZM).

- *Community-based order* **–** The court may impose a 'community-based order' on an offender where the offender has been found guilty of an offence punishable by imprisonment or a fine of more than five penalty units (ie. $100; s110). A pre-sentence report must be completed in relation to the offender, and the offender must agree to comply with the order (s36). A community-based order must not exceed two years' duration (s36(3)). It must contain all of the following core conditions; that the offender (s37):
    - not commit another offence punishable by imprisonment;
    - report to a specified community corrections centre within two working days of the order coming into force;
    - report to and receives visits from a community corrections officer;
    - notify an officer of any change of address or employment within two working days;
    - not leave Victoria; and
    - obey all lawful instructions and directions of community corrections officers.

  The order must also contain at least one of the following program conditions; that the offender (s38):
    - perform unpaid community service work, of no more than 20 hours per seven day period;
    - be under the supervision of a community corrections officer;
    - attend an educational or other program of between one month and 12 months' duration;
    - undergo assessment and treatment for alcohol or drug addiction, or a medical, psychological or psychiatric condition;
    - submit to drug or alcohol testing;
    - participate in a justice plan, where services are recommended that would reduce the likelihood of re-offending, eg. a specialist vocational program might be recommended for a person with intellectual disability; or
    - comply with any other condition the court considers necessary or desirable.

- *Home detention* – Home detention is available as a sentencing alternative under s18ZT.

- *Suspended sentence* – Suspended sentences are available as a sentencing alternative under s27.

- *Criminal Justice Diversion Program* – The Magistrates' Court in Victoria has established the Criminal Justice Diversion Program (under s128A of the *Magistrates Court Act 1989* (Vic)) which is aimed at diverting low level offenders from the criminal justice system, ordering instead that certain restitutive and rehabilitative tasks be undertaken. Such tasks may include making restitution, writing a letter of apology, attending programs and services within the community which provide counselling and/or treatment, and undertaking voluntary work in the local community. Defendants must be considered suitable for this alternative by the prosecuting authority, and they must admit the facts of the case as presented to the court. The diversion plan is developed by the magistrate and charges are adjourned until the plan has been completed (Magistrates Court Victoria 2004: 5-7).

Victoria also has a number of specialist programs in place to ensure that the special needs of certain groups of offenders are met. It has established a number of court support services including (see in particular Magistrates' Court Victoria 2004):

- Aboriginal Liaison Officer – The role of this position is to provide advice and assistance to the court on matters such as cultural and cross-cultural issues; services that are available to Indigenous offenders and their families; and appropriate courses of action in response to Indigenous offending behaviour.
- Court Services Unit – Based at Melbourne Magistrates' Court, this unit provides advice to magistrates on appropriate programs which are available and suitable to individual offenders. It then liaises with community corrections to monitor the offender's progress.
- Disability Coordinator – The role of this position is to ensure that all relevant information in relation to persons with a disability is before the court including their background, treatment options, available programs and services and existing support networks.

4.1.6.2 Fine default

Fines in Victoria are enforced under the PERIN (Penalty Enforcement by Registration of Infringement Notice) system. The PERIN Court is a division of the Magistrates' Court which deals exclusively with the enforcement of fines.

Fines may be issued via infringement notices or by the court. If a fine is imposed by a court, the court must consider the financial circumstances of the offender and the nature of the burden that payment will cause when determining the amount and method of payment of the fine (s50 *Sentencing Act 1991* (Vic)). The court may order that the fine be paid in instalments or that the offender be given an extended time in which to pay (ss53 and 54). If an infringement notice is issued to a person, they have 28 days in which to pay the fine. Alternatively, they can attempt to negotiate a waiver

of the fine with the issuing authority or they can elect to have the matter dealt with by a magistrate (*Magistrates Court Act 1989* (Vic) Schedule 7, cl 3(6)). If the person fails to pay, a courtesy letter is sent to them and they are given an additional 28 days in which to pay. If the amount still remains unpaid, the matter is referred to the PERIN Court for enforcement.

The PERIN Court will issue the person with a notice of enforcement order, adding costs to the existing fine. The person is then provided with a further 28 days in which to pay the fine (cl6). The person may at this point apply to the registrar for additional time to pay or permission to pay in instalments (cl7), or to elect to have the matter dealt with in the Magistrates' Court. Also, under cl10, the registrar may revoke an enforcement order if he/she is satisfied that there are sufficient grounds for revocation. The matter is then remitted to the issuing authority for their reconsideration. If the issuing authority does not withdraw the matter, it is referred to the Magistrates' Court for determination.

The registrar may at any time refer the matter to court if they are satisfied that 'special circumstances' contributed to the person's commission of the offence (cl10A). A separate court list has been created for such matters, called the 'special circumstances list'. If a defendant is identified as having 'special circumstances' (that is mental illness, intellectual disability, acquired brain injury, physical disability or drug/alcohol addiction), medical and other supporting evidence is forwarded to the Enforcement Review Program (ERP). The ERP prepares a file in relation to the defendant and forwards this to the PERIN registrar for determination. The most likely outcome of a case referred to the special circumstances list is an unconditional dismissal, or an adjournment with or without conditions (Condon and Marinakis 2003).

If no such action is taken, a warrant will be issued by the PERIN Court (which attracts an additional fee) and the sheriff will attend the person's home requesting payment (cl8). If the person is unable to pay, they will be issued with a notice to pay which provides then with an additional seven days to pay. Once this period of time has lapsed, the sheriff may seize and sell the person's property. If the person does not have sufficient property to discharge the fine, the person may be arrested under a PERIN warrant.

An assessment will then take place to determine their eligibility for a Custodial Community Permit (CCP), that is, an order to perform unpaid community service work. Offenders who do not qualify for a CCP appear before a magistrate. The magistrate may discharge the fine, adjourn the matter for a maximum of six months if the person committed the offence or failed to pay the fine due to a mental impairment or condition (cl23), impose a community based order, or impose a sentence of imprisonment (with every day in prison discharging $100 of the fine) (cl24).

The PERIN Court may revoke an order, or refer a matter to court (cl10, 10A), and it may decide not to include additional fees in the fine amount (cl7(3A)). This discretion has the potential to prevent extreme hardship from being caused to people who are indigent.

Victorian innovations in brief:

- The court may impose a community-based order as an alternative sentencing option, which may require a defendant to attend educational or other programs, undergo assessment or treatment for drug or alcohol addiction, or receive medical, psychological or psychiatric treatment. This is an appropriate sentencing alternative for homeless and other marginalised people who have engaged in trivial offending behaviour and the introduction of such an alternative should be considered in Queensland.
- Low level offenders may be diverted from the criminal justice system under the Criminal Justice Diversion Program and undertake restitutive or rehabilitative tasks instead. A like program should be developed in Queensland to ensure that homeless and otherwise marginalised offenders are dealt with appropriately in relation to trivial offending behaviour committed in public space.
- The registrar of PERIN may refer a matter to the court if they are satisfied that special circumstances contributed to a person's commission of an offence and/or inability to pay a fine. A separate court list has been created to deal with these matters and the most likely outcome is an adjournment or dismissal of the defendant. A similar system could be established in Queensland to deal with trivial offences committed by marginalised public space users who are unable to pay fines for such offences.
- The PERIN Court has the discretion to revoke any order and to refer any matter to a magistrate. Having access to a discretionary decision-maker is extremely important in relation to fine default, and the fact that this does not occur in Queensland should be remedied.

4.1.7 Western Australia

4.1.7.1 Sentencing alternatives for minor offences

In WA the court may only order a sentence of imprisonment where the offence is serious enough to warrant imprisonment, or the protection of the community requires it (s6(4) *Sentencing Act 1995* (WA)), and sentences of imprisonment of six months' duration or less must not be imposed (s86). Also, the sentence must be commensurate with the seriousness of the offence (s6(1)).

WA has introduced a wide range of alternative sentences, and the Act is very clear on which sanctions are available as substitutes for each statutory offence. For example, where the prescribed statutory penalty is imprisonment only, or imprisonment and/or a fine, the court may release, fine, or imprison the defendant, or it may impose a conditional release order, a community based order or an intensive supervision order on the defendant (ss41, 42, 43). Where the statutory penalty for the offence is a fine only, the court may only impose a fine or a conditional release order, or release the offender absolutely (s44). Each of the alternative sanctions is described in greater detail below:

- *Conditional release order* **–** A conditional release order may be imposed upon an offender where there are reasonable grounds for expecting that the offender will not re-offend during the term of the order, and the offender does not need to be supervised during the term of the order (s47).

- *Community-based order* **–** A community-based order must impose at least one of the following requirements (see s64):
  - a supervision requirement;
  - a program requirement; and/or
  - a community service requirement – Under this requirement, offenders are required to complete between 40 and 120 hours of unpaid community service for each offence, however an offender cannot be required to complete more than 12 hours' community service work per seven day period (s67).

  A community-based order must extend for between 6 and 24 months.

- *Intensive supervision order* **–** An offender sentenced to an intensive supervision order must comply with a supervision requirement (s71) and any of the primary requirements outlined in s72 that the court imposes – they are:
  - a program requirement;
  - a community service requirement; and
  - a curfew requirement.

- *Suspended sentence* **–** A sentence may also be suspended under Part 11 of the Act.

4.1.7.2 Fine default

In Western Australia, fines issued by the court and via infringement notices must be paid within 28 days. When issuing a fine, the court must consider the means of the offender and the extent to which payment of the fine will burden them (s53 *Sentencing Act 1995* (WA)). If the offender does not have the means to pay within the prescribed period of time, the court must make an order extending their time in which to pay (s33 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA)).

A final demand must be issued by the prosecuting authority which notifies the person that they must pay the fine within 28 days and informs them of their right to elect to have the matter dealt with in court (s14). If the fine has not been paid and no such election takes place, the fine may be registered with the Fine Enforcement Registry (s42). The registrar must then issue an 'order to pay or elect' which gives the person an additional 28 days to pay or to elect to go to court, and at this point, additional fees will be added to the original fine (ss17, 21).

If there is no response within 28 days, the registrar will issue a notice of intention to suspend driver's licence and will provide the person with a further 28 days in which to pay (s42). If the fine is still not paid, the person's licence will be suspended. If the person does not have a drivers' licence, or the licence has already been suspended, a warrant of execution will be issued for the seizure and sale of goods (s45 and Part 7). Under s75, family photographs, personal items, necessary items of clothing, necessary household items, tools of trade and reference books may not be seized.

If the offender has no property which may be sold to discharge the fine and the fine remains unpaid, the court will issue a Work and Development Order (WDO), akin to a community service order (s47). For every six hours of community work completed, $150 will be deducted from the fine amount (s57A). However, a person may not be issued with a WDO unless he/she is mentally and physically capable of performing the work (s57A of the *Sentencing Act 1995* (WA)). This requirement has the effect of excluding many homeless people from this alternative sentencing option.

The only other alternative sentence available is imprisonment. However, the prosecuting authority may withdraw the claim at any time (s22 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA)), and the registrar may amend a time to pay order and cancel a warrant at any time 'for good reason' (ss27B, 45(5)). Also, the court may elect to discharge the offender at any time (s39(2)).

WA innovations in brief:

- Sentences of imprisonment of six months or less have been abolished. This should be considered by the Queensland government to demonstrate their commitment to the *Aboriginal and Torres Strait Islander Justice Agreement.*
- One sentencing option available to the court is a community-based order which enables the court to order a defendant to participate in approved programs. Queensland is in need of a sentencing option of this nature, as it represents an appropriate and just way of dealing with minor offending behaviour committed by marginalised people.
- Fine defaulters may be dealt with by the court, and the court may cancel any order or warrant and discharge the offender for good reason. Fine defaulters in Queensland should also have access to a discretionary decision-maker.

4.2 What can we learn from these jurisdictions?

This analysis of the practices of other States and Territories in Australia provides some suggestions for reform in relation to the policing and sentencing of public space offenders, and the enforcement of fines against them.

4.2.1 Policing and sentencing

4.2.1.1 Diversion at the policing stage

The most appropriate method of dealing with the minor offending behaviour of homeless people is diversion. Since marginalised people are unlikely to be able to repay a fine imposed on them for public space offences, and since many will have difficulty appearing in court on the appropriate date and at the appropriate time, issuing infringement notices and notices to appear and subsequently fining homeless offenders seems highly inappropriate.

Instead, a diversionary scheme should be established, based on the model adopted by NSW, ACT and Tasmania in relation to public drunkenness. Under this model, police

officers could be instructed to take a homeless person to a safe place, such as a welfare agency or emergency accommodation facility, rather than arresting them, or issuing them with a notice to appear or an infringement notice. To an extent, this would amount to a formalisation of current policy – the Police Operations and Procedures Manual states that a police officer should consider taking a 'vagrant' to a hostel or other social service rather than charging them with vagrancy (Queensland Police Service 2000, para 2.5.9). See **Recommendation 3** above.

Alternatively diversion could take place at the sentencing stage.

4.2.1.2 Diversion at the sentencing stage

Although some other jurisdictions throughout Australia have a wider array of possible sentencing alternatives, Queensland legislation does include a number of provisions which enable an appropriate penalty to be imposed upon a minor offender for whom a fine would be inappropriate. The clearest example of this is s19 of the *Penalties and Sentences Act 1992* (Qld) which allows for the conditional release of a person subject to certain conditions imposed by the court. In addition, under s93(1)(d), a person subject to a probation order may be required to attend counselling or other programs aimed at addressing their offending behaviour. These sections create important avenues for the diversion of minor offenders away from the criminal justice system, and they allow the court to address offending behaviour by prescribing treatment and/or referring the offender to welfare and other social services. As noted above, the problem is that these sections are underutilised amongst magistrates in Queensland.

Perhaps what is required is a more formal recognition in legislation of the appropriateness of diverting defendants charged with minor offences where they pose no threat to the safety and security of community members. For example, in NSW, ACT and SA, sentencing legislation contains a provision to the effect that if an offence is trivial in nature, and/or it is considered inexpedient to inflict any punishment under the circumstances, the defendant should be released without conviction, either unconditionally or subject to such conditions as the court sees fit. A like provision in Queensland might encourage magistrates to divert public space offenders away from the criminal justice system.

In Victoria, a more substantial and coordinated response has been adopted to ensure that offenders from marginalised groups are diverted from the criminal justice system where appropriate. A number of different programs have been established within the Magistrates' Court to address the needs of offender groups that are disadvantaged, in recognition of the fact that the social conditions under which they live contributes to their offending behaviour. The Victorian approach has been influenced and informed by the therapeutic jurisprudence movement (Popovic 2004), which acknowledges that the law may have beneficial or detrimental effects upon individuals. It recognises that an opportunity for therapeutic intervention exists at the court stage to deal with life and personal circumstances influencing offending behaviour (see particularly Hora et al 1999). The Criminal Justice Diversion Program and the numerous specialist court support officers in Victoria (ie. the Aboriginal Liaison Officer, the Court Services Unit and Disability Coordinator) combine to create a therapeutic court system which aims to address the causes underlying offending behaviour.

The success of the Victorian court support programs introduced in the late 1990s has been demonstrated statistically (Department of Justice, Victoria 2002):

- Between 1996/7 and 2001/02 the proportion of clients who received a fine in Victorian Magistrates' Courts fell from 63% to 58%.
- Between 1996/97 and 2001/02 the proportion of clients who were discharged or dismissed increased from 13% to 16%.
- Between 1996/97 and 2001/02 the number of public order offenders sentenced by the Magistrates' Courts in Victoria fell by 40% and the number of property damage offenders sentenced fell by 14%.

The Victorian experience suggests that the presence of a range of specialist advisors on social, psychological, cultural and welfare issues at Magistrates Courts, and the utilisation of them by magistrates in devising sentence plans, may result in higher rates of diversion and more creative, appropriate sentences which address the circumstances underlying offending behaviour, and prevent further offending.

4.2.1.3 Incorporating a therapeutic approach through community service

One glaring deficiency in Queensland's sentencing provisions relates to community service orders. In Queensland, attendance at counselling, psychiatric treatment, drug treatment, life skills training and other rehabilitative programs cannot be credited as community service under a community service order. Queensland community service orders differ from those in a number of other Australian jurisdictions in this respect (including Victoria, South Australia and Tasmania), and the result is that homeless people are often judged to be unsuitable for such an order. By crediting attendance at an approved development or educational program to an offender as community service, community service orders would become a more appropriate penalty for people who are homeless who have committed minor offences who would otherwise be unable to perform community service. Alternatively, a different kind of order akin to the intervention program order in NSW could be created to allow disadvantaged offenders an opportunity to have the causes of their offending behaviour addressed through their participation in approved rehabilitative and social service programs.

4.2.1.4 Discouraging shorter prison sentences

WA and NSW have taken steps to discourage courts from imposing prison sentences of six months or less – in NSW, courts must record their reasons for imposing a prison sentence of six months or less instead of an alternative penalty, while in WA, sentences of six months or less have been abolished altogether. Adoption of this approach in Queensland would go some way towards ensuring that the goal in the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* of reducing Indigenous incarceration rates by 50% by 2011 was met. It would also encourage the use of alternative sentences in response to minor offending behaviour, such as offences committed in public space.

4.2.1.5 Conclusion

There are, therefore, three additional reforms which Queensland could make to address some of the deficiencies in sentencing law which adversely impact upon homeless public space offenders.

Recommendation 5
That the diversion of homeless public space offenders occur at the court stage – ie. that magistrates be instructed in legislation to release offenders charged with 'trivial' offences, either unconditionally or with appropriate conditions attached, if they pose no danger to the safety and security of the community. Magistrates should be encouraged to make greater use of court support staff when devising appropriate conditions. The recruitment of additional court support staff may be required.

Recommendation 6
1. That community service work under a community service order be extended to include attendance at approved programs including life skills training, drug education and treatment, psychiatric treatment and other rehabilitative programs as is the case in Victoria, SA and WA; or
2. That a new sentencing alternative be created along the lines of the intervention program order in NSW, and the community-based order in Victoria and WA, which allows the court to sentence people to attend approved programs to promote rehabilitation.

Recommendation 7
That sentences of six months or less be discouraged (eg. by creating a requirement that sentencers provide reasons for imposing a short prison sentence rather than an alternative penalty) or abolished.

4.2.2 Fine enforcement procedures

The main deficiency of Queensland's fine enforcement process highlighted by this examination of practices in other States is that once they have been referred to SPER those who are unable to pay their fine(s) do not have access to a discretionary decision-maker who is able to cancel the fine. There are three ways in which this difficulty could be solved:

4.2.2.1 Increasing the discretion of SPER in relation to the waiver of fines

SPER is the only fine enforcement agency of its kind in Australia which lacks the discretion to cancel fines where an offender is simply unable to pay. As noted above,

the SDRO (NSW) and the FRU (NT) have the power to cancel unpaid fines where the fine cannot be satisfied in any other way.

In practice, this is already occurring in Queensland. The Department of Corrective Services and SPER report that no one has been imprisoned for fine default since the introduction of the *State Penalties Enforcement Act 1999* in Queensland, thus the addition of a section in this Act akin to s101(2) of the *Fines Act 1996* (NSW) or s96 of the *Fines and Penalties (Recovery) Act 2001* (NT) would merely formalise existing practice.

Further, it is submitted that SPER should be given the discretion to waive additional fees associated with enforcement, where this would result in severe hardship to the defendant. The SDRO, PERIN and the FRU have this discretion.

4.2.2.2 Allowing indigent offenders who can't pay their fines to access the court

An alternative to providing SPER with this additional/formal discretion would be to enable offenders who are unable to pay their fine to revisit the court so that a magistrate can decide whether the fine should be revoked. This would require an amendment to the *Penalties and Sentences Act 1992* (Qld) stating that magistrates or registrars have the power to cancel unpaid fines where the interests of justice suggest this is appropriate and that persons referred to SPER who wish to have their fine amount, or the penalty itself, reconsidered on the basis of hardship or triviality of the offence may make an application to the Magistrates' Court to this effect.

This is the practice in WA, where the registrar may cancel a warrant issued as a result of non-payment of a fine 'for good reason' and the court may elect to discharge a defendant from payment at any time. In Victoria, the registrar of the PERIN Court has the power to revoke a fine enforcement order at any time if special circumstances exist. And in SA, the FPU may refer the matter back to the court for alternative sentencing if it is satisfied that the person does not have the means to pay their fine.

4.2.2.3 Tailoring the minimum repayment amount to the size of the fine

A further suggestion for reform is that applied in the NT, where fine repayment amounts are tailored to the size of the fine. As noted above, the minimum instalment amount in NT varies according to the fine amount – the less the fine, the less the minimum instalment. This model has the capacity to avoid hardship to those who are poor and homeless. While fine amounts for public nuisance type offences are generally 'small', for someone who receives social security as their sole source of income, or receives no income at all, they are impossible to pay. If, however, a sliding scale was created with realistic repayment amounts (eg. repayment amounts of $10 per fortnight for fines of up to $200, steadily increasing), defendants would be capable of repaying their fine, and enforcement costs would be saved.

Thus, there are three very simple ways, which are already successfully applied in other Australian jurisdictions, in which Queensland's fine enforcement system could be made much fairer with regard to offenders who suffer extreme disadvantage.

Recommendation 8

1. That SPER be given the discretion to cancel fines in the event that they cannot be repaid and existing fine enforcement options are inappropriate in the circumstances; or
2. That, if a person is unable to pay their fine(s) and the fine enforcement options available to SPER are inappropriate in the circumstances, that person's case be remitted to the Magistrates' Court for determination.

Recommendation 9

That a more equitable and proportionate system of fine calculation be introduced in Queensland.

5. What can we learn from jurisdictions around the world?

5.1 Introduction

Clearly, sentencing alternatives which aim to address the causes of minor offending behaviour in public space, including mental illness, drug dependency and socio-economic disadvantage, are more likely to have the effect of reducing offending behaviour in the future.

This Part of the report will outline suggestions for alternative sentences based on international best practice. Strategies employed by countries all over the world will be canvassed including the Americas, Europe and the United Kingdom, the Asia-Pacific region and Israel.

5.2 Fines

5.2.1 The use of fines as a sentencing alternative around the world

Throughout the world, fines have been recognised as an effective penalty for a wide range of crimes. They are clearly punitive; they are flexible and can be scaled according to the gravity of the offence and the offender's means; they can be enforced easily and inexpensively; and they generate revenue (Raine, Dunstan and Mackie 2003: 182; Cole 1992: 150ff; Hillsman and Greene 1992: 124-5; Greene 1988: 38,40; Mahoney and Thornton 1988: 52). They have even been found to have a deterrent effect, with slightly lower recidivism rates being reported around the world for fines than for probation or prison (MacKenzie 2002: 339).

Fines are commonly regarded as residing at the lower end of the sentencing tariff, and certainly in many jurisdictions it is true to say that the less serious the offence the more likely it is to be dealt with by fine (Morris and Gelsthrope 1990: 839). Yet, in some international jurisdictions, fines are available as the sole penalty for most criminal offences, including violent offences which would ordinarily attract a sentence of imprisonment in other jurisdictions. Thus the place of the fine in the sentencing tariff actually differs markedly from country to country (Hillsman and Greene 1992: 125; Shaw 1989: 40).

The use of fines is extremely widespread in Europe. In Western Europe, fines are imposed in approximately 80% of adult criminal cases. Indeed, in the Netherlands, a statement of reasons is required from the judge if a fine is not imposed as the penalty (s359(6) *Netherlands Code of Criminal Procedure*), and in the UK around 70% of offenders sentenced in Magistrates' Courts are fined (Home Office 2003). In the

USA, however, the fine has never been used extensively as a penalty in and of itself; nor has it been used as an alternative to imprisonment. In 2001, only 4% of US defendants were ordered to pay a fine (Bureau of Justice Statistics, US 2003). Generally, fines are only imposed in addition to other penalties such as probation. This is also the case in Argentina, Italy and Japan (Shaw 1989: 40)

The chief complaint regarding the use of fines as a penalty for breaches of the criminal law is the difficulty of enforcement. While most fines are eventually paid, often the cost of enforcing payment outstrips the fine amount (Morris and Gelsthrope 1990:839). In some jurisdictions, including the US and the UK, significant amounts are written off each year (Raine, Dunstan and Mackie 2003:182). Contrary to popular belief, these difficulties with enforcement are generally the result of offenders' inability, rather than unwillingness, to pay. Indeed, it is now widely acknowledged in the international literature that fines are an inherently inequitable penalty; since each person begins with a different level of income, a flat-rate fine will have a differential effect upon offenders depending on their means to pay. Fines may have little impact on affluent offenders while causing extreme hardship to indigent offenders (see Raine, Dunstan and Mackie 2003: 183; Tonry 1999: 51; Ashworth 1995: 262; Joutsen and Zvekic 1994: 14; DeJong and Franzeen 1993: 62; Morris and Gelsthrope 1990: 850; Carlen 1989: 23; Shaw 1989: 42; Mahoney and Thornton 1988: 53; Wasik and Von Hirsch 1988: 567). Indeed, it has been speculated that the imposition of fines as a penalty on indigent people may encourage additional criminal behaviour, as offenders must go to extreme lengths to obtain sufficient funds to make the payments (DeJong and Franzeen 1993: 62).

5.2.2 The calculation of fines

In most jurisdictions where the imposition of a fine is available as a sentencing option, legislation provides that an offender's ability to pay must be taken into account before a fine is imposed. For example:

- Section 164 of the *Criminal Justice Act 2003* (UK) requires sentencers to inquire into and take account of the financial circumstance of a person, so far as they are known to the court, before imposing a fine. Defendants must complete a standard 'statement of financial circumstances' form and bring it, and proof of earnings or details of entitlement to a benefit, with them to court (Sussex Magistrates Court Committee 2004).
- Similarly, in Canada, under s734(2) of the *Canadian Criminal Code*, a court may only impose a fine on an offender if it is satisfied that the offender is able to pay the fine. Since 2002, there has existed a formula to assist judges in calculating fines, based on minimum wage levels (Daubney 2002: 46).
- In the United States it is a constitutional requirement to take means into account at the point of enforcement (Klein 1997: 228). This has led to a general trend by judges to set fine amounts at very low levels. Further to this, some individual judges ensure that undue hardship to indigent defendants is avoided by failing to enforce payment (Hillsman and Greene 1992: 128-9). This is possible in the US since enforcement is generally the responsibility of the court that imposed the fine.
- In Kenya, the court must investigate the financial status of an offender before imposing a fine (*R v Bishon* 2 Tanganyika L Rep (Revised) (HCt 1954)) and the

amount a person is fined must bear a reasonable relationship to an offender's ability to pay (*Juma v R* 1 Tanganyika L Rep (Revised) 257 (HCt 1942)) (see Vyas 1995: 84-85).

However, even in these jurisdictions, the extent to which means assessments form the basis for the calculation of fines in practice has been questioned. The literature from England reports that unrealistic fines are still imposed upon people who are poor, and that any reductions in fine amounts on the basis of means do not sufficiently reflect offenders' capacity to pay (Raine, Dunstan and Mackie 2003: 183; Ashworth 1995: 194-5; Morris and Gelsthrope 1990: 849-850; Carlen 1989: 24). Similarly in the US, concerns have been raised regarding judges' tendency to set fines at low levels. Fines are set at this low rate for all offenders, which means that poor defendants still suffer disproportionately, and because they are so low, judges are more inclined to impose additional penalties on top of a fine (ie. to 'pile up penalties') in order to achieve desired punitive or deterrent effects (Hillsman and Greene 1992: 126-7; Cole 1992: 143; Greene 1988:40; Mahoney and Thornton 1988: 52). Further, failing to enforce fines on an ad hoc basis for select indigent offenders only does not conform to natural justice or broader requirements of fairness (Hillsman and Greene 1992: 129).

5.2.3 Fine default – a comparative analysis

International jurisdictions differ in the approach they take to fine default, however the common thread is that most jurisdictions are actively seeking new ways of responding to fine default due to the high numbers of people being imprisoned for fine default and the rising costs of fine enforcement (Home Office 1996: 1; Daubney 2002).

5.2.3.1 The causes of fine default

It is well-established in the international literature that the main cause of fine default is lack of income. The size of a fine and an offender's means to pay have both consistently been found to be related to voluntary payment of fines (Shaw 1989: 36). A number of studies conducted around the world have demonstrated this:

- In a recent survey, UK magistrates reported that those from poorer neighbourhoods were less likely to pay their fines (Raine, Dunstan and Mackie 2003: 191).
- In a UK study, 66 people fined in lower criminal courts were interviewed. Of those who failed to pay their fine, 65% were reliant on government benefits as their source of income, and all but one was earning considerably less than the national average (Morris and Gelsthrope 1990: 841-2).
- In the late 1970s, a UK survey found that those respondents who were given no time to pay and subsequently defaulted in payment were all unemployed and of no fixed abode (Wilkins 1979: 37).
- A national study on the use of fines by Magistrates' Courts in the UK found unemployment to be predictive of fine default. Also, 78% of fine defaulters interviewed said that they were unable to pay their fine due to the necessity of meeting other expenses including clothes, food, rent, bills and public transport. Further, over 60% of those issued with warrants of commitment still failed to pay their fine, implying that their default was the result of an inability rather than an unwillingness to pay (Softley 1978: 19, 24, 27).

- In a survey of American trial court judges, 74% agreed that offenders' poverty is the primary reason for fine collection and enforcement difficulties (Mahoney and Thornton 1988: 56).
- Various studies have shown that the majority of those in gaol for fine default are unemployed, dependent upon government benefits or work only casually or sporadically (Shaw 1989: 37-38).
- It has been found that default rates are higher for public order offences (such as drunk and disorderly offences) and property offences than for motoring offences (Wilkins 1979: 33-34).

5.2.3.2 Responses to fine default

As noted above, while most fines are eventually paid, the enforcement process can be lengthy and costly. Many jurisdictions have legislative and/or conventional mechanisms in place to avoid these costs in circumstances where it is unlikely that an offender will pay the fine.

One strategy is to introduce various methods of payment to encourage and facilitate payment. For example, in many jurisdictions, including Canada (s734.1 of the *Canadian Criminal Code*), the US (Klein 1997: 228) and many countries in Latin America (Carranza, Liverpool, Rodriguez-Manzanera 1994: 412-3), fines can be repaid in instalments. Another payment option which has been tried internationally with some success is the direct debit of social security benefits. In the UK, this is strictly monitored by the relevant government department to ensure that benefit recipients' incomes are protected (Raine, Dunstan and Mackie 2003: 192). Both these options are available to defendants in Queensland, yet problems with enforcement remain.

An alternative means of dealing with fine default is selective- or non-enforcement. For example, in Sweden, fines for petty offences are often waived when an offender is unable to pay on the basis that contact with the court at the stages of prosecution and default may be considered punishment enough (Carlen 1989: 25). Similarly, under s165 of the *Criminal Justice Act 2003* (UK), UK courts have the power to cancel fines either in whole or part if, on inquiring into the offender's financial circumstances, the court is satisfied that had it been privy to this information, it would have fixed a smaller amount or would not have fined the offender at all.

As noted above, many US courts choose not to enforce payment of fines where it seems unlikely that the offender will have the capacity to pay. As a result, as many as 60% of fines imposed remain unpaid (Cole 1992: 143). Indeed, in one survey of American trial court judges, 52% agreed that there is no effective means of enforcing fines against poor people (Mahoney and Thornton 1988: 53-4). In Canada, selective enforcement has been formalised under s734.7(1) of the *Canadian Criminal Code* which states that the court is not able to issue a warrant of committal for fine default unless it is satisfied that the offender has, without reasonable excuse, refused to pay the fine.

The decision to remit an unpaid fine is often made by the relevant fine enforcement agency, however some jurisdictions have established Fines Courts which have

expertise in these matters; they have a wide discretion to vary payment levels, and to decide whether or not to proceed with enforcement mechanisms (Shaw 1989: 35).

5.2.4 An alternative fine system – the 'day fine'

An alternative means of addressing these issues is the 'day fine' system. Indeed, academic commentary and government-commissioned reports worldwide are in unanimous agreement that the majority of the problems associated with the inequities of fine imposition are solved by the 'day fine' or 'unit fine' system (see for example MacKenzie 2002: 339-40; Tonry 1999: 51; Klein 1997: 223; Ashworth 1995: 265; Begasse 1995: 14; Tonry and Hamilton 1995: 33-37; Joutsen and Zvekic 1994: 14; DeJong and Franzeen 1993: 62; Hillsman and Greene 1992: 127ff; A Morris and Gelsthrope 1990: 850; Morris and Tonry 1990: 143-5; Carlen 1989: 24; Shaw 1989: 41; Greene 1988: 39; Mahoney and Thornton 1988; Wasik and Von Hirsch 1988: 556, 567).

The 'day fine' system enables realistic and fair fines to be imposed on offenders based on the gravity of the offence and the offender's income. It was established in the Scandanavian countries in the 1920s, and is now used extensively throughout Europe and Latin America (eg. in Sweden, Finland, Denmark, Germany, Austria, Hungary, France, Portugal, Spain, Greece, Bolivia, Costa Rica, Cuba, El Salvador and Peru). It was piloted in both the US and the UK in the late 1980s and early 1990s, but it has not yet been trialled in Canada or Australia (Tonry 1999: 54).

The exact procedures involved in the issuing of 'day fines' or 'unit fines' vary between jurisdictions, but they have in common the following three step process:

Step 1: First, the court assesses the gravity of the offence and allocates a unit value to that offence depending on its seriousness. In Sweden, judges rate the offence between 1 and 120, 1 representing the most minor of offences, and 120 representing the most grave. In Germany, ratings range from 5 to 360. In the Staten Island pilot (US), unit amounts ranged from 5 to 120 where 5 represented public space offences such as disorderly conduct and trespass and 120 represented sexual misconduct.

Step 2: Having made this determination, the court goes on to determine the value of each unit according to the offender's means. In some jurisdictions, including Germany, each unit represents one day's income (hence the name 'day fine'). In Sweden, each unit represents 0.1% of the offender's annual income, while in the pilot conducted in England, the unit value was calculated according to weekly disposable income minus deductions for living expenses. In the Staten Island pilot, a systematic method was developed for calculating the dollar value given to fine units. A user-friendly table was developed for judges and magistrates (akin to a table for calculating taxation or child support) with net daily income on the vertical axis and number of dependents across the horizontal axis.

Methods for obtaining the financial information required to make this calculation vary between jurisdictions. Some jurisdictions rely on offender representations rather than requiring substantial evidence as to income. Other jurisdictions require offenders to bring evidence of income including pay slips and other relevant documentation with them to court.

Step 3: Once these two determinations have been made, the number of units representing the gravity of the offence is multiplied by the dollar amount and this calculation yields the fine amount. Thus, both the gravity of the offence and the offender's means to pay are taken into account when imposing the fine. (For further explanation of the day fine system, see Albrecht 1997: 182; Ashworth 1995; Hillsman and Greene 1992: 127-128; Morris and Tonry 1990: 143-145; Shaw 1989; Greene 1988).

Those jurisdictions which have introduced a day fine system have experienced substantial reductions in rates of imprisonment for fine default (Morris and Tonry 1990: 145), and increases in revenue due to increased payment rates. For example, the Staten Island pilot was smoothly and successfully implemented, and demonstrated a significant record of compliance with 70% of fines being paid in full by the due date and a further 13% being substantially paid. This led to an increase of 14% in revenue (see Hillsman and Greene 1992: 129-134).

In the US, a number of jurisdictions implemented day fine systems based on the Staten Island pilot, including Maricopa County (Arizona), Coos, Josephine, Malheur and Marion Counties (Oregon), and Kansas (Klein 1997: 223; Tonry and Hamilton 1995). Interest has been expressed in a number of other US jurisdictions however the day fine system has not yet become prolific (Tonry 1998: 91).

The pilot of the day fine system conducted in England was also heralded a success. Reductions in the dollar amount of fines imposed on the poor did occur, fine enforcement rates increased and the standard forms used to obtain information on offenders' financial circumstances were easy to understand and proved an effective means of gathering information (Ashworth 1995: 265; Tonry and Hamilton 1995: 33-37). A day fine system based on the successful pilot was introduced by legislation in 1991 (see the *Criminal Justice Act 1991* (UK)), however it was abolished in 1993. This was not the result of any serious or intractable failure on the part of the new system, but rather its abolition was a hurried response to some minor glitches in implementation. For example, under the pilot, the maximum value of each unit was set at £20, while under the national scheme, the maximum was set at £100. This led to some unfortunate sentencing anomalies; for example, one man was fined £1200 for throwing a potato chip packet on the ground (Moxon 1997: 142). Further, if no information regarding the defendant's financial circumstances was available to the court, some magistrates applied the maximum rate per unit. This led to some cases where fines were too high in comparison with the offender's means (Moxon 1997: 140). Cases of this nature were the subject of extensive hostile media coverage (Tonry 1999: 53-54; Moxon 1997: 143) and despite the fact that within a few months these glitches had been largely resolved, and a number of concerned stakeholders (including the Magistrates' Association) had made a range of recommendations for improvement, the system was abolished. The fact that the 'evidence' upon which the decision was made to abolish the system was never made public seems to lend further weight to the hypothesis that the decision was a purely political one.

Significant public support has been voiced in relation to the day fine system. Prior to the Staten Island pilot, a national survey of US trial judges was carried out in order to ascertain whether judges supported the introduction of day fines. Of the 1261 judges

interviewed, 52% believed that the day fine system could work in the US. The most common cause of concern was the difficulty of obtaining information on financial means (which, as noted above, has not proved difficult for those systems currently operating). A small minority mentioned reverse discrimination as a concern, arguing that this system penalised the wealthy for their affluence (see Mahoney and Thornton 1988). Others contended that day fines set at very low levels may become derisory. However, these objections seem to miss the point. If an offender is only able to spare a small amount of money each week due to their low income, a small fine is not derisory, nor does it discriminate against the wealthy. Rather, it is proportionate to the amount of hardship caused to someone on a much higher income who receives a more substantial fine (Morris and Gelsthrope 1990: 850). Indeed, some have argued that a progressive rather than an arithmetic approach would be fairer because some people have such high incomes that a fine of even a few hundred dollars would not have any impact upon them (Carlen 1989: 25).

With regard to the general population, surveys have demonstrated that a majority of people support the introduction of equitable alternative penalties. For example, focus groups held in Oregon found that the majority of participants supported the introduction of day fines as long as they were strictly enforced (Begasse 1995: 14).

Thus the day fine system may provide an innovative solution to Queensland's fine default and fine enforcement problems.

5.3 Alternative Sentences

Another way of dealing with indigent public space offenders is to make a variety of appropriate sentencing options available to judges and magistrates to impose in lieu of a fine in circumstances where it seems unlikely that a person will be able to discharge a financial penalty.

5.3.1 Dismissal and diversion

For many public space offences, the most appropriate penalty will be diversion or dismissal of the charge. The literature suggests that there is general agreement around the world that public space offences are among the least serious of all offences and that, based on conventional standards, many of these should be decriminalised (Greene 1988; Wilkins 1979). Thus diversion at the policing stage may prove most appropriate. Indeed, in Leeds, if a police officer charges a person with public drunkenness he/she must provide an explanation as to why they did not take the person to a welfare or treatment facility instead (Wilkins 1979: 70).

Diversion at the court stage is also appropriate. Dismissal may take the form of either an absolute discharge or a conditional discharge. Ashworth (1995: 254-55) comments that absolute discharges are usually reserved for offences with little moral blame, thus it would seem that many public space offences would qualify. In such cases, interaction with the criminal justice system as a result of the arrest and/or court appearance would seem to be punishment enough (Vyas 1995: 87-88; Carlen 1989: 25). In Sweden, the courts frequently remit fines where it seems impossible for the offender to pay the required amount (Carlen 1989: 25). Dismissal of homeless

defendants charged with public space offences could be accompanied with the provision of material aid – in Japan, offenders are provided with meals, clothes, medical costs and travel fares if required (Nishukawa 1994: 235).

Also, a conditional discharge, where the conditions attached are appropriate to the individual circumstances of the offender, would seem appropriate for most people charged with public order offences. Conditions could include attendance at treatment or a requirement to see a doctor, mental health specialist, welfare agency or social worker.

With regard to fine defaulters, dismissal of the charge appears to be the most appropriate response where it is impossible for the person to pay the fine, particularly where the fine has been imposed for a petty offence (Carlen 1989; Shaw 1989: 42). Also, it has been argued that the imposition of penalties for fine default should be restricted to those who wilfully refuse, or culpably neglect, to pay their fine. Imprisonment for fine default where an offender is unable to pay seems 'a world removed from the lofty aspirations of the law and the classic functions of the criminal justice system' (Shaw 1989: 39).

The dismissal of charges for public space offences, and fine default where the offender is unable to pay, would provide a clear avenue for evading inappropriate penalties such as fines or incarceration.

5.3.2 Community Service Orders, Work Orders, Service Orders

Work in the community has long been used as a form of punishment. Originally, it took the form of restitution to the kin of victims of crime, but community service orders in their current form have been applied as penalties since the 1960s (Tonry 1998: 88; Davis 1991: 107-108). The advantages of community service orders are many, including their capacity for ensuring offenders' continued integration in society by allowing them to continue in employment and maintain relationships with friends and family members. Their symbolic value in forcing an offender to give something back to the community has also been widely acknowledged (Szostak 2001: 63; Ashworth 1995: 278; McDonald 1992: 182; Davis 1991: 108-109,110). Further, recidivism rates for those who receive community service orders have been found to be equal to or less than those who receive a sentence of imprisonment for a wide range of offences (McDonald 1992: 188; Davis 1991: 111-2). Community service as a sentencing alternative has also been met with widespread public approval; interviews with members of the public have demonstrated that there is community support for the imposition of community service orders in lieu of a fine where an offender is unable to pay (Begasse 1995: 13).

Community service orders are used widely throughout the United States, United Kingdom, Europe, Latin America and the Asia Pacific Region (see for example Harris and Wing Lo 2002; Tonry 1999: 56; Weigend 1997: 180; Bard 1994; Department of Justice Sentencing Team (Canada) 1994; Sugihara et al 1994; Tak 1994; McIvor 1990; Menzies and Vaas 1989). However, these jurisdictions differ in their application of community service orders in terms of both the number of hours' work and the type of work to be completed.

In England, the maximum number of hours that can be imposed is 240 hours, with no more than 21 hours of work completed each week, the average sentence being 90 hours. The order itself is considered to be the punishment, not the type of work. Offenders may be assigned to an individual placement in a community organisation or a work party, and they remain under the supervision of the probation service (Ashworth 1995: 278; Menzies and Vaas 1989: 205-6). Community service orders in New Zealand are very similar. A maximum of 200 hours' community service to be completed in one year may be ordered where a person is found guilty of an imprisonable offence. Offenders conduct their work at community organisations while being monitored by probation officers. Such orders are considered appropriate for low level offenders only (Harris and Wing Lo 2002: 432-434).

In Finland, a community service order can only be imposed once a court determines that a prison sentence of eight months or less is an appropriate penalty for the offence. Once this occurs, a sentence of community service may be substituted for imprisonment, with one day of imprisonment equating to one hour of community service, the minimum being 20 hours and the maximum being 200 hours (Harris and Wing Lo 2002: 430).

In Hong Kong, community service orders are only available where a person has been convicted of an offence punishable by imprisonment, however the work undertaken must be dignified and useful. It is supervised by the organisation at which the work is conducted, and is often tailored to the skills of the offender (Harris and Wong Lo 2002: 438). A similar skills-matching exercise is conducted in the Work Alternative Program connected to Albany County Correctional Facility in the US; the skills and talents of participants are matched to the needs of the voluntary organisations they are sent to work in. As a result, the contributions of participants are invaluable to those organisations, and participants are made more 'job ready' (Szostak 2001).

In Israel, offenders may only receive a 'service work' order if they have been sentenced to imprisonment for six months or less. Offenders are still considered prisoners, however they serve their sentence by working full-time in a public institution under the supervision of a prison officer (Sebba 2001: 547; Nirel, Landau, Sebba and Sagiv 1997: 74-75).

In the United States, community service is only considered to be an appropriate penalty where thousands of hours' work are ordered. Otherwise it is considered a 'soft option' and is generally only ordered as a condition of probation (Tonry 1999: 56-58; Harris and Wing Lo 2002: 435). Similarly in Ontario, Canada, the hours of community service imposed are very high; only 20% of community service orders are for less than 100 hours and orders of up to 1500 hours have been reported (Menzies and Vaas 1989: 206-210).

Many jurisdictions allow a community service order to be substituted for a fine in the event that an offender is unable to pay. In Colombia, Costa Rica, Cuba, Panama and Peru, fines may be replaced with work orders if the offender is unable to pay (Carranza, Liverpool and Rodriguez-Manzanera 1994: 412-413). In Canada, a fine can be discharged by earning credits for community work performed (s736(1) of the *Canadian Criminal Code*). Also, s151 of the *Criminal Justice Act 2003* (UK) allows the court to impose a community service order in lieu of a fine if it is satisfied that it

is in the interests of justice to do so, where the offender has been fined on three or more previous occasions for offences which are not serious enough to warrant a community sentence. The Home Office has commented that around 20 hours' community service would be an appropriate penalty for low level offenders and fine defaulters (Home Office 1996: 5).

Of course, the imposition of a community service order for minor summary offences and fine default is preferable to imprisonment. However, one problem with community service orders is that if the order is breached, a sentence of imprisonment may result, either because the court has run out of alternatives or because imprisonment is the prescribed penalty for breaching a community service order. The result is that the offender is pushed up the tariff, receiving a harsher penalty for what was initially judged to be a minor offence (Ashworth 1995: 283; Carlen 1989: 23; Shaw 1989: 42). Due to their multifaceted hardships, homeless people are more likely to breach community service orders than other offenders. Thus, community work may not provide a useful alternative when sentencing indigent public space offenders.

The international literature provides some suggestions on how community service orders could be better tailored to meet punishment goals such as rehabilitation and community protection. Members of the general community in Oregon suggested that community service be specifically tailored to the crime and to the circumstances of the offender, for example, drink drivers could conduct work at a drink driving victim support agency (Begasse 1995: 13). The application that such a suggestion might have with regard to those who have committed victimless public space offences might be that the work be aimed at increasing their chances of obtaining gainful employment, or perhaps enabling them to assist and empower those people who experience similar difficulties to themselves. Ideally, any such work would include the provision of the necessities of life including meals and accommodation.

Another variation of community service orders which might meet the needs of the population group in question here is the Kenyan 'detention camp'. In these camps, offenders engage in labour during the day and can sleep onsite at night. In Kenya, camps of this nature are available as a sentencing opinion for fine defaulters and other petty offenders. They are utilised less now due to the spread of the extramural penal employment order (the equivalent of a community service order), however they provide an innovative sentencing alternative in relation to homeless people because they may enable those without conventional accommodation to successfully complete a community service order (see Vyas 1995: 81-82).

5.3.3 Day Treatment Centres (DTCs)

Day treatment centres (DTCs) are used extensively in a number of international jurisdictions, particularly in the UK and US (Coleman, Felten-Green and Oliver 1998: 13; Anonymous 1995a; Anonymous 1995b; Anonymous 1995c). These centres provide supervision, substance misuse treatment, educational and vocational assistance, counselling and community service opportunities to offenders as an alternative sentence. They are generally operated by non-profit organisations.

Each centre is unique and some provide specialised treatment for certain offender groups such as women and those who have committed drug-related offences. Some

incorporate electronic monitoring, curfews and/or random drug testing into their program. Participants may also be required to provide detailed itineraries to DTC staff including addresses and phone numbers where they can be reached at any time during the day or night (Tonry 1998: 87-88). Each DTC differs in the number of contacts offenders must have with the centre throughout the week. Under the Massachusetts model, offenders may initially have up to 80 contacts with DTC staff per week. These contacts include the offender presenting at the centre, visits by centre staff to the offender's place of residence, and phone contact (see McDevitt and Miliano 1992). Some DTCs therefore involve a high level of surveillance.

Treatment programs at DTCs are often delivered in distinct stages, with offenders moving from higher to lower levels of supervision and surveillance based on their progress and level of compliance. Programs may last from two to six months' duration. A wide range of treatments are commonly offered by DTCs either onsite or by referral. Services provided include job search training, job placement, literacy education, drug misuse education, drug treatment, alcoholics anonymous, group counselling, individual counselling, life skills training and recreational activities (McDevitt and Miliano 1992; Anonymous 1991). Some also offer childcare, and transitional housing for clients in need of shelter (see also 'Residential Community Correctional Facilities' below).

Jurisdictions around the world differ in the use they make of DTCs. In some jurisdictions, such as Massachusetts, offenders who are sentenced to DTC supervision are still regarded as prisoners. Thus, breach of program rules may lead directly to imprisonment (McDevitt and Miliano 1992). At the other end of the scale, some DTCs may be used as an alternative to a charge: in Leeds, police officers should ordinarily take a drunk and disorderly person to a DTC rather than charging them (Wilkins 1979: 70).

Unfortunately, no impact evaluations have been conducted to date. However, evaluations of individual programs delivered as part of community corrections have shown high rates of success. For example, offenders who attend adult basic education programs demonstrate a significantly lower re-arrest rate and the provision of vocational education to offenders leads to lower recidivism rates (MacKenzie 2002: 358,363). On the other hand, small surveys conducted by individual services have demonstrated that termination rates for DTCs vary dramatically. Indeed, rates of between 14% and 86% have been reported (Anonymous 1995b). This may be a result of the harsh rules of some centres, with some DTCs terminating treatment due to a failure to report to the centre within 24 hours. Also, non-compliance and relapse is more likely to be detected if high levels of surveillance are involved (Anonymous 1995c).

While DTCs are an expensive alternative, they are still less costly than imprisonment (a typical day reporting centre operates at a cost of $US20 per offender per day; National Institute of Justice 1995), and they provide an opportunity to meet the needs of offenders, including those who are homeless. They provide a unique opportunity to provide assistance to indigent public space offenders on a mid- to long-term basis, addressing their unique needs with an aim to prevent future offending behaviour. However, an excessive number of weekly contacts would impinge too much on

offenders' liberty and freedom of movement where the offence committed was trivial in nature.

5.3.4 Residential Community Correctional Facilities (Halfway Houses)

One sentencing innovation which has been developed and trialled in many international jurisdictions is the use of residential community correctional facilities in response to the offending behaviour of those who do not have conventional shelter, or whose housing arrangement may be considered a risk factor in continued criminal behaviour. These facilities, often referred to as 'halfway houses' provide transitional placements for offenders as well as counselling, substance misuse treatment, educational and vocational programs and a variety of other social services. Generally, such facilities are targeted at offender groups with special needs, such as women, young people or those who misuse substances. Traditionally they have been run by non-profit organisations, however there is a trend (generally recognised to be unfortunate) in some jurisdictions towards corrections department supervision (see Latessa and Travis 1992).

A number of model facilities are detailed in the literature. For example in New York City, the 'Hopper Home' (established in 1845) provides a drug-free residence for up to 20 female offenders as an alternative to prison. Women live there for a period of months, during which time they are enrolled in a day treatment program and attend workshops in the evenings on topics such as life skills and household work. They are also provided with both individual and group counselling at the residence which is fully staffed 24 hours a day, seven days a week (Conly 1999).

Japanese 'rehabilitation aid hostels' provide accommodation to probationers who require shelter. Together, these hostels have a total capacity of 2400. They are run by private organisations and licensed under the Department of Justice. Residents may perform work in the community, or work in the on-site workshops during their stay (see Nishikawa 1994).

Residential treatment facilities have also been used in a number of jurisdictions to deal with issues surrounding the offending behaviour of young people. In Washington County, young offenders who lack stable accommodation may be referred to a 'shelter evaluation program' for up to 60 days where they undergo a behaviour modification program which involves individual and group counselling, an educational component, vocational activities, arts and crafts, and physical activities, all within a caring environment which places strict limits on behaviour. Weekly assessments are presented to the juvenile court (see Kinion 1993).

In Israel, 'community hostels' provide young male offenders between the ages of 14 and 16 who are members of the surrounding community with a safe place to reside which is tightly regulated, and which provides counselling and mentoring to boys who are unable to live with their family. Since the facility is located within their community, they are able to visit, and be visited by, family and friends regularly. They can attend their own school, and maintain close contact with the community (see Wozner and Arad-Davidson 1994).

Similarly, in Hong Kong, residential treatment facilities run by the Social Welfare Department provide sentencers with an alternative to imprisonment for young offenders. These 'probation homes' provide young people with individual and group counselling, education and training, in a regulated residential environment (Chui 1999).

For adult offenders, these facilities have been found to be more effective than other alternatives at assisting offenders to reintegrate into society and preventing recidivism (Hartman, Friday and Minor 1994). This is a notable finding considering those referred to residential facilities tend to have higher treatment needs than those on probation (MacKenzie 2002: 344; Latessa and Travis 1992: 175). Juvenile residential programs have been found to be most effective when they are treatment-oriented (MacKenzie 2002: 355). While such facilities require a substantial funding commitment, they are less costly than imprisonment, and provide an opportunity for criminogenic factors to be addressed.

Philip Joseph (1996) has recommended that residential care homes be established in the UK for homeless people with psychiatric conditions charged with minor offences, since many of those who would ordinarily have been cared for in institutions prior to the trend towards deinstitutionalisation are now forced to live on the streets without treatment or medical supervision. Treatment in a residential setting clearly seems a more appropriate response to their minor, victimless offending behaviour than incarceration.

5.3.5 Intensive Probation

Probation is one of the most widely utilised penalties throughout the world (Whitfield 1990; Wasik and von Hirsch 1988). However, it is sometimes not considered a genuine sentencing alternative due to its perceived leniency, and ineffectiveness in preventing recidivism. This belief has corresponded with the decline of the rehabilitative ideal; control and surveillance are often emphasised over and above goals of treatment (Wasik and Von Hirsch 1988: 556, 569).

However, as Wasik and Von Hirsch (1988: 568-9) point out, the severity of a sentence to probation will vary depending on the conditions attached. Many jurisdictions have developed intensive probation programs whereby a probation order is supplemented with a period of electronic monitoring, random contacts and curfews (English, Chadwick and Pullen 1999). Also, in many jurisdictions, including those in the US and UK, a sentence to probation may include a requirement to attend a DTC or to conduct community service work for a set period of time.

In Scotland, an intensive probation program has been adopted in some districts. This program involves three weeks of intensive assessment, followed by a five month treatment program. Sixty meetings must be attended which include group counselling sessions focusing on social skills and problem solving skills development. Also, individualised offence-related community service work and community reintegration is conducted, and offenders are encouraged to explore the reasons for their offending behaviour and to develop strategies which they can employ to prevent re-offending (Middleton 1995). Similarly, the intensive probation program in Kansas involves the daily surveillance of offenders while they receive assistance in the form of

educational or employment training, or drug and alcohol counselling (Jones 1990), and in Japan, probation is considered more akin to 'supervisory casework' (Nishikawa 1994: 226-7)

Evaluation studies have yielded ambivalent results. An evaluation of the intensive probation program operating in Scotland found that offenders who participated in the program where not less likely to re-offend than offenders on probation or in prison (Middleton 1995). Similar results were yielded in an evaluation study conducted in Colorado (English, Chadwick and Pullen 1999). These findings are probably the result of the high level of surveillance because evaluations have found that offenders under intensive probation are not more likely to re-offend than those sentenced to prison (Middleton 1995; Tonry 1999: 83-86). Also, such programs are much less expensive to run than prisons are (Middleton 1995; Tonry 1999).

Some studies have made extremely positive findings in relation to intensive probation programs. British studies have found that intensive probation based at DTCs is more effective at reducing recidivism than ordinary probation (Whitfield 1990: 10) and the evaluation study conducted in Scotland found that in programs with a high staff to offender ratio, offenders are less likely to re-offend (see Middleton 1995: 7-8).
In Kenya and England, it has been found that the most effective intensive probation programs are those which target interventions to the circumstances of the individual offender, taking into account their housing status, health status, the nature of their offending behaviour, and their character; those programs that impose more surveillance only are less likely to be successful (MacKenzie 2002: 343; Vyas 1995: 88-89; Whitfield 1990: 11).

Thus, probation may be used as an educative and rehabilitative tool (Golding 1994: 7). It may allow for offenders to benefit from treatment and social service delivery, while meeting community demands for safety through surveillance. It should be remembered, however, that intensive surveillance is largely unnecessary with regard to people who are homeless who have committed public space offences (see Gendreau et al 1993). For these people, it is the treatment and service delivery element which is likely to have the greatest success in reducing their offending behaviour.

5.3.6 Court-referred treatment

5.3.6.1 Overview

Much petty offending behaviour is caused (either directly or indirectly) by health-related conditions. For example, many people with mental illness and people with acquired brain injury are at greater risk of being charged with public space offences because they are visible to police, and because they sometimes engage in unusual and 'unacceptable' behaviour (such as shouting, swearing, urinating or defecating in public). Also, people with drug and alcohol problems may be arrested for offences directly related to their alcoholism or drug addiction (eg. for public drinking and drunk and disorderly offences), and for public space offences such as offensive behaviour.

The argument has frequently been made that many of those arrested for public space offences are in need of treatment rather than punishment, and that any interaction they

are forced to have with the State should be with health and welfare departments rather than the criminal justice system (Walsh 2003a; Popovic 2004). However many jurisdictions around the world have found ways to combine the two, by creating sentencing alternatives which allow the court to mandate treatment as a sentencing alternative (see Carranza, Liverpool, Rodriguez-Manzanera 1994: 408-9). This has been termed 'therapeutic jurisprudence', that is, it enables the law to produce therapeutic outcomes for individuals involved in the legal system (see particularly Hora, Schma and Rosenthal 1999: 442-444).

5.3.6.2 Imposing treatment

One method used by courts to mandate treatment is to impose a probation order on an offender which involves attendance at treatment as a condition, and then monitor the progress of the offender while they are subject to the order. For example in Washington DC, judges can refer any defendant to drug treatment for up to one year, with a maximum aftercare period of six months via a probation order. Relapse is dealt with by imposing additional treatment or otherwise revising the treatment plan to make it more effective. The court may also order that additional services be provided, such as vocational training, family counselling and literacy training, as a supplement to drug treatment (see McColl and Sokoni 2003). In Sweden, the positive use of time on probation is emphasised, and active treatment programs including drug and alcohol treatment and life skills training are offered to offenders to facilitate their positive reintegration into the community (Osterdahl 2002).

Alternatively, treatment can be mandated by the court through the use of suspended sentences. In Dumbarton in Scotland, the court is able to defer a sentence so that an offender may participate in a counselling program for alcoholism. Individual and group counselling is provided by trained volunteers, who may also refer the offender to social skills training and other social services (see Collins and Tate 1988).

Evaluation studies have demonstrated that mandated treatment, for drug and alcohol addiction and mental illness, generally yields positive outcomes for patients (Hodulik 2001). In addition to its successes in terms of outcomes for offenders, there is some evidence to suggest that court-mandated treatment as a sentencing alternative is supported by the community. In a survey of over 800 North Carolinians, 84% agreed that offenders should be sentenced to drug and/or alcohol treatment if they suffer from addiction, regardless of the cost. Also, the vast majority of respondents agreed that mandatory psychiatric treatment should be imposed as a sentencing alternative for those suffering from mental illness, where their offending behaviour is connected with their condition (Higgins and Snyder 1996).

5.3.6.3 Model – mandated drug treatment

The most prolific form of therapeutic jurisprudence is mandated drug treatment. Generally, drug and alcohol treatment involves three distinct stages (see Bull 2003; Belenko 2001; Hennessy 2001; Walsh 2001):

Detoxification
Detoxification may include a period of residential care. In most programs, the offender must refrain from using drugs altogether under the support of and close

supervision by drug and alcohol counsellors. Pharmacological treatment is often imposed at this stage of the treatment regime.

Stabilisation
The stabilisation phase usually involves the provision of drug treatment, through individual and group counselling, and additional social services including vocational training, job training, housing and welfare support. During this phase of treatment, the offender keeps in close contact with drug and alcohol professionals. Random and/or regular drug testing is imposed, and relapse may be reported immediately to the court. Sanctions may be imposed, or the treatment regime may be amended to better address the needs and difficulties of the offender. Regular hearings may be scheduled throughout this phase of treatment to ensure that the court retains close supervision of the offender.

Aftercare
Aftercare is usually comprised of attendance at Narcotics Anonymous, Alcoholics Anonymous or other support groups. Drug testing and attendance at regular court hearings may continue for some months until the offender's treatment order expires.

On the basis of the objective success of court-mandated drug treatment, Hodulik (2001) suggests that a treatment program similar to that applied to people with drug and alcohol addictions might be applied to people with mental illness who are homeless. She notes that programs for persons with mental illness are associated with the same kinds of treatment, and relapse and compliance problems, as with drug and alcohol treatment. For example, people with mental illness may require the equivalent to a detox stage where they receive pharmacological treatment; they may then require stabilisation involving the provision of social services such as counselling and welfare support and training in relapse prevention; and they may require a period of aftercare to ensure that relapse is dealt with effectively.

Ethical concerns have been raised with regard to mandating treatment for mental illness against the will of the individual (Carney 2000). However, Hodulik (2001) argues that a psychiatric patient's refusal of treatment may be the result of the illness itself; the patient may be in denial of the illness and/or their cognitive impairments and delusions may influence the decision. Similarly, it has been claimed that since people with mental illness are coerced by their illness, coerced treatment seems less sinister, and indeed may be justifiable as a result of the 'positive' consequences it will have for the individual (Wertheimer 1993: 248-250). Hodulik (2001) states that '[a]lthough this solution necessarily involves some civil liberty costs to the extent that coercive treatment is advocated, these costs are not as great as an outright denial of liberty through incarceration.'

Treatment alternatives for homeless people with drug and alcohol addiction and mental illness should be considered as an alternative to incarceration or fines. Such treatment should ideally involve a residential element, and incorporate the provision of other welfare services. However, serious thought must be given to coercing pharmacological treatment if the over-arching goal of informed consent to medical treatment is not to be abandoned.

5.4 Alternative Forums

Further to creating a new method of fine imposition, or an array of alternative sentences, another alternative means of dealing with marginalised public space offenders is to alter the setting in which offenders are dealt with. Alternative forums described in the literature tend to be based on the principles of restorative justice and therapeutic jurisprudence.

5.4.1 Community Conferencing

Restorative justice focuses on the need to restore the damage caused to victims of crime, including individuals as well as the society as a whole, and to restore the offender by facilitating their reintegration into the community (Braithwaite 2003; Dinnen 1997: 254; Kinkinson 1997: 1). Restorative justice involves not only restitution in an economic sense, but also restoring harmony between the victim and the offender, and promoting the empowerment and dignity of all parties (Braithwaite 2003; Dinnen 1997: 255). This sometimes involves bringing the victim and offender face to face; the victim is given an opportunity to express what the consequences of the offence have been and the impact it has had on their life, and the offender is given an opportunity to contextualise the offending behaviour (Claasen 1997; Dinnen 1997: 255).

There is generally no identifiable 'victim' in relation to public space offences, so victim/offender mediation models are inapplicable. However there are some restorative justice methodologies which may provide suggestions on how communities may work together to address the causes of homeless persons' offending behaviour.

5.4.1.1 Citizens' Reparative Boards – Vermont, USA

Citizens' Reparative Boards were established in Vermont in 1996 to provide an alternative sentencing option for offenders who plead guilty in relation to property and other minor offences. The offender comes before a board comprised of five or six community members, and these community members determine the kinds of activities the offender should complete in order to repair the damage caused by the offence. Possible reparative activities include writing letters of apology, community service, research and writing assignments, oral presentations and tours of correctional facilities. The offender may be required to meet with board members during and after the completion of the activities prescribed in order for their progress to be monitored. Once they have completed their allocated tasks, the board will recommend to the court that they be discharged (see Kinkinson 1997). The offender plays a passive role in this process; indeed, some panels meet independently of the offender and decide amongst themselves what penalty is appropriate in the circumstances (see Kurki 2003: 305).

The difficulty in applying this model to homeless people is that the emphasis seems to be on cognition; the majority of the activities prescribed as 'reparation' are aimed at educating the offender on issues related to their offending behaviour. Such learning would hold little sway over a person whose offending behaviour is beyond their

cognitive control, such as people with mental illness, people with acquired brain injury and people with drug and alcohol problems. Further, such a model does not seem appropriate in cases where a person's offending behaviour is a matter of necessity (such as begging), or indeed where the offence amounts to the criminalisation of a state of being (such as homelessness or alcoholism). The party truly in need of education may be the community rather than the offender, yet the passivity of the offender in citizen reparative board meetings may reduce the capacity of the offender to inform the board about the real causes of the offending behaviour.

However such boards do provide an opportunity for more appropriate penalties to be imposed on low level offenders, which is a positive step away from forcing judges and magistrates to choose between a fine or imprisonment, and they encourage communities to find community-based solutions to community-based problems. This model also acknowledges that the community as a whole is affected by the plight and subsequent behaviour of the defendant. Assuming the panel adopts an appropriate level of compassion, tolerance and objectivity in relation to offenders, they may have the capacity to improve outcomes for indigent defendants.

5.4.1.2 Circle sentencing – Toronto, Canada

Circle sentencing is a sentencing method which has been influenced by the traditional circle healing practices of Aboriginal people throughout the world (Smith 2001; Immarigeon 1997: 7). The Toronto Community Council Project, for example, was based on the healing circles conducted by Toronto's Aboriginal community. Under this model, the hearing is said to resemble a family unit; members sit in a circle with the offender and make an attempt to understand the influences on and reasons for the offending behaviour. A sanction is negotiated and agreed upon between the members, taking the circumstances of the offender into account (Roberts and Roach 2003).

In Toronto, only half the cases involve victims, thus the model has been used, and is appropriate for use, in cases where there is no identifiable victim. Also, offenders are given a much more substantive role to play in sentencing circles than in the reparative boards described above. Thus, there is greater opportunity for special circumstances to be taken into account when prescribing a penalty, such as mental illness, developmental disability, drug or alcohol problems or extreme poverty.

Further, studies have shown that the benefits of sentencing circles resonate beyond the offender. Community members have been found to experience positive effects in addition to, if not over and above, those experienced by offenders, due to the cohesion, trust and knowledge about the community it creates (Kurki 2003).

5.4.1.3 Community Conferencing – Minneapolis, USA

Community conferencing is a hybrid of the two restorative justice approaches outlined above. Participants include the offender, the victim (if one exists), supporters of the offender and victim, and community members. In addition to this, representatives from other stakeholder groups may participate; such stakeholders might include local business, residents and/or shopkeepers. This provides a unique opportunity for a wide array of stakeholders to gain an understanding and an appreciation of each other's circumstances. The offender is given an opportunity to

explain the context of the offending behaviour, and other parties are able to describe the consequences of the offender's actions on them. Together, the group reaches an agreement on what action should be taken, and it is signed-off by all participants (see Schiff 2003; Kurki 2003).

In Minneapolis, this model of restorative justice has assisted the community to deal with a range of petty offences related to public order and aesthetics such as prostitution, trespassing, disorderly conduct or indecent exposure (including public urination), theft, begging, and public drinking. The project reports high levels of satisfaction (close to 100%) amongst all participants (Central City Neighbourhoods Partnership 1998).

This model lends itself well to the kinds of offences often committed by marginalised people in rural Queensland. If local businesses, residents, police and community members were able to come together to discuss the circumstances surrounding the offending behaviour of such people, a greater level of understanding and compassion might be aroused, and improved outcomes might result. For example, if it could be explained to community stakeholders that a certain person is unable to control their use of obscene language in public places due to a mental condition; or that a certain person drinks alcohol and stores their belongings in the park because they are homeless and have no where else to go; or that certain Indigenous persons reside in a park because their ancestors have done so for generations and because they have a cultural and spiritual connection to the site, strategies might be developed by the community which are aimed at alleviating the suffering of the 'offender' rather than simply removing them from public view.

5.4.1.4 Draw-backs of restorative justice

While restorative justice principles do appear to provide some positive suggestions regarding the treatment of public space offenders, there are some potential drawbacks to the sentencing methods outlined above. First, existing power imbalances may be transferred into the conference or circle. This is particularly the case with regard to community conferencing, where the offender may be grossly outnumbered by members of the community who condemn their behaviour. Second, there are very few procedural safeguards in circles or conferences, and thus fewer ways of ensuring that an offender's rights are recognised and upheld. Third, since achieving equity is not generally a priority, the penalty eventually imposed may in fact end up being disproportionate to the offence committed; a person who might have been discharged by a court without penalty, may have numerous reparative tasks imposed upon them by citizen boards (see Roberts and Roach 2003: 242-243; Schiff 2003: 324; Rhys 2000; Dignan 1992).

These potential problems must be borne in mind when developing a restorative justice program in the nature of those described here. Overall, however, these models of community consultation may provide a means of educating the public on issues related to the offending behaviour of indigent people, and acknowledging the ways in which the community is affected by this offending behaviour.

5.4.2 Specialty courts/dockets

5.4.2.1 Therapeutic jurisprudence

The rise of therapeutic jurisprudence, and growing distrust in the ability of the traditional adversarial court system to deliver desired social outcomes, has led to the development of courts which specialise in particular kinds of legal matters and/or offender groups (Carney 2000: 321). The most prolific specialty courts have been family courts and drug courts, however others such as domestic violence courts, teen courts and homelessness courts have also been developed throughout the Western world.

Specialty courts are often characterised by a proactive, inquisitorial bench, as opposed to the typically passive, neutral role played by the judge. The judge, in consultation with relevant professionals, devises a program consisting of court attendance, treatment and monitoring, and the judge contributes to the implementation of that plan by acting as an encourager, taskmaster and parent (Carney 2000: 322). The court seeks to integrate relevant services and professionals into the adjudication and sentencing process, and seeks to foster a collaborative relationship with the wider community (Carney 2000: 324-5).

The values and methodologies underpinning these courts may provide suggestions capable of adaptation for use in dealing with the offending behaviour of homeless people.

5.4.2.2 Drug Courts

Drug courts were one of the first kinds of problem-oriented courts to be trialled as an alternative to traditional adjudication of criminal offences. In addition to their widespread use in Australia, they are also extensively used throughout the US, as well as in Canada and Scotland (Belenko 2001; Evans 2001; Eley, Malloch, McIvor, Yates and Brown 2002). Drug courts provide an alternative method of adjudication and sentencing for drug addicted offenders whose substance use may be implicated in their offending behaviour. They create a special docket or court devoted to defendants whose offending behaviour is drug or alcohol related. The prosecutor, defence lawyer, judge, social workers and drug and alcohol liaison officers work together to develop a plan for each defendant which aims to reduce their offending behaviour by eliminating those circumstances which give rise to it. The court is empowered to impose drug treatment as the sole sentence for such an offender, and a treatment plan is devised either by the court in consultation with relevant professionals, or by service providers external to the court (for a thorough description of drug courts' methodologies, see Bull 2003).

Such programs generally involve many months of drug treatment, administered by professionals in the community. Drug courts have provided the model upon which a number of other treatment- or problem-oriented courts including mental health courts, community courts and homeless courts are based.

5.4.2.3 Mental Health Courts

Many jurisdictions have established mental health courts or mental health tribunals to deal with matters such as fitness for trial, criminal responsibility, involuntary commitment and/or guardianship issues. In addition, some jurisdictions in the US have developed criminal mental health courts that hear cases of individuals with mental illness who are charged with petty criminal offences, where their illness has contributed to their offending behaviour. These diversion-oriented courts were established in response to the large numbers of people with mental illness in prison for petty offences, and the resultant strain placed on corrective services and the criminal justice system in general (Griffin, Steadman and Petrila 2002: 1285; Hasselbrack 2001; Kondo 2001; Watson, Hanrahan, Luchins and Lurigio 2001: 477).

Mental health criminal courts are modelled on drug courts. A specialty court or docket is created for defendants with mental illness, and is presided over by judges or magistrates who have received mental health training. Mental health professionals assist with diagnosis and the development of a treatment plan for the offender. All participants in the court process, including the judge, prosecutor, defence lawyer, mental health service providers, case manager and probation officers work as a team to develop a treatment plan which meets the individual needs of the offender in an attempt to reduce his/her offending behaviour (see Griffin, Steadman and Petrila 2002; Hasselbrack 2001; Kondo 2001; Watson, Hanrahan, Luchins and Lurigio 2001).

The aim of the court is to ensure that defendants are given quick access to the treatment services they require as an alternative to incarceration. Treatment programs to which defendants are referred may include medication management, treatment for substance addiction, psychosocial rehabilitation, housing and welfare assistance. The defendant is released into the community under the supervision of a probation officer or caseworker, who provides regular reports to the court on the offender's progress, and regular compliance hearings may be held as a monitoring mechanism (see Griffin, Steadman and Petrila 2002; Hasselbrack 2001; Kondo 2001; Watson, Hanrahan, Luchins and Lurigio 2001).

Preliminary evaluation studies have indicated that mental health courts may be effective in reducing rates of recidivism amongst petty offenders with mental illness, particularly where psychiatric treatment is supplemented with housing and welfare support (Kondo 2001; Trupin, Richards, Wertheimer and Bruschi 2001). However the availability of appropriate community mental health services is crucial to the success of a mental health court of this nature. In jurisdictions where mental health services are already inadequate, the additional demand created by a mental health court will be impossible to meet without a substantial increase in funding.

5.4.2.4 Community Courts

Community courts have been established in a number of jurisdictions in the US. They focus on local 'quality of life' offences such as petty theft, prostitution, begging and drunk and disorderly offences, and aim to impose appropriate sentences upon offenders, taking into account their personal circumstances and the views of community members. They aim to solve neighbourhood problems in a creative way,

to make justice visible, and to build stronger communities. Commonly used sentencing options include community restitution (such as street sweeping, painting and picking up rubbish) and referral to social services such as health care, drug treatment, job placement and job training.

Community courts invite offenders, victims and their supporters, as well as local residents, community organisations, local businesses and other members of the community, to be part of the justice process. This is achieved by locating the courthouse within 'problem suburbs' and in buildings which are readily accessible to community members (such as neighbourhood centres or shopfronts); involving the community in planning for the court; involving the community in shaping sanctioning options; establishing community advisory boards to report to and liaise with the court on community issues which arise; and distributing newsletters to community members (Lee 2000).

There are currently a number of community courts operating in the US. The Midtown Community Court in New York City is one such court. It focuses on quality of life offences and sentences offenders to community service while they receive assistance with the problems which underlie their offending behaviour, such as lack of housing, lack of job skills, mental illness and drug and alcohol addiction. Social services including general education classes, health care, drug treatment and welfare services are provided to offenders at the court house. The wider community is involved through a representative advisory board which reviews court operations, and a community conditions panel which provides regular information to the court regarding emerging problems and hot-spots. Also, regular feedback is provided to police on offender outcomes (Lee 2000: 9).

Another community court operating in the US is Hartford Community Court in Connecticut. The court services 17 neighbourhoods. Each participating neighbourhood has its own problem-solving committee, a representative of which sits on the court's advisory board. Sentences of the court involve community service and/or a social service mandate. Each defendant meets with the court's social service team which makes referrals to appropriate social services including substance addiction treatment, health care, education and housing options (Lee 2000: 11-12).

West Palm Beach Community Court in Florida provides social services, including counselling, education and employment programs and case management, to defendants onsite. The court also provides transport to and from job interviews and social service appointments for defendants who lack transportation. The court coordinates closely with local police, and as a result, some police officers bring offenders straight to the court for assistance instead of arresting them (Lee 2000: 14-15).

Thus, the community court provides a novel means of providing petty offenders with assistance rather than punishment. Indeed, many community courts have reported lower levels of crime in their neighbourhoods as a result (National Centre for State Courts; cited Homeless Persons' Legal Clinic 2004).

5.4.2.5 Homelessness Courts

Based on the community court model, a number of homeless courts have been established in the US. In California, around ten counties have established Homeless Courts. These courts aim to deal with the offending behaviour of homeless people in a familiar, non-threatening environment, by mandating that they participate in self-help activities aimed at addressing their individual needs.

The San Diego Homeless Court operates out of two of San Diego's largest homeless shelters on a monthly basis. The court is empowered to sentence homeless defendants to activities within their shelter program including life skills, drug and alcohol treatment and counselling, computer training, literacy classes, job search training, and community work. The court may deal with many offences in one single hearing, indeed, homeless people are encouraged to volunteer to come before the court to have backlogs of outstanding warrants, charges and fines dealt with. Many homeless people have chosen to 'give themselves up' to the court in order to be free from such encumbrances to enable them to start afresh (Binder 2002).

An evaluation of this court has found that participants have responded positively to the program, and many have felt empowered to make positive changes in their lives as a result. In addition, the benefits of the program have been made clear to the community (see Binder 2002). Homeless Courts demonstrate lower levels of recidivism since they provide homeless people with the support they need to stop engaging in offending behaviour, namely housing, mental health services, and substance abuse treatment (Binder 2002: 5).

In addition, Binder (2002) reports that Homeless Courts have resulted in substantial cost savings to government. Homeless Courts bring about significant reductions in the number of hearings necessary to deal with the offending behaviour of homeless people since they generally deal with a number of offences at once and at a location frequented by homeless people. Also, since the hearings aim to address the causes of offending behaviour, many defendants are empowered and enabled to avoid future offending behaviour. This results in a reduction in the amount of police time and resources spent on pursuing homeless people who have warrants or fines outstanding. They are also more likely to be able to comply with court orders; less likely to clog the court system with hearings resulting from re-offending, non-compliance, and failure to appear; and since the majority of cases are dismissed, the costs of incarceration are avoided (Binder 2002: v, 14). A further benefit for government and the community is that by assisting homeless people to engage in gainful activities, they are removed from public places, such as shopfronts, parks and other public places, where they are unwelcome (Binder 2002: 5).

5.4.2.6 Teen Court

In the US, a number of jurisdictions have developed 'teen' or 'youth' courts which are aimed at appropriately addressing the offending behaviour of young people. In these courts, there is a high level of involvement of young people in the court process. Some members of court staff are young people, and young people are generally consulted in the adjudication and sentencing processes.

In most courts of this nature, the judge is an adult. However, in Arlington, Texas, a unique teen court is in operation which may provide some novel suggestions for possible use in the context of the homelessness. In this teen court, all court staff are young people. The jury, made up of a panel of young people, makes determinations on guilt and sentence, which may include community service and serving time on the teen court. An adult director oversees the process, and helps determine which young offenders are eligible to have their case heard by the teen court, however the remainder of court staff are young people. An evaluation study has demonstrated that the court may be effective in reducing rates of recidivism, particularly for 16 year old white males. Also, since the majority of court staff are young people, the program is extremely cost-effective.

5.4.2.7 Summation

The idea of creating a specialty court for homeless people, or for public space offenders, is one worthy of consideration. The homeless and community court models have been applied successfully in the US. The teen court may provide a novel variation on the homeless or community court model which could be applied in this context; the idea of including homeless people or public space offenders in the court process is one which could be considered in any homeless or community court model developed for use in Queensland.

5.5 So what can we learn?

International best practice has much to offer us as we search for alternative ways of dealing with issues such as the sentencing of public space offenders and fine default. The following are among the most exciting suggestions for reform.

5.5.1 Diversion through treatment

International best practice suggests that court mandated treatment is one of the most effective ways of addressing the factors underlying offending behaviour and reducing recidivism. This reinforces **Recommendations 2, 3 and 5** discussed above. The offending behaviour of indigent people in public space will not stop unless the causes of offending behaviour are addressed. The response to such offending behaviour should be health and welfare service provision, rather than criminalisation.

5.5.2 Day fines

The day fine system provides perhaps the most effective way of dealing with problems associated with imposing fines for minor offences which tend to be committed by socially and economically marginalised people. Indeed, a day fine system could be introduced in Queensland within existing legislation. As noted above, s48 of the *Penalties and Sentences Act 1992* (Qld) states that courts should take an offender's means into account when imposing a fine – the introduction of a day fine system would merely formalise this requirement.

It is recommended that a day fine system, or at the very least a more structured system of fine calculation linked directly to income, be trialled in Queensland. This would be the first trial of its kind in Australia, and thus Queensland would be leading the way in terms of creative sentencing for minor offences.

Recommendation 10

1. That a day fine system be trialled in Queensland; or
2. That the need to tailor fines to offenders' means be more firmly entrenched in legislation either by:
   (a) creating a formula for fine calculation for use by magistrates based on income level; or
   (b) inserting a new provision in the *Penalties and Sentences Act 1992* (Qld) requiring magistrates who impose a fine on an indigent person to provide reasons as to why they did not apply an alternative sentence; or
   (c) adopting the NT model whereby monthly payments are tailored to the total fine amount, so that the less the total amount of the fine, the less the monthly repayment.

5.5.3 Alternative sentences – supported community service and probation

It has been consistently noted throughout this report that those who are homeless are likely to be deemed unsuitable for community service work. However, a number of international jurisdictions have established programs which better enable disadvantaged people to complete such orders, and therefore accrue the benefits of such orders, including work experience and meaningful daily employment. The most promising aspect of international best practice in community service orders is the halfway house. Halfway houses provide defendants with housing, food, emotional support and social services relevant to their needs while they complete a community service order, or another order with conditions attached. Such facilities have been established in the United States, Japan, Hong Kong, Israel and Kenya, and their establishment has been recommended in England. While the initial outlay to establish such facilities may be high, they are less expensive to establish and to run than the correctional facilities which recidivist public space offenders are often committed to. Further, they provide an opportunity for the circumstances which contribute to offending behaviour to be addressed.

Recommendation 11

1. That some trial half-way houses be established in Queensland to provide shelter and material and social support to marginalised defendants throughout the duration of their community service order or other court order.
2. That the possibility of establishing Day Treatment Centres be considered to provide case management and referral services to marginalised offenders subject to community service orders, or other court orders.

5.5.4 Alternative forums

The possibility of establishing a trial Homeless Court in Victoria has been offered up for discussion by the Homeless Persons' Legal Clinic in Melbourne (Homeless Persons' Legal Clinic 2004). Queensland has exercised courage and creativity in establishing other specialty courts including the Murri Court, the Drug Court and the Mental Health Court, thus it is recommended that Queensland build on this expertise by trialling a Homeless Court, whereby those who are recognised by the court as being homeless or at risk of homelessness can have their cases heard in a less threatening environment (perhaps in a community centre or even within the premises of a welfare service). This would address the problems associated with ensuring that people who are homeless do not fail to appear due to their chaotic lives, their inability to keep track of time, or their non-receipt of correspondence. It would also presumably lead to the imposition of more appropriate penalties which were aimed at reducing offending behaviour by ensuring that they had access to life's necessities including food, shelter, clothing and meaningful daytime activity. As with the Teen Court, the involvement of homeless or formerly homeless people themselves in addition to their service providers may be an interesting and rewarding innovation.

Alternatively, options for community reparation might be explored as a means of dealing with those who commit public space offences. The increasing acceptance of restorative justice sentencing in Australia has not yet extended to marginalised public space users, yet it has been demonstrated above that in the United States, a number of models have been developed for dealing with public order offending in a community-based, restorative way including circle sentencing and community justice boards. Provided offenders were supported by a properly trained advocate, these models may provide an appropriate means of educating the community on the underlying causes of petty offending behaviour, and to encourage the community to develop responses outside the law and order framework for dealing with and preventing the future commission of public space offences. Local expertise in restorative justice sanctioning could be drawn upon in developing an appropriate model.

Recommendation 12
That the establishment of a trial specialty court or docket for public space offences (Public Space Court), or homeless people (Homeless Court), be considered. This court should be presided over by a specially trained magistrate, and should impose sentences which are appropriate to the offences committed and the circumstances of offenders.

Recommendation 13
That trial community boards, including adequate advocacy and support services for marginalised participants, be established in a number of select communities to deal with the offending behaviour of homeless people in public space.

6. Conclusions and Recommendations

6.1 Introduction

This report has made recommendations for dealing with the minor offending behaviour of homeless people across four dimensions: the legislation; police practices; sentencing and fine enforcement. Each of these will be addressed in turn.

6.2 Reform of the legislation

Public space law in Queensland is in desperate need of reform. Particularly in need of reform, if not repeal, is the *Vagrants, Gaming and Other Offences Act 1931* (Qld). This Act is antiquated, it allows for selective enforcement against vulnerable groups, it offends international human rights law and the rule of law, and it duplicates provisions contained in other Acts.

Recommendation 1

1. That the provisions of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) which criminalise homelessness or disproportionately impact upon homeless people as a result of their presence in public space be repealed, on the basis that police have the power to deal with threatening or abusive behaviour conducted in public space under other Acts; and/or
2. That these offences be replaced by one 'catch-all' provision aimed at regulating public space. This provision could take the form of an amended s7AA which includes the following:
   - a requirement that a complaint be made by a member of the public before police can begin proceedings under the offence; and
   - a statutory defence of reasonable excuse (akin to that under ss4 and 4A of the NSW *Summary Offences Act 1988*) to ensure that those who are conducting 'offensive' behaviour as a result of necessity, or for reasons associated with mental illness, homelessness, etc. are not unfairly impacted by the provision; and
   - a safeguard which is similar to that in s39, that a person's right to peaceful assembly should not be interfered with by the exercise of police powers unless this is reasonably necessary in the interests of public safety, public order or the protection of the rights and freedoms of others.

6.3 Reform at the policing stage

It is recommended that the diversion of homeless public space offenders away from the criminal justice system be be encouraged, based on the models established in relation to intoxicated persons in NSW, ACT and Tasmania, and the diversionary strategies already in place in Queensland under the *Juvenile Justice Act 1992* (Qld), the Brisbane City Council Homelessness Strategy and the Volatile Substance Misuse Strategy.

Police officers should be formally instructed, in legislation, to take homeless public space offenders to a relevant social service agency where they can obtain treatment for psychiatric illness and/or substance misuse, and receive case management and support as required.

Recommendation 2
That Queensland draw upon its expertise in diversion, demonstrated by the successful diversionary strategies already in place, to develop an alternative response to the offending behaviour of homeless people in public space.

Recommendation 3
That diversion of homeless public space offenders occur at the policing stage – ie. that police officers be instructed to consider taking alternative courses of action rather than simply arresting a public space offender, eg. taking no action, using their move-on powers, phoning a welfare agency and asking them to attend to the person, or taking the person to a welfare agency or safe place. Referral protocols should be developed in partnership with relevant social services.

Recommendation 4
That the power of the court to set default periods of imprisonment in relation to trivial offences be abolished.

6.4 Reform at the sentencing stage

6.4.1 Diversion

It is recommended that magistrates be instructed in legislation to divert marginalised public space offenders away from the criminal justice system by discharging them, or releasing them into the community either unconditionally or under the condition that they attend counselling, case management, psychiatric treatment, drug treatment, an approved program, or any other condition appropriate in the circumstances.

Recommendation 5
That the diversion of homeless public space offenders occur at the court stage – ie. that magistrates be instructed in legislation to release offenders charged with 'trivial' offences, either unconditionally or with appropriate conditions attached, if they pose no danger to the safety and security of the community. Magistrates should be encouraged to make greater use of court support staff when devising appropriate conditions. The recruitment of additional court support staff may be required.

6.4.2 Sentencing people to treatment and social service assistance

As it exists currently, community service orders are an inappropriate penalty for most homeless people. Due to their chaotic lifestyles, their lack of access to transport and/or the presence of mental illness or drug dependency, homeless people are commonly judged unsuitable to perform community service work. This fact excludes them from a penalty which might otherwise be appropriate and advantageous to them.

This problem could be solved most simply by considering attendance at approved rehabilitative and educational programs to be community service work under a community service order, as is currently done in Victoria, SA and WA. Alternatively, a new sentencing alternative could be created akin to the NSW intervention program order, the Victorian and WA community-based order, or the UK and US day treatment centre order, allowing courts to sentence offenders to attendance at certain approved programs aimed at promoting their rehabilitation and reintegration into the community. Another possibility would be to establish halfway houses in which defendants could live, and receive social support, while they complete a community service or other community-based order.

Recommendation 6
1. That community service work under a community service order be extended to include attendance at approved programs including life skills training, drug education and treatment, psychiatric treatment and other rehabilitative programs as is the case in Victoria, SA and WA; or
2. That a new sentencing alternative be created along the lines of the intervention program order in NSW, or a community-based order in Victoria and WA, which allows the court to sentence people to attend approved programs to promote rehabilitation.

Recommendation 11

1. That some trial halfway houses be established in Queensland to provide shelter and material and social support to marginalised defendants throughout the duration of their community service order or other court order.
2. That the possibility of establishing Day Treatment Centres be considered to provide case management and referral services to marginalised offenders subject to community service orders and other court orders.

Clearly, sentencing a homeless person to imprisonment for committing a public space offence is an unjust and disproportionate response to their offending behaviour, yet a number of people in Queensland are sentenced to prison for public space offences each year. The abolition of short prison sentences would go some way towards preventing this and encouraging sentencers to consider imposing a less severe, more appropriate alternative sentence with treatment or social service conditions attached.

Recommendation 7

That sentences of six months or less be discouraged (eg. by creating a requirement that sentencers provide reasons for imposing a short prison sentence rather than an alternative penalty) or abolished.

6.4.3 Moving away from the traditional court system

All the above recommendations in relation to sentencing alternatives have assumed the continued existence of the traditional court system. However, in the US a number of creative alternatives to traditional courts have been trialled. For example, a number of jurisdictions have established Homeless and Community Courts, which hold more informal proceedings in buildings which are accessible to community members. Specially trained magistrates preside over the court, and creative sentences are imposed which are appropriate to the circumstances of the offender. Also, community conferencing has been trialled as a means of dealing with public space offenders. This involves decision-making power being transferred from the court to the community; a representative body hears the case and imposes a restorative plan on the offender which is appropriate to his/her circumstances and the nature of the offence. Some of these innovative ideas could be trialled in Queensland and in so doing, Queensland would be leading the way in alternative sentencing in Australia.

Recommendation 12

That the establishment of a trial specialty court or docket for public space offences (Public Space Court), or homeless people (Homeless Court), be considered. This court should be presided over by a specially trained magistrate, and should impose sentences which are appropriate in the circumstances.

Recommendation 13
That trial community boards, including adequate advocacy and social support services for marginalised participants, be established in some select rural communities in Queensland to deal with the offending behaviour of homeless people in public space.

6.5 Reforming the fine system

Queensland's fine enforcement system is unique in that once referred to SPER, offenders do not have access to a decision-maker who can exercise the discretion to cancel their fine. Technically, they may be subject to imprisonment if they fail to pay, and are considered unsuitable for a fine option order.

Recommendation 8
1. That SPER be given the discretion to cancel fines in the event that they cannot be repaid and existing fine enforcement options are inappropriate in the circumstances; or
2. That, if a person is unable to pay their fine(s) and the fine enforcement options available to SPER are inappropriate in the circumstances, that person's case be remitted to the Magistrates' Court for determination.

Research has suggested that fines imposed for public space offences are often not tailored to the capacity of the offender to pay. It appears that a legislative instruction to judges and magistrates to take means into account when imposing a fine is insufficient to ensure that this occurs. This problem could be solved either by entrenching this requirement in legislation even further, eg. by requiring judges and magistrates to provide reasons for imposing a fine rather than an alternative penalty on an indigent person, or by establishing a day fine system.

Recommendation 9
That a more equitable and proportionate system of fine calculation be introduced in Queensland.

Recommendation 10

1. That a day fine system be trialled in Queensland; or
2. That the need to tailor fines to offenders' means be more firmly entrenched in legislation either by:
   (a) creating a formula for fine calculation for use by magistrates based on income level; or
   (b) inserting a new provision in the *Penalties and Sentences Act 1992* (Qld) requiring magistrates who impose a fine on an indigent person to provide reasons as to why they did not apply an alternative sentence; or
   (c) adopting the NT model whereby monthly payments are tailored to the total fine amount, so that the less the total amount of the fine, the less the monthly repayment.

6.6 Concerns regarding creative sentences

Each of these alternatives provides an opportunity for the causes of homeless persons' offending behaviour to be addressed. However, some concerns may be raised with regard to the introduction of such alternatives.

One concern is the potential for net-widening, that is, where defendants are subjected to a harsher penalty under alternative schemes than might otherwise have been imposed upon them by the court. Further, increased surveillance of offenders (eg. when sentenced to treatment or attendance at programs) may lead to higher levels of detected non-compliance, which may in turn result in harsher sentences which would not otherwise have been imposed (see particularly Blomberg and Lucken 1994; Jones 1990: 115-116). This has occurred in a number of international jurisdictions, particularly with regard to sentencing for public space offences, where the 'piling up of sanctions' may result in the imposition of a sentence which is disproportionate to the trivial offence originally committed (Blomberg and Lucken 1994). Similarly, it is feared that if short prison sentences are abolished, sentencers might be prompted to impose longer prison terms on those who they wish to incarcerate. These concerns must be borne in mind when developing alternative strategies for dealing with the offending behaviour of people who are homeless.

Another cause for concern in developing alternative strategies for dealing with the offending behaviour of vulnerable population groups such as homeless people is the degree to which public support for such schemes may be secured. It has been acknowledged by some commentators that law and order policies tend to be driven by partisan politics, and that policy-makers are often more concerned to appear sufficiently punitory and respectful of victims' interests rather than to promote penalties which are instrumentally effective and that achieve stated legislative goals (Tonry 1999: 48). The media has fuelled a 'moral panic' in relation to crime rates and 'dangerous' population groups (Hogg and Brown 1998) and elected officials may be tempted to respond to those emotions rather than evidence as to the costs and benefits of alternative policy choices. (Tonry 1999: 50). However, various surveys have

demonstrated that members of the public, when properly informed, are more inclined to support creative sentencing and diversionary schemes than first thought. There is a growing recognition within the community that the incarceration of offenders does not necessarily achieve desirable outcomes (Matthews 1989). Surveys have shown that members of the public who have some knowledge of corrections, either through personal experience or due to the nature of their employment, invariably endorse the use of alternative sanctions, particularly in relation to non-violent offenders (Higgins and Snyder 1996; Sigler and Lamb 1995; DeJong and Franzeen 1993). Community members are particularly supportive of sentencing alternatives which aim to address the reasons behind the offending behaviour of defendants, such as treatment for substance addiction and mental illness, and the provision of housing and welfare support (Begasse 1995). Thus, if the public were better informed about sentencing alternatives and offender characteristics, they would be more likely to support non-incarcerative options (Benn 2002).

Recommendation 14
That a public education campaign which:

- informs the public that homeless people are more likely to be victims of crime than perpetrators of crime; and
- educates the public regarding the effectiveness of diversion and creative sentencing alternatives

be launched in Queensland as a joint initiative between the Office of the Premier, the Department of Justice and the Attorney-General, and the Department of Police and Corrective Services.

6.7 Conclusion

Reform of the law relating to marginalised persons' use of public space in Queensland is urgently needed. Legislative reform is required, as well as a review of policing, sentencing and fine enforcement practices. These reforms need not necessarily be costly, indeed there are a number of innovative approaches which have been implemented around Australia and the world at no additional cost, and without the need for large-scale legislative amendments. It is hoped that the Queensland government will give serious consideration to this issue in the near future.

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