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STREET OFFENCES

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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

STREET OFFENCES

CHAIRMAN:

The Honourable Sir Laurence Street
Chief Justice, Supreme Court, New South Wales

27th April, 1983

State Office Block, Sydney

TABLE OF CONTENTS

FOREWORD

Associate Professor Gordon Hawkins
Director, Institute of Criminology

The Institute of Criminology does not attempt either to formulate solutions to social problems or to solicit support for programmes designed to deal with them. It does however try to promote informed discussion of them. One of the principal functions of the seminars organized by the Institute is to provide a forum for the dissemination of information about, and the discussion of, issues in the area of criminal justice which are currently the subject of public controversy. They are also intended to encourage the free expression of opinion by members of the public who are interested in and concerned about the matter selected for debate.

In this instance the seminar dealt with the controversy surrounding the operation of the laws relating to Street Offences, particularly the *Offences in Public Places Act*, which, in 1979, replaced the *Summary Offences Act*, 1970. The term "Street Offences" covers, or at least covered, a wide variety of behaviour including such things as indecent exposure, letting off fireworks and gathering alms. But the focus of public controversy in recent years has been the fact that the repeal of the provisions of the *Summary Offences Act* dealing with prostitution, effectively decriminalized soliciting and loitering for the purpose of prostitution.

It is not surprising therefore that this proved to be the principal subject matter of most of the papers presented at this seminar and of most of the discussion following their presentation. It is true that some attention was paid to public drunkenness and the working of the *Intoxicated Persons Act* 1979. Mr John Marsden and other speakers for instance complained that there had been abuse of the Act by the New South Wales Police. It had been used, Mr Marsden said "simply to arrest persons and hold them in cells for no apparent reason."

Apart from that, criticism mainly related to the inadequacy of the back-up services available to deal with persons taken into charge under the Act. But most speakers appeared to agree with Dr Richard Matthew's statements in his paper that the Act represented "an obviously overdue reform" and "an example of socially responsible legislation".

There was no such agreement in regard to the law and practice relating to prostitution and solicitation by prostitutes. Dr Richard Matthews spoke of "an explosion of street prostitution" and "the current crisis in relation to street offences". He said categorically "it is clear that the law has failed". Senior Inspector Sweeny spoke of the repeal of the *Summary Offences Act* as "erasing the thin line that separates civilization from chaos and anarchy" and "setting the scene for hitherto unknown freedom on the streets".

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On the other hand Dr Woods, while acknowledging that there had been problems in relation to the 1979 package of statutes dealing with prostitution and other street offences, claimed that the more than 7 000 convictions under section 5 of the *Offences in Public Places Act* since 1979 indicated that the law was "working effectively". Mr John Marsden responded to Senior Inspector Sweeny's assertion about "hitherto unknown freedom on the streets" with "Thank God that we will have freedom on our streets". He also remarked that it had not been difficult for police to secure convictions under section 5 of the *Offences in Public Places Act* and that there had been no fall-off in convictions after the abolition of the old *Summary Offences Act*.

It should be added that neither Dr Woods nor Mr Marsden were as totally complacent as that brief epitome of their remarks might suggest. Dr Woods acknowledged that street prostitution presented a difficult problem which he claimed had been recognized by the Government in the form of a recent amendment to the *Prostitution Act* (which made it an offence to solicit near a house, church, school or hospital) and decisions to establish a Parliamentary Select Committee to consider the whole subject of prostitution, and an Inter-Departmental Task Force to deal with social welfare aspects of the prostitution problem in the Kings Cross/Darlinghurst area. Mr Marsden also acknowledged that "an immensely complex human problem" was involved and expressed sympathy with Darlinghurst residents. He also recommended that prostitution should be moved into commercial areas.

The ensuing discussion was lively and wide ranging. Participants included lawyers and law students, public servants, police officers, social workers, prostitutes, and residents of Darlinghurst including the Rector of St Johns Church. I shall not attempt to summarize that discussion which is fully reported in this volume, but will make two brief comments.

The first relates to Senior Inspector Sweeny's rhetorical question: "Does the government really want to stamp out prostitution?" To this Mr Marsden replied: "I don't believe nor have I heard it said by this government, that it wants to stamp out prostitution. If it is the policy of the government then the government should stand up and say so. It hasn't done so yet".

In fact it would, I believe make little difference if the government did want to stamp out prostitution. It has been with us in Australia at least since the arrival of the *Lady Juliana* in 1790, two years after the First Fleet. It enjoyed considerable expansion during the Gold Rushes in the middle of the last century. Despite the current economic recession it continues to flourish today and it is notable that not one speaker at the seminar suggested that an attempt should be made to totally prohibit or abolish it.

The truth of the matter was well put by a U.K. Government Departmental Committee in 1957. The Committee (usually referred to as the Wolfenden Committee) was set up to consider, in addition to the law and practice relating to homosexual offences for which it is best known, "the

law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes". It reported, amongst other things, that prostitution "has persisted in many civilizations throughout many centuries and the failure of attempts to stamp it out by repressive legislation shows that it cannot be eradicated through the agency of the criminal law . . . no amount of legislation directed towards its abolition will abolish it".

My second comment derives from the assumption that the Wolfenden Committee's judgment was correct. It does not follow from the fact that the abolition of prostitution is an illusory objective that the activities of prostitutes and others associated with them should be subject to no control or regulation whatsoever. It is not as though we are forced to choose between abolition or anarchy. Nevertheless one thing that emerged clearly from this seminar is that the collateral social costs of our present laws relating to prostitution and the manner of their enforcement are very considerable.

In presenting his paper to the seminar Dr Richard Matthews both adverted to some of those costs and made a proposal designed to eliminate them. He said:

> The only way to solve the problem is to legalize prostitution . . .. The only way to get rid of organized crime, the only way to get rid of police corruption, is to let the girls run their own show in legalized licensed brothels; to make the proprietor responsible for the behaviour of the patrons as they come and go in the same way as licensees of hotels are responsible for the behaviour of their patrons. Only by full legalisation can we have a full measure of control over prostitution; and control is what we are really talking about. At the moment, with the situation of *quasi* or *de facto* legalisation it is impossible to control. The only people who are benefiting from the present situation are criminals, corrupt policemen and corrupt politicians. (Page 25).

The Parliamentary Select Committee that is to consider the subject of prostitution should seriously consider Dr Matthews' suggestion. There is no doubt that full legalization would meet with vociferous objections from self-appointed guardians of private morals. But Dr Matthews is right in indicating that legalization need not mean total deregulation and could result in more effective regulation than at present, with the criminal law restricted to the more modest and more achievable role of backing-up regulatory efforts.

It may of course be sanguine to expect such a rational and realistic approach to prevail in an area where humbug and hypocrisy have for so long dominated public policy. And here a brief historical footnote seems relevant. In the summer of 1894, Mrs Ormiston Chant, a member of the London County Council launched a Purity Campaign. Its principal objective was the closure of the promenades and bars behind the auditoriums in London music-halls which were frequented by prostitutes and their clients.

One person whose indignation was aroused by what he saw as an assault on "British Freedom" was the young Winston Churchill. Indeed his scorn for the intolerance and hypocrisy of Mrs Chant and her backers led to his first foray into politics and to his first public speech delivered to a tumultuous reception at London's Empire Theatre.

Many years later in *My Early Life* he wrote about delivering his maiden speech "in these somewhat unvirginal surroundings" and being "received with rapturous applause". He was, he says, "naturally proud of my part in resisting tyranny as is the duty of every citizen who wishes to live in a free country".

In recalling that episode Churchill declared that what he wanted in this connection was a "clear-cut definition of the duties of the state and of the rights of the individual, modified as might be necessary by public convenience and decorum". But he notes that "in the end all our efforts went for nothing". This volume of the Institute's Proceedings demonstrates that, nearly a century later, the kind of clear-cut definition Winston Churchill sought remains elusive.

It is appropriate to conclude this Introduction by expressing the appreciation of the Institute to John Oxley-Oxland who acted as Convenor for this seminar. As he indicated in speaking to his submission to the seminar because of the controversial character of the topic he met with some difficulties in securing suitable speakers. In the end however this proved to be one of our best attended, most informative, interesting and entertaining seminars.

CURRENT CHANGES IN LAWS RELATING TO STREET OFFENCES

Dr G. D. Woods, Q.C., Public Defender;
Director, Criminal Law Review Division,
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The repeal, in 1979, of the *Summary Offences Act*, 1970 was effected through various Bills, notably in *Offences In Public Places Act*, 1979: the *Prostitution Act*, 1979; and the *Intoxicated Persons Act*, 1979. The changes made in 1979 were a result of a Government policy aimed at rationalising and modernizing various provisions of the *Summary Offences Act*, 1970 which were thought to be out-dated and inappropriate. Consideration is currently been given, as at early March 1983, to certain further changes in relation to street offences in New South Wales.

The whole subject of street offence raises a number of interesting jurisprudential, social and policy questions. I do not intend in this brief paper to make any predictions about what changes may be or have been made around about the present time. Rather, I intend to comment generally upon three significant policy consideratories in this area.

Changing Community Standards

The question of what public behaviour will be tolerated by the law depends inevitably upon social customs at a given time. In recent years, social attitudes towards nudity have changed considerably, as may easily be noted by anyone visiting Sydney beaches. Standards of dress in public have changed in recent years. However, this is not to say that the great bulk of behaviour which was unacceptable 50 years ago its today acceptable. On the contrary, there are certain historical continuities which cannot be ignored. Public fighting remains behaviour which is generally unacceptable, assaultive behaviour remains unacceptable, violence to property remains unacceptable, etc. It is easy to exaggerate changes in community standards.

The Need For Clarity In The Law

It is frequently said that an uncertain criminal law is a bad law, and that a certain and clear rule is a good law. However, there are some areas of human conduct in respect to which it is impossible to draw precise black-and-white boundaries. For example, s. 54 of the *New South Wales Crimes Act*, 1900, makes it a criminal offence attracting imprisonment for two years to cause grievous bodily harm to any person "by any unlawful or negligent act". Leaving aside the question of what may constitute unlawfulness, the offence of causing grievous bodily harm by negligence is useful. There is

one school of thought that no crimes should properly be based upon the concept of negligence, but no criminal law system of which I am aware of accepts that principle. It is useful to have a broad general offence of this type which can encompass the causing of injury by negligence of any kind however impossible of advance categorisation.

So it is with street offences. There is a view that all "public order" type offence should be spelt out precisely and particularly in any attempt to control such behaviours by the criminal law. On the other hand, there is a need to allow for cases which are not definable in precise terms in advance, but which come within a general range of behaviours of a type sought to be prohibited. A recent case under s. 5 of the *Offences in Public Places Act* involved the leaving of a bleeding sheep's head, recently struck from the creature, in a telephone booth, to the potential serious alarm of an unsuspecting telephone user. It would certainly be difficult to list such a factually unusual type of behaviour in any specific listing of prohibited actions.

One of the great difficulties in framing "street offences" legislation is to achieve an appropriate synthesis of the general and the particular in the drafting of the provision.

Public Perception Of The Law

Many people are frightened of crime and disorder in the streets. Research shows that generally those who are most frightened, that is old people, are the least at risk of personal violence. Public perceptions of the validity and enforceability of street offence legislation are vital in considering the appropriateness or otherwise of the continuation of particular legislative provisions.

Public perceptions are important whether they are well based or ill founded. Indeed, their practical significance may sometimes be inversely proportional to their validity.

As I have said these brief remarks are intended merely to provide a reference point for broader discussion of this subject. It is well-known at the present time that the question of the effectiveness of the New South Wales street offences legislation is being discussed. I do not intend to embark upon an exercise of prediction, but merely to suggest that there are some basic jurisprudential questions which must be addressed in any careful consideration of this subject.

PRESENTATION OF PAPER

Dr G. D. Woods, Q.C.

I thank the Institute of Criminology for the opportunity to speak on this important practical and theoretical subject. My own paper has been distributed and I shall assume, albeit in the face of past experience, that it has been read. In any event my own paper as distributed is considerably more bland than what I shall now say.

I found the written comments of Dr Matthews of considerable interest. Much of what he says I agree with. Undoubtedly, the increase in recent years in narcotic trafficking and increased unemployment have significantly contributed to recent problems in connection with prostitution. I am glad to see that Dr Matthews acknowledges this, but the point bears emphasis, particularly the matter of unemployment. In the central western industrial area of Sydney, with which I am familiar, the last two years have produced an unemployment problem of quite staggering proportions. Employers are faced daily with the heart-wrenching problem of refusing face-to-face applications for jobs from desperate people. Worse, employees of long-standing are laid off, and in many cases business owners themselves are "going under" economically. In the last 12 months, for example, 13 out of the 14 transport firms which have been operating in the western suburbs of Sydney have disappeared. Restaurants and similar small businesses over Sydney, but especially in the western area, have been failing at a quite alarming rate.

This is why I find difficult in understanding, let alone accepting, the statement made by Dr Matthews in the second last paragraph of his paper:

> In any case the three year delay in dealing with these unsavoury social consequences is incomprehensible. (Page 22)

and he is referring here to what he describes as "failure" of the 1979 legislation and that legislation, of course, concluded with what might be referred to as "a package of statutes" dealing with prostitution and other street offences.

I should have thought that the difficulty which the government has faced over the last three years in dealing with these problems is not at all "incomprehensible" and that what we are witnessing is not a failure of legislation, but a grand scale failure of the economy and national and international economic policy. That is the main reason, in my view, why East Sydney and Darlinghurst have been afflicted by an historically high level of homelessness, drug addiction and prostitution. Perhaps if ones horizons extend no further than the territorial limits of Darlinghurst failure to solve all the problems of that area may seem extraordinary and incomprehensible. Let me assert to Dr Matthews, and to those of his colleagues who have assisted in the campaign that he has been involved with, that the social pains of economic collapse which are being felt in the Darlinghurst area are probably less than those being felt in places such as Wollongong, Fairfield and Newcastle where the shattering of the Australian manufacturing industry has led to a shattering of many lives.

The quiet desperation of the dole may not make for television as sensational as thigh length leather boots and fishnet stockings in the streets, but it is connected. It is just as real and in many regards it is even more lethal. Being kept awake at night by those whom Dr Matthews describes as "drunken, rowdy yobbos" is indeed a social pain and the government has set out to remedy it. But it is no more than the corollary of greater and more widespread pains being inflicted at the current time upon the wider community. Of course, both of our papers were written prior to the recent amendment to the *Prostitution Act* which makes it an offence to solicit for the purposes of prostitution in a public street near a house, school, church, or hospital. I am sure that Dr Matthews will be sufficiently gracious to acknowledge that a genuine and thoughtful attempt has been made by the government to counter the difficulties of the Darlinghurst and East Sydney residents in relation to street prostitution. That legislation is not by any means the overturning of the social reforms introduced by the 1979 Act. It is what might be described as "fine-tuning" of that legislation, and frank and proper recognition that in certain aspects the 1979 statute could not cope with changed social conditions.

Allied with that recent legislation, where decisions by the government to establish a Parliamentary Committee to consider the whole subject of prostitution, and to establish an interdepartmental task force to deal with social welfare aspects of the prostitution problem in the Kings Cross/Darlinghurst area. Again, I look forward to an acknowledgement by Dr Matthews, who is I know an humane and intelligent person, that what has been done represents a responsible step in the direction of addressing this difficult and complex problem.

As for the paper by my friend Inspector Sweeny, I should say that I am somewhat surprised at the attempted resuscitation by him of old and, I should say, thoroughly-discredited criticisms of the *Offences in Public Places Act*. His paper is entitled "Apparent Defects in Legislation Relating to Street Behaviour" and he rehearses the litany of criticisms of s. 5 of the *Offences in Public Places Act* which we have heard over the last several years from the Police Association in particular, but from some other police as well. Frankly Inspector Sweeny is flogging a horse which is not only dead, but which has long since been buried. That fact is that there have been over 7 000 convictions obtained in New South Wales courts under s. 5 of the *Offences in Public Places Act* since 1979.

If indeed, as he suggests, this law is so difficult to interpret, so vague, so unworkable, how is it possible that almost everybody charged with offences under the section is convicted? Most plead guilty, most are appropriately punished. There is a yawning chasm between the rhetoric of Mr Sweeny's paper and the real facts of law enforcement in New South Wales. There are without question thousands of responsible and competent police officers who are effectively enforcing this law which provides protection for the citizens of New South Wales against serious alarm or serious affront in public places. Those police officers are to be congratulated for giving effect to the policy of the law as laid down by the democratically elected government.

These responsible, loyal and competent police officers in taking action to obtain the more than 7 000 convictions under s. 5 of the *Offences in Public Places Act* over the last three years have quite properly ignored the campaign. to undermine s. 5 which was initiated by the New South Wales Police Association. In a large newspaper advertisement in the *Sydney Daily Telegraph* dated 20th August, 1979, the Police Association asserted "You can still walk on the streets in New South Wales but we can no longer *guarantee* your safety from harassment". This alarming advertisement attacked the new law and suggested that the new Act could be the seed from which a growth pattern of New York style street crime would be produced. This attack has been, however it may have seemed justified to those who initiated it at the time, since than proven to be quite false. As I have said, the simple fact is that despite the fears originally expressed by the Police Association about s. 5, as they were no doubt entitled to express their opinion, the section is being enforced and will in the future continue to be enforced by responsible police officers and by the courts. More than 7 000 convictions under that section of the Act are unquestionable proof that the citizens of New South Wales can indeed walk the streets with appropriate legal protection.

The police have never, in truth, been able to guarantee absolutely the safety of the public, whether under the old *Police Offences Act*, the old *Summary Offences Act* or the new *Offences in Public Places Act*. Any Police Commissioner who purported to *guarantee* public safety would be making a very rash promise indeed. Nonetheless, we have at the present time, in s. 5, addressed to serious alarm or serious affront a law which is regularly and effectively used by police to cover a variety of cases of offensive behaviour, violence, and general misbehaviour in the streets. I have absolutely no doubt that my friend Mr Sweeny put forward his arguments about the "failure" of s. 5 with complete sincerity, but they inevitably flounder on the undeniable statistics of charges and convictions obtained under the new law. The conviction rate is very high indeed as it is generally in the Courts of Petty Sessions. Whatever the theoretical imperfections s. 5 may be said to contain, it is in practice being used and it is in practice working. I should add that Mr Sweeny seems to draw some support for his critisisms of s. 5 from the comments of Mr Justice Yeldham in a case of *White and Edwards*. However, he fails to point out that s. 5 has been considered by the New South Wales Supreme Court of Appeal in a case of *Lake* v. *Dobson* decided on the 19th December, 1980. In that case, the most authorative consideration of the section so far, the court consisting of three very senior Supreme Court judges, said:

> It is not correct to say that the offence created by section 5 is less reprehensible than its equivalent in the Summary Offences Act; nor that it is in absolute terms, minor.

In this careful analysis of s. 5 the New South Wales Court of Criminal Appeal did not echo any of the doubts which several individual judges had previously raised about the efficacy of the provision. Moreover, the 7 000 or more convictions under s. 5 to date have been dealt with by a multiplicity of magistrates and judges, without apparent difficulty. Overall, I reiterate my

view that criticisms of s. 5 such as Mr Sweeny puts forward, or repeats, are, however sincerely and conscientiously felt, no longer appropriate. The horse is not only dead but has been effectively buried. Until I am persuaded that the 7 000 convictions under s. 5 have been obtained in some unlawful or otherwise inappropriate fashion, I adhere to the view that s. 5 is, in fact, working effectively. I look forward to the general debate.

COMMENTARY

Dr Richard Matthews
Spokesman for Darlinghurst
Residents' Action Group, N.S.W.

I have read Dr Woods' paper with great interest as the 1979 changes in legislation in relation to street offences affected both me and the community in which I live. Discussion of any defect in the legislation I leave to Senior Inspector Sweeny. My comments are confined to the effect of the legislation on one section of the community. Other areas of the State have been affected but I believe Darlinghurst has been the catalyst responsible for the mooted changes in the legislation, which, at the time of writing are a matter of conjecture.

Changing Community Standards

Community standards certainly are changing, but the law must follow, rather than attempt to mould, these standards. True, social attitudes toward nudity have changed considerably, but the law has responded to these changes rather than caused them. Many people still find nude bathing offensive and the law recognizes this by allowing it only in certain proscribed areas.

Dr Woods speaks of the need for clarity in the law. Clarity and certainty are pointless however if the law enforcement agency is unwilling to act. The residents of Darlinghurst believe they have been caught in a struggle between reformist law makers and a police force determined to retain traditional powers. It must be admitted that s. 5 of the *Offences in Public Places Act* 1979 lacks certainty and clarity and that this, combined with a police determination to force re-enactment of *Summary Offences Act* 1970, has resulted in a failure in the law in relation to street offences.

I am convinced that police inaction is the major reason for the current crisis in relation to street offences in Darlinghurst. I must say in defence of police that it is their frustration with s. 5 of *Offences in Public Places Act* 1979, which leads to inaction in other areas.

Public Perception of the Law

Dr Woods states that many people are frightened of crime and disorder in the streets. Surely all reasonable people abhor and fear crime and disorder.

As for elderly people, my personal experience suggests that, in the Darlinghurst area, they are particularly at risk because they represent an easy target for those desperate for money. Indeed the fears of these elderly people, whether ill founded or not, are nonetheless real. Public perception of

the law is based on its effectiveness. Perhaps the residents of nearby Woollahra perceive the existing laws as effective as they have few problems, but in Darlinghurst it is clear that the law has failed.

In 1979, Darlinghurst was a quiet suburb of terrace houses and residential flat buildings. The main controversy in the area involved sporadic resistance to gentrification which took the form of conversion to strata title of residential flat buildings and often resulted in the eviction of the original residents.

Several factors changed the area—

1. Repeal of the *Summary Offences Act*, 1970 and enactment of *Offences in Public Places Act*, 1979;
2. Rapid increase in narcotics trafficking; and,
3. Increased unemployment.

Unemployment and economic gloom are not responsible for all our problems but they have caused increased numbers of young people to drift to the inner city area. Many brought heroin habits with them; many more acquired them on arrival. Heroin addicts have a desperate need for the drug which they must fill whatever the cost to themselves or others. Traditionally, they do this in three ways; stealing, dealing in the drug itself, or by prostitution; or any combination of the three.

The "Decriminalization of Soliciting", whilst in my view a socially desirable objective, had a number of unforeseen consequences bringing about a complete change in the operation of prostitution. A traditional style brothel is based in a house and gains custom by advertising and by displaying a red light. Business is controlled at the reception desk and girls receive only about 40 per cent of the money they have produced after overheads are deducted by the proprietor.

Decriminalization of soliciting led to the development of a new "residential-style" brothel. Darlinghurst abounds in rooming houses where traditionally pensioners pay $30 per week for a room. These have been bought or leased by entrepreneurs who evict the residents and rent the rooms to prostitutes at $30–$40 a night—a considerable increase in return. The prostitutes based in these establishments conduct their business in the streets. They attract the customers, haggle over price, disappearing only for the final act. Sexual acts often take place in cars, laneways and on residents' doorsteps. Bitter fights between girls over territorial rights are commonplace.

Traditional style brothels have always been reluctant to employ heroin addicts. These new residential-style brothels on the other hand provide an ideal way for a heroin addict to finance her/his addiction and in fact since 1979 a number of addicts have come from interstate and from New Zealand because of the ease of financing their habit from street prostitution in New South Wales.

At first sight it appears strange that "Organized Crime" which tightly controls the income from vice has permitted this loosening of traditional bonds allowing the girls to keep the majority of their income. Some 80–90 per cent of the street girls however are heroin addicts who spend all their income on narcotics, and as long as "Organized Crime" continues to control heroin trafficking then the income from street prostitution flows to them anyway. Heroin deals between the girls and drug pushers have become common sights on the streets at Darlinghurst.

In the last few months increasing numbers of massage parlour girls, resentful of paying the majority of their earnings to brothel keepers, have taken to working on the streets because of the obvious economic advantages. Because these girls are not heroin addicts and their income does not flow on to "Organized Crime" there is already an increase in extortion and standover tactics.

A whole range of unacceptable activities has closely followed the advent of street soliciting. Street prostitution provides street theatre. It is the patrons of this theatre rather than the clientele who provide most offence. Customers tend to be furtive, whereas those attracted by the spectacle tend to be drunken, rowdy yobbos who since the advent of random breath testing have taken to arriving in hired buses, laden with alcohol and *sans toilettes*! The streets have become public urinals.

The Intoxicated Persons Act, 1979

In 1979, drunkennesss ceased to be a criminal offence and was moved to the medical/social welfare sphere. An obviously overdue reform, but unfortunately few social welfare resources were mobilized to meet the need. Having derelicts collected by paddy wagon and deposited in gaol overnight is hardly ideal but is better than nothing. Both Department of Health, and Department of Youth and Community Services are largely 9 a.m.–5 p.m. agencies, and, in any case they were never really mobilized to meet the problems which are largely left to voluntary agencies.

The State government collects a 10 per cent licensing fee from all liquor outlets. Surely sharing in the profits of the liquor industry bestows some responsibility for social consequences of alcohol abuse. The *Intoxicated Persons Act*, 1979 is an example of socially responsible legislation being enacted with insufficient thought to providing back-up services to deal with problems arising from it.

Disorderly Houses Act, 1943

By late 1982, resident protest had increased considerably and the media mounted an intensive coverage of activities in Darlinghurst streets. In December, 1982, the Attorney-General's Department instructed police to gather evidence for prosecutions under the *Disorderly Houses Act*, 1943.

This Act relates to activities within the houses themselves and its use to control activities in the streets is surely an implied failure of legislation relating to street offences.

Likewise Sydney City Council has faced a barrage of protests. Despite the fact that Council has no powers concerning street offences, it has been placed in the position of having to appear as it if is doing something and so has mounted expensive prosecutions in the Land and Environment Court based on unauthorized use of premises. The brothels singled out for these prosecutions have mostly been orderly, traditional style brothels whose existence are related to the activities in the streets.

Conclusion

In 1979, the New South Wales Government gave us new legislation in relation to street offences which was undoubtedly reforming in nature.

Three factors have contributed to the failure of this legislation.

1. The determination of the law enforcement agency to regain its traditional powers;
2. Failure to provide adequate social welfare services to deal with offences which had been decriminalized.
3. In the area of street prostitution in particular there have been a number of consequences which have disrupted the lives of many people. Some of these could have been easily foreseen, others could not.

In any case the three-year delay in dealing with these unsavoury social consequences is incomprehensible. In this interval the business of street prostitution in Darlinghurst has developed a complicated infrastructure and many people have become dependent on it. Not just prostitutes but also pimps, minders and drug pushers, who themselves have expensive habits to support.

A government preparing new legislation must address itself seriously to the problems which will arise if the income from street prostitution is suddenly cut off or significantly reduced.

PRESENTATION OF COMMENTARY

Dr Richard Matthews

I am here in my capacity as a resident at Darlinghurst. I am not legally trained and my comments are very much localized and very much concerned with the situation in Darlinghurst. I accept as valid criticism what Dr Woods says about me not lifting my horizons beyond Darlinghurst. However, I do feel that the activities there in some way can be influenced by me, whereas the general world wide economic recession is somewhat beyond my control.

Many street offences can be considered in isolation like Mr Marsden's gentleman who urinates in a snowstorm at Mount Kosciusko and Dr Woods' example of a gentleman who leaves sheeps' heads in telephone booths would both probably fall into this category. However, the situation which has arisen regarding street offences in Darlinghurst is far more complicated. They are offences which are of a repetitive nature and which have arisen in association with criminal activities such as drug trafficking and prostitution; and I refer to criminal activities in respect of prostitution as far as living off the earnings of prostitution is concerned and not as far as prostitution itself. These activities involve very large cash flow situations, and there are powerful vested interests which have money to protect these interests. The situation is also coloured by various allegations made about police corruption, about corruption of politicians and even on rare occasions about corruption involving the judiciary. Moreover, what is seen on the streets of Darlinghurst is only the very base of the pyramid whose apex is in the clouds and is beyond our sight.

Prior to 1979, Darlinghurst was a quiet residential area geographically quite distinct from East Sydney and from Kings Cross, which do have some historical association with prostitution and with other criminal activities. It was after the 1979 changes that Darlinghurst itself began to change. I accept, and I did point out in my commentary, that other factors have played a part, e.g., unemployment, and more important than unemployment, narcotics trafficking. I don't believe that any of those people who become unemployed in the western suburbs decide because of that unemployment that they will go to Kings Cross and work in prostitution. They may drift to the area because of some of the other attractions, and they may subsequently become involved in those sorts of activities for various other reasons, but to state that all our problems are associated with economic downturns and with unemployment is, in my view, rather simplistic.

At first the changes that took place were rather subtle. A small number of transvestites came into the area because they were looking to establish their own area. I think they chose Liverpool Street and Darley Street by accident, purely at random. In 1980–1981 there was an explosion of street prostitution involving mostly, at that time, female prostitutes, the majority of whom were narcotics addicts. I believe myself to be a reasonable person, somewhat akin to this rather mythical "reasonable person", and I can understand, and I can even agree, that soliciting should not be a criminal offence. However, the activities which inevitably are associated with

soliciting have the tendency to bring out the fascist in one. When outside your bedroom window you hear girls screaming obscenities at each other as they fight over territorial rights; when a Budget rent-a-bus arrives with twelve drunken gentlemen who are not, I would say, unemployed, carrying cartons of beer who proceed to urinate over your front fence; when I can see from my bedroom window people peddling heroin to the girl prostitutes and, of course, the boy prostitutes; when I come out in the morning and I find that someone has vomited over the front steps and that there have been a number of syringes left in the front yard; when I find used condoms hanging on the front fence, and when I find blood splattered over the front windows because someone has made a rather clumsy attempt to get into a vein; I tend then to become somewhat less reasonable. All these activities: urinating in the street, drunken behaviour, etc., tend to be transitory in nature, and the gentleman who plans to urinate in the street usually has a look around to see if there is a policeman in sight. Because of their transitory nature they are rather difficult to police, and we must inevitably come back to the common ground, street prostitution, which has provided the *milieu* for these things to happen.

A telephone call to the local constabulary brings a response, which one could almost say has become part of the folklore of Darlinghurst, and that is "We are very sorry—our hands are tied. There is nothing we can do—the government has changed the law". Further approaches to the Attorney-General receive a standard reply from him "Look there is nothing wrong with the law. It is simply that the police will not enforce it". Residents of Darlinghurst, and I speak for Darlinghurst, but there are other areas with similar problems, feel that they have been very much the meat in the sandwich in a struggle between the police and the Attorney-General. I say to Dr Woods and to the former Attorney-General, Mr Walker, and to the current Attorney-General that I agree with the general thrust of their legislative changes in 1979, and I believe that any reasonable person would do so, but if you are going to give us these reformist changes you must also give us a police force who are both willing and able to enforce what powers they do have. In fruitlessly trying to find exactly where the responsibility in these matters does lie, I would point out that, during those three years of discussions, we have always received a sympathetic hearing. The former Attorney-General and the current Attorney-General both have said "Well, look we realize you have a problem but . . .". I believe that one of the greatest tragedies that has come out of this is that because of the frustrations of three years we eventually have reached a situation where the residents of Darlinghurst and the prostitutes, both of whom in my view are the real victims of the situation, were at the stage where they were at each other's throats. The blame for what had happened lay with neither of those parties.

I know my brief is to commentate on Dr Woods' paper but I am going to make one comment on Mr Marsden's paper. He says that it is *trendy* to blame prostitution or the problem of prostitution on drug dependency and that there is no hard evidence for this. Over the last three years I have treated over one hundred prostitutes, both male and female, and a few transvestites. Of those working on the streets, and I stress *on the streets*,

80 per cent had a problem with narcotics. That situation has changed slightly recently because a lot of girls who have been working traditionally in massage parlours have been attracted by the obvious economic advantages of working on the streets and renting your own room and not having to pay high overheads to massage owner-proprietors. But, over the last three years I would estimate, based on a small personal series, that 80 per cent have a problem with narcotic addiction. I think, therefore, we have to deal with the problem in two sections.

Firstly, for those people who are working on the streets because they have a narcotic addiction we must deal with the problem of their addiction, and if the only way that we can stop people with an addiction from being forced to sell their bodies to supply that addiction is to legalize heroin, to register addicts and to supply them with heroin, then I believe we should do so.

The second part of the problem involves those people who, for their own reasons, decide that this is the profession for them. I respect that decision. In many ways, prostitution is one of the most honourable professions. I will say to Dr Woods that I do think the change in the legislation is a thoughtful attempt to do something about the problem. However, I do not believe that it goes anywhere near far enough. The only way to solve the problem is to legalize prostitution and to give those people who wish to work in this profession reasonable decent working conditions. The only way to get rid of organized crime, the only way to get rid of police corruption is to let the girls run their own show in legalized licensed brothels; to make the proprietor responsible for the behaviour of the patrons as they come and go in the same way as licensees of hotels are responsible for the behaviour of their patrons. Only by full legalization can we have a full measure of control over prostitution; and control is what we are really talking about. At the moment, with the situation of *quasi* or *de facto* legislation it is impossible to control. The only people who are benefiting from the present situation are criminals, corrupt policemen and corrupt politicians. I apologize if my remarks have been confined to one very narrow area but I do believe that a very large number of the problems associated with street offences in Sydney, not just in Darlinghurst, do stem from this problem.

In conclusion, I would just like to make one comment about the *Intoxicated Persons Act*. We are all familiar with the situation as it was prior to 1979 with intoxicated people, drunks, being picked up and thrown into the back of the paddy waggon. Obviously, this is not a good situation, and obviously, being intoxicated should not be a criminal offence. I agree with Dr Woods that it is something which should be removed to the area of medicine and of social welfare. However, when the legislation was changed in 1979 there were no back up services provided, and neither the Department of Health nor the Department of Youth and Community Service had been in evidence. In fact, the only State government instrumentality which works 24 hours is the police force, and to simply remove what little there was for these fellows by taking them off to gaol for the night is not good enough. You can't simply remove something and not replace it with anything only to leave a vaccum.

The State government receives a good deal of profit from the liquor industry. 10 per cent turnover in the form of licensing fee, and if you are going to share in the profits you have to share in the social responsibilities of alcohol abuse. To simply say, as Mr Marsden does, that shortage of funds didn't allow for these things to be implemented is not good enough.

APPARENT DEFECTS IN LEGISLATION RELATING TO STREET BEHAVIOUR

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SUMMARY

The essential ingredients which combine to provide an effective criminal justice system are:

(1) The legislators who make the law;

(2) The police who enforce the law; and

(3) The courts and legal fraternity who interpret and apply the law.

Legislation may be conceived by lawyers and enacted by parliamentarians, but if the resultant law leads to a lack of faith by police in the practicability of its implementation, the whole system must suffer and the interests of the community will inevitably be detrimentally affected.

History of Legislation

In every organized society the supreme authority is responsible for legislating laws governing behaviour of the members of that society. It is undeniable that there should be only one law for all; and it is right that this should be so. The best the supreme authority can ever hope to achieve is to make laws to suit the vast majority. It is an unfortunate fact of life that there is always some vociferous minority to oppose every worthwhile legislation on the basis that it affronts their personal liberties. If one is to remain a member of an organized society there will be occasions when the personal liberties of the individual must give way to the broader interests of the vast majority. It is axiomatic that in order to comply with the laws of the land, those laws must be clear and should precisely stipulate the conduct proscribed and define the circumstances in which the police should intervene.

The laws which have regulated the public behaviour of the people in this State can conveniently be grouped under the heading "Public Order Legislation". The history of these legislations can be traced through the repealed *Police Offences Act*, *Vagrancy Act* and the *Summary Offences Act* to the present *Offences in Public Places Act*.

On the 3rd October, 1901, the *Police Offences Act* No. 5 was assented to. Many sections of the act were copied from or similar to various English Statutes and was declared to be an act to consolidate the statutes relating to certain police offences which came under the notice of police officers in their general duty of maintaining public order, public safety and enforcing the law with particular reference to the obstruction, annoyance or danger to people.

The *Vagrancy Act* No. 74 was assented to on the 11th September, 1902. The various sections contained in the act sought to control the behaviour of persons in public places and streets such as (a) soliciting, (b) begging alms, (c) consorting, (d) vagrancy, (e) being found in houses frequented by reputed thieves, vagrants or prostitutes, also the use of language of an obscene, indecent, profane, threatening, abusive or insulting nature, and included behaviour of a riotous, indecent, or offensive nature.

Because of the very nature of the legislation appropriate definitions were accepted by the judiciary:

Obscene—Offensive to chastity and delicacy; impure; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed, as obscene language and obscene pictures. The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences.

Indecent—Offensive to common propriety, or adjudged to be subversive of morality; offending against modesty or delicacy; unfit to be seen or heard, immodest, gross, obscene, contrary to what is fit and proper; unbecoming.

The tribunal in considering whether a particular act is indecent should therefore examine *objectively* firstly the act, and, secondly, the attitude of the community to such acts at the relevant time.

Profane—Exercising or manifesting irreverence, disrespect, or undue familiarity towards the Deity, or religious things, blasphemous, sacrilegious, or a secular nature hence uninspired.

Riotous Behaviour—The behaviour must be such as to cause alarm to some members of the public of a reasonably courageous disposition, that alarm amounting to a fear that a breach of the peace is likely to be occasioned. It also means noisy, turbulent, or uproarious, disturbing the quiet and good order of the neighbourhood.

Offensive Behaviour—It is sufficient if the accused does an act which he must know has a tendency to insult or offend when judged by an external standard.

Insulting Behaviour or Words—To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect, to offer indignity to; *to affront*, outrage.

In 1967, a Police Department committee made a comprehensive review of both Acts and submitted recommendations to the appropriate Minister. These and other proposals were subsequently considered by the Law Reform Committee which was looking into the question of embodying in a single act the existing *Police Offences* and *Vagrancy Acts*.

It was not until late 1970 that the proposed *Summary Offences Act* commenced to take shape. Many of the ancient imperial laws were excluded and the remainder amended to reflect the views of the law makers of the day. The sections were reasonably clear and provided adequate directions to police to ensure that the law abiding majority could attend public places without the fear of being alarmed.

Some members of the community voiced their protest as to some sections of the act as being too restrictive towards behaviour of the individual in a modern society who should have the fundamental right to criticize in forceful and strong terms without fear of arrest. I refer to part of s. 4 the definition "unseemly words" means obscene, indecent, profane, threatening, abusive or insulting words. The main objection raised seemed to be the words abusive or insulting being included in the definition.

My research has revealed a continuous lobbying to have the *Summary Offences Act* repealed from the date of assent in 1970. The Premier, when leader of the opposition, in a campaign speech at Bankstown in 1976 said:

> The law is for the protection of the people, it is not the private preserve of lawyers. We will repeal the *Summary Offences Act* and replace it with a more just and more contemporary statute to deal with summary matters.

On the 28th October, 1976, the Committee for Revision of Summary Offences recommended that Drunkenness and Vagrancy be removed from the Criminal Law and be dealt with as a medical/welfare problem. The Committee also recommended that any new act should relate solely to behaviour in streets, schools and other public places. Any offences to be included should only be those which did not warrant a term of imprisonment. Therefore any existing provisions carrying a penalty of imprisonment would be transferred to the Crimes or other Acts.

Offences in Public Places Act: Section 5

The *Summary Offences (Repeal) Act* commenced on the 11th May, 1979, and removed seven offences from the statutes of this State, they were:

s. 22—Vagrancy.

s. 23—Person in charge of Premises frequented by Prostitutes.

s. 24—Found in Premises frequented by Vagrants, etc.

s. 28—Prostitute soliciting.

s. 29—Prostitute on Premises used.

s. 39—Fortune telling.

s. 55—Compound prosecution.

The Attorney General in introducing the *Offences in Public Places Act* No. 63 of 1979 to Parliament said referring to s. 5 of the Act:

> This section is designed to include all genuinely and realistically offensive behaviour in or near public places or schools and refers to all such behaviour whether constituted by actions, words or gestures.

Section 5 in effect purports to take the place of eight separate offences which were in the *Summary Offences Act*. They were:

s. 7: A person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence.

s. 8: A person who, whether or not in a public place or school, writes, draws, exhibits or displays any unseemly word or any obscene or indecent figure or representation so that it is within view from a public place or a school is guilty of an offence.

s. 9: A person who in or within hearing from a public place or a school uses, in any manner, any unseemly words is guilty of an offence.

s. 11: A person whose person is indecently exposed in or within view from a public place or a school is guilty of an offence.

s. 16: A person who, in circumstances likely to cause obstruction of, or annoyance or danger to, any other person or damage to the property of any other person—

(a) throws or discharges any stone or other missile in or into a public place or a school.

(b) places a line across, or pole in or across, any part of a public place; or

(c) plays at any game in a public place,

is guilty of an offence.

s. 17: A person who, in circumstances likely to cause obstruction of, or annoyance or danger to, any other person or damage to the property of any other person, makes or lights any fire, or lets off any firework, in a public place or a school is guilty of an offence.

s. 19: Where an occupier of premises near a public place, having reasonable cause to do so, or a member of the police force, requests a person who is in that public place using a noisy instrument or device to discontinue doing so and that person remains in the neighbourhood of those premises and uses a noisy instrument or device for the purpose of announcing a show or entertainment, or of hawking, selling, distributing or collecting any article or announcing the availability of any services, that person is guilty of an offence.

s. 26: (1) A person who—

(a) in a public place begs or gathers alms;

(b) is in a public place to beg or gather alms; or

(c) causes or encourages a person under the age of fourteen years to beg or gather alms in a public place or to be in a public place to beg or gather alms.

is guilty of an offence.

The then Attorney General when addressing a public forum shortly after the introduction of the *Offences in Public Places Act* stated that the Government had deliberately not given any guide lines to the interpretation of s. 5 as he expected the courts to interpret the section having regard to community standards at any given place at any given time and such an approach would allow for changing attitudes.

The section reads:

A person shall not, without reasonable excuse, in, or near or within view or hearing from a public place or school behave in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted.

An analysis of the section reveals a number of important proofs required.

(a) *Without reasonable excuse:* The actual behaviour must not be looked at in isolation. All the surrounding circumstances must be considered.

(b) *Behave in such a manner:* The behaviour must be considered as it relates to the object of s. 5 i.e., to preserve order and decorum in public places.

(c) *as would be likely to cause:* The assessment must be made as to whether a reasonable person would be likely to be seriously alarmed or seriously affronted.

(d) *Reasonable Persons:* This is the *objective test*, the average or normal person in the community what would he/she think of that behaviour would they be justified in all the circumstances in feeling seriously alarmed or seriously affronted.

(e) *Justifiably in all the Circumstances:* A member of the police force is required to take into account all the circumstances surrounding the behaviour and decide whether a reasonable person would have sufficient reason to be seriously alarmed or seriously affronted. A realistic assessment must be made.

(f) *Seriously alarmed or seriously affronted:* The aim of the act is to preserve the peace and decent standards of behaviour in public places and schools. A reasonable person will be alarmed where his peace is threatened and affronted when behaviour is offensive, indecent, insulting, etc. but he has to be more than just alarmed or affronted it must be serious, he must after sincere consideration take a stern or grave view of the behaviour and not merely disapprove or find it distasteful or improper.

Professor Norval Morris and Professor Gordon Hawkins in their joint publication, *The Honest Politician's Guide to Crime Control* (1970) although made within an American context clearly should have been applied when s. 5 was being framed. I refer to the following words in chapter one:

> Disorderly conduct and vagrancy laws will be replaced by laws precisely stipulating the conduct proscribed and defining the circumstances in which the police should intervene.

The controversy surrounding s. 5 from almost all sections of the community relating to the understanding and application of this section is supported by judges of the Supreme and District Courts and stipendiary magistrates.

A police officer does not make the law, he looks for guide lines contained in legislation such as definitions, he also looks to judicial pronouncements as a guide to the way in which legislation is to be enforced. Such guidance has been noticeably absent. The incongruous situation exists whereby members of the New South Wales Police Force are charged with the responsibility of enforcing legislation which has been soundly criticised since its inception.

Within six months of the Act coming into force a Consultive Committee to monitor the effect of the act was formed. This committee comprised of the Solicitor-General as Chairman, the other members represented the magistrates, Council of Civil Liberties, Trades and Labour Council, Criminal Law Review, Commissioner of Police, Police Association and Bureau of Crime Statistics and Research. The first meeting of this Committee was held on 6th November, 1979, and a view was expressed that a decision from the Supreme Court on the correct interpretation of s. 5 was desirable.

This section has been the subject of considerable public and legal controversy and it cannot be denied that the uncertainty of the section is brought about by its very wording. A lottery effect has in fact been introduced into the judicial system due to the various interpretations placed upon the section, not only by stipendary magistrates but by judges in both District and Supreme Courts. One example is the decision of *Lake* v. *Dobson & anor.* and *Gault* v. *Dobson & anor.* in the Court of Appeal on 19th December, 1980.

This appeal arose in respect of convictions recorded against Lake and Gault, who were arrested for nude bathing at Coogee Beach. The appeal was argued on two grounds; firstly, that the information laid was bad for duplicity on the basis that the words "seriously alarm or seriously affront" disclosed two offences; and secondly, that the magistrate in convicting the defendants had misdirected himself in law because he approached the matter on the basis that the offences contained in s. 5 was less serious than that originally created by s. 7 of the repealed *Summary Offences Act*.

Mr Justice Begg held that the appellants had been properly convicted and dismissed the appeals. The appellants obtained leave to appeal to the Court of Appeal. The three judges constituting that court unanimously agreed that the information was not bad for duplicity by the use of the words "seriously alarmed or seriously affronted". They ruled against the decision of Begg J. on the ground that the magistrate had misdirected himself in relation to the gravamen of the offence. This is only one of the decisions which clearly indicate the difficulties experienced in interpreting this particular legislation. There are many examples associated with nude bathing where convictions have been obtained in Courts of Petty Sessions based upon charges preferred by police following complaints made by offended citizens. These convictions usually being upset in subsequent appeals leaving police and citizens in a state of concern and bewilderment.

In certain District Court and Supreme Court decisions clear criticism is levelled at s. 5 of the *Offences in Public Places Act* with particular emphasis on its wording and difficult interpretation. The latest and perhaps the most stringent criticism is that made by Mr Justice Yeldham in *White* v. *Edwards*, in his decision delivered on the 5th March, 1982. The decision involves the use of "unseemly" words used by an individual at Kings Cross whilst speaking to his friends, such words being overheard by a member of the police force. It focuses attention on the difficult tests which are to be applied in determining whether or not the particular behaviour would in the circumstances justifiably cause a person to be seriously alarmed or seriously affronted. This charge had been defended in the Court of Petty Sessions where the presiding magistrate indicated that he was "in a quandry" in determining the intention of the legislation.

Mr Justice Yeldham indicated that the need for a court to determine the question of the standards of "reasonable persons" at Kings Cross at 12.15 a.m. on Saturday morning demonstrates the lack of skill in the drafting of the section and the lack of consideration given to its terms. He continued with the following words:

> Is the objective test to be applied in determining how "reasonable persons" may react that which envisages the standards of prostitutes, of dedicated churchgoers, of young people or of old, of visitors to the area or of residents of Kings Cross? In the course of argument one counsel said that "at Kings Cross you may find a prostitute shoulder to shoulder with an Archbishop". That statement, although no doubt an exaggeration, demonstrates the type of difficulty with which magistrates are

concerned in applying the section. The law in a number of contexts (especially in the law of torts) speaks of the "reasonable man" (which I hasten to add, embraces also the "reasonable woman") but such a concept gives rise to obvious difficulties when related to the question of whether such a person in the particular area and in the relevant circumstances would be likely to be seriously alarmed or affronted. The very nature of a place such as Kings Cross, where there is to be found a large cross-section of persons, not all of whom may be regarded as "reasonable", emphasises the problem. No doubt it is the hypothetical "reasonable persons" who would be likely to be in the street at the time whose reactions must be objectively assessed. Whether this would or could embrace likely visitors from outer suburbs who may be expected to be in the vicinity and whose views as to proper conduct may differ from those of *some* residents of Kings Cross (and the significance which the views of any such persons is to be given when objectively considering the likely reaction of "reasonable persons") is far from clear. Perhaps the problem would not be as difficult if the conduct complained of occurred in a different area; but even then *the test is vague and uncertain and hence is difficult to apply.*

Further in his judgement Mr Justice Yeldham states:

Section 5 of the Offences in Public Places Act, 1979, has been the subject of criticism from and the expression of divergent views by a number of persons who are obliged to interpret and apply it in practice (i.e., both magistrates and police). *Different views upon its meaning have been expressed by a number of magistrates* and to some of these I have been referred. Plainly Mr Henderson, S.M., from whom the present appeal is brought, was concerned at the lack of guidance which it gave, and it is difficult not to sympathize with his view. Judge Newton, in *In the Appeal of Van Den Hende* (1980) 1 N.S.W.L.R. 167 at 170 said:

> "It is with regret that I feel bound in law to uphold this appeal, because I consider the appellant's conduct warrants punishment; and would certainly have constituted an offence under the repealed section 7 of the Summary Offences Act, 1970, which provided:
>
> > 'A person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence.'
>
> *By the repeal of this section, it is apparent that Parliament intended that riotous, indecent, offensive, threatening or insulting behaviour is permissible, as long as it does not create that state of mind in a reasonable person which would justifiably cause such person to be seriously alarmed or seriously affronted.*"

Mr Justice Yeldham concluded by saying:

In deciding to penalize particular types of conduct, it is essential, for obvious reasons, that members of the community and those charged with the enforcement of laws such as that now under consideration,

should have reasonably clear guidance as to what conduct is permissible and what is not. I would strongly recommend that s. 5 be amended or redrafted so that the necessary guidance, which at present is absent, might be given. I would echo also the regrets expressed by Judge Newton in the case to which I have referred.

A well established principle is that the law should be enunciated in a fashion which can be understood by the "ordinary man". In the words of Holmes *J.* of the Supreme Court of the United States— ". . . it is reasonable that a fair warning should be given to the world in a language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." (see *Criminal Law*, *The General Part*, 2nd edition, Glanville Williams, 1961, p. 590).

The need for clear and concise provisions to enable police to combat improper, unlawful, and disruptive behaviour in public places is illustrated by the legislation which exists in other states which have stood the test of time.

Section 7 of the *Vagrants, Gaming and Other Offences Act* of Queensland reads:

> Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person in therein or not, could view or hear—
>
> (a) Sings any obscene song or ballad;
>
> (b) Writes or draws any indecent or obscene word, figure, or representation;
>
> (c) Uses any profane, indecent, or obscene language;
>
> (d) Uses any threatening, abusive, or insulting words to any persons;
>
> (e) Behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;
>
> shall be liable to a penalty of . . .

Section 17 of the *Summary Offences Act* of Victoria reads:

> Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon—
>
> (a) Sings an obscene song or ballad;
>
> (b) Writes or draws exhibits or displays an indecent or obscene word, figure or representation;
>
> (c) Uses profane indecent or obscene language or threatening abusive or insulting words; or
>
> (d) Behaves in a riotous indecent offensive or insulting manner—
>
> shall be guilty of an offence.

Section 7 of the *Police Offences Act* of South Australia reads:

> Any person who in a public place or a police station—
>
> (a) behaves in a disorderly or offensive manner; or
>
> (b) fights with any other person; or
>
> (c) uses offensive language,
>
> shall be guilty of an offence.
>
> Any person who disturbs the public peace shall be guilty of an offence.

In this section "disorderly" is defined as including riotous and "offensive" is defined as including threatening, abusive or insulting.

Conclusion

It is now twelve months since Mr Justice Yeldham's decision in *White* v. *Edwards*. I am aware extensive consultation has taken place between interested parties and future policy may be determined.

With a basic philosophy of liberalism we should all know about civil rights and have the determination to ensure that all our traditional rights and freedoms are preserved and strengthened. Our present society is a complex and complicated one. It involves us moving freely about our streets, parks and places of recreation. We naturally expect to be able to do this in an orderly and responsible manner just as we expect our fellow citizens to respect our right to do so.

The function of the criminal law is to protect the citizen's person and property. To prevent the exploitation or corruption of the young and others in need of special care of protection. To take away by questionable legislation police powers to preserve the peace and decent standards of behaviour in public places you are erasing the thin line that separates civilisation from chaos and anarchy.

PROSTITUTION

Four years ago by the repeal of the *Summary Offences Act* soliciting and loitering for the purpose of prostitution was decriminalised setting the scene for hitherto unknown freedom on the streets.

Residents of Kings Cross and the nearby suburb of Darlinghurst complain bitterly of prostitutes and clients having sex in public view, of used contraceptives being thrown into gardens, of clients exposing themselves at the front door of residences. A horrifying side effect of the new freedom to solicit in Sydney has been the spectacle of teenagers apparently hustling for customers and drug dependence. Social workers say that the mushrooming drug problem and high unemployment has exacerbated the situation.

In Sydney, many who favour decriminalisation of prostitution support the establishment of an official "red light" district. But where? *Would you want one next door to your residence?*

The states of Queensland, Victoria, South Australia and Western Australia still have legislation to control the activities of prostitutes in public places.

The relevant sections of the *Prostitution Act* No. 71 of 1979 are:

5. (1) A person shall not knowingly live wholly or in part on the earnings of prostitution of another person.

Penalty: $800 or imprisonment for 12 months.

(2) For the purposes of subsection (1), a person not being a child or young person within the meaning of the Child Welfare Act, 1939, who—

(a) lives with or is habitually in the company of a reputed prostitute; and

(b) has no visible lawful means of support,

shall be deemed knowingly to live wholly or in part on the earnings of prostitution of another person unless he satisfies the court before which he is charged with an offence under that subsection that he has sufficient lawful means of support.

6. A person shall not use, for the purpose of prostitution, or of soliciting for prostitution, any premises held out as being available for the provision of massage, sauna baths, steam baths, facilities for physical exercise, or services of a like nature, or held out as being available for the taking of photographs or as a photographic studio.

Penalty: $400 or imprisonment for 6 months.

7. (1) A person, being the owner, occupier or manager or a person assisting in the management, of any premises held out as being available for the provision of massage, sauna baths, steam baths, facilities for physical exercise, or services of a like nature, or held out as being available for the taking of photographs or as a photographic studio, shall not knowingly suffer or permit the premises to be used for the purposes of prostitution, or of soliciting for prostitution.

Penalty: $800 or imprisonment for 12 months.

(2) A conviction under subsection (1) does not exempt the offender from any penalty or other punishment to which he may be liable for keeping or being concerned in keeping a brothel or disorderly house, or for the nuisance thereby occasioned.

8. A person shall not, in any manner, publish or cause to be published, an advertisement, or erect or cause to be erected any sign, indicating that any premises are used, or are available for use or that any person is available, for the purpose of prostitution.

Penalty: $400 or imprisonment for 6 months.

Section 5 of the Act deals with the offence of living wholly or in part part on the earnings of prostitution. Subsec. 1 creates the offence whilst subsec. 2 contains a "deeming" provision. In order to establish this offence, without relying upon subsec. 2, it is necessary to produce direct evidence of the fact that the person charged was living on the earnings of prostitution. This can only come from the prostitute or prostitutes concerned. Police experience has shown that only on the rarest of occasions will prostitutes provide information concerning the identity of the person or persons to whom they are paying money, much less be prepared to give evidence of the transactions. The operators of premises used for prostitution rarely attend the premises, calling only on infrequent occasions to collect the proceeds, and the prostitutes involved will almost invariably claim that they do not know the identity of the operator.

Many persons obviously gain considerable wealth from the activities of prostitutes but almost invariably these people have sufficient lawful means of support and therefore cannot be convicted under this provision. In some cases the person concerned is a property owner who allows or organises the use of his property by prostitutes for which he is paid substantial sums of money. Even when detected acting as a "pimp" for a prostitute a person cannot be convicted of an offence under s. 5 if in receipt of a lawful income, be it from employment or government unemployment benefit.

Section 6 prohibits the use of prostitution of premises held out as being available for the provision of massage, sauna baths, steam baths, facilities for physical exercise, or services of a like nature, or held out as being available for the taking of photographs. If premises are used for prostitution but are not held out as being available for any of the purposes mentioned there is no breach of this section. It has been held in the District Court that no offence is committed under s. 6 when a prostitute offers massage with sex, provided there is no form of advertising or other indication that the premises are used as a massage parlour.

Proceedings have been instituted under s. 6 of the *Prostitution Act* against prostitutes operating at the subject premises. One case was heard and determined at Penrith Court of Petty Sessions on 5th August, 1982, the information was dismissed. The magistrate held that even though the premises were described as a therapeutic centre he was not satisfied that they were held out as being available for the provision of any of the services mentioned in the section. This decision serves to illustrate the difficulty of proving an offence under s. 6.

Section 7 of the Act provides a penalty for the owner, occupier or manager or a person assisting in the management of any of the premises mentioned in s. 6 who knowingly suffers or permits the premises to be used for the purpose of prostitution, or of soliciting for prostitution. In addition to the burden of proof imposed by s. 6, a prosecution under this section requires proof that the owner etc. *knowingly* suffered the premises to be so used.

The remaining offence creating provision is s. 8 which prohibits the advertising of premises as being available for prostitution. The popular method used by the operators of such premises to avoid the provisions of the section is to describe the premises as an "Escort Agency".

I am aware that numerous submissions have been made by concerned police since the implementation of the *Prostitution Act* because of the lack of effective legislation relating to prostitution. Several meetings have been held between members of the Government and police the last earlier this year following a visit to the Kings Cross and Darlinghurst area by the Attorney General and Minister for Police and Emergency Services who were accompanied by members of the Vice Squad.

There has been a steady growth of prostitution since 1979 in New South Wales because the established laws interstate and overseas control the activities of prostitutes, not so in this state. It is the opinion of members of the Vice Squad that drugs and prostitution in Sydney are interwoven. Approximately ninety per cent of the persons soliciting for prostitution in the streets of Kings Cross and Darlinghurst are heavy users of heroin and are in fact, operating as prostitutes to satisfy their heroin habit. Some are involved in dealing as well because their drug dependence is so strong they are unable to survive on prostitution alone. Another major problem in residential neighbourhoods is prostitutes operating from home units, flats and cottages. Residents are disturbed by the prostitutes clientele, who arrive at all hours of the day and night, frequently knocking on the wrong door and generally disturbing permanent residents.

The provisions of the *Disorderly Houses Act* has been suggested as a means to combat prostitution in houses. I believe the Act does not have the necessary force to effectively control such activity.

> 3. (1) Upon the affidavit of a Superintendent or Inspector of Police showing reasonable grounds for suspecting that all or any of the following conditions obtain with respect to any premises, that is to say—
>
> (e) that the premises are habitually used for the purpose of prostitution, or that they have been so used for that purpose and are likely again to be so used for that purpose.
>
> any judge of the Supreme Court may declare such premises to be a disorderly house.
>
> (2) Such declarations shall be in force until rescinded.

7. If after publication in pursuance of paragraph (a) of subsection (1) of section 6 of notice of the making of such declaration with respect to any premises, and during the time that such declaration is in force, any person is found—

(a) in, or on, or entering, or leaving such premises; or

(b) in, or on, entering, or leaving any land or building used as a means of access to or exit or escape from the same.

such person, unless he proves that he was in, or on, or entering, or leaving as aforesaid for a lawful purpose, shall be guilty of an offence against this Act and shall on summary conviction be liable to imprisonment for a term not exceeding six months.

Upon the declaration of premises as being "Disorderly Houses" prostitutes usually move to other premises close-by and continue business. On the 24th December, 1982, three premises were declared as disorderly houses and since the making of the declaration, five prostitutes and four males have been charged under s. 7. Only two males have been dealt with at petty sessions. The first pleased guilty and the magistrate dismissed the charge under s. 556A of the *Crimes Act.*

The second matter was defended and the magistrate held as the defendant was on the premises for sexual intercourse with a prostitute it *per se* was not unlawful and dismissed the information. The informations against the remaining persons under s. 7 and the owner under s. 8 have not been finalised by the courts. I am aware that ten other applications are presently before the Supreme Court for declaration under the *Disorderly Houses Act.*

Even if declarations are made in respect to the present applications the real problem of soliciting for prostitution in a public place still exists. I refer to both female and male of up to 200 in numbers working shifts almost 24 hours per day. Approximately forty to fifty rooms and/or houses are used with a number of prostitutes using the same premises. Prostitution is known as the oldest profession and has been part of the Kings Cross area for many years.

The evil today is the combination of drugs, traffic congestion, disruption and annoyance to local residents, obscene and indecent behaviour, the scantily dressed prostitutes, the large numbers of pedestrians and vehicular traffic, even bus loads of sightseers add to the congestion and juveniles.

It has been argued that people who choose to earn their living from mercenary sex are entitled to do so and should not be subjected to harassment or arbitrary arrest because their choice of career is different from others. They contend the fact that sex cannot be sold openly and legally makes prostitutes liable to exploitation putting them at the mercy of pimps and the criminal elements, forcing them to pay high rents and unfair percentages to their protectors from earnings. If controlled, prostitution would be almost free of medical hazards because of regular medical checks. There is a very grave concern at the growing incidence of genital herpes.

The debate whether legislation relating to prostitution should be re-introduced, in whatever form, is still on-going at the time of writing this paper.

INTOXICATED PERSONS ACT

Public drunkenness is not an offence known to law. It was removed from the statute books of New South Wales by the repeal of the *Summary Offences Act*.

Section 5 (1) (a) of the *Intoxicated Persons Act* provides for a person found intoxicated in a public place (including a school) and is:

(i) behaving in a disorderly manner; ("Disorderly" according to the *Concise Oxford Dictionary*—untidy, confused, irregular, unruly, riotous, constituting public nuisance).

(ii) behaving in a manner likely to cause injury to himself or another person or damage to property; or

(iii) in need of physical protection because of his incapacity due to his being intoxicated,

may be detained and taken to a proclaimed place by a member of the police force or an authorised person.

Such detained person may be detained in the proclaimed place until:

(a) he ceases to be intoxicated; or

(b) the expiration of 8 hours etc. whichever first occurs.

Under s. 3 the intoxicated person shall be released from a proclaimed place if a responsible person is willing immediately to undertake the care of the intoxicated person and that there is no sufficient reason for not releasing such person to such care.

Subsection (5) of s. 5 states: a person found intoxicated in a public place shall not be detained under subsec. (1) of 5 by reason of his behaving in a manner referred to in subsec. (1) (a) (i) or (ii) if that behaviour constitutes an offence under any law.

Under s. 6 the authorised person may be searched and restrained as may be considered necessary for his and others protection.

A proclaimed place maybe for either adults or juveniles or for both. There are five proclaimed places for adults in the inter-city area and seven in outlying and country centres. Also seven centres for juveniles. All police stations are proclaimed places within the meaning of the Act. The research has disclosed a steady increase in the number of persons effected by intoxicating liquor who are attending proclaimed places either voluntarily or otherwise.

PRESENTATION OF PAPER

Senior Inspector P. H. Sweeny

I did have in mind attacking the legislation right from the outset, to go back over the years of the history of legislation relating to street offences in New South Wales and elsewhere; but I am moved by Dr Woods, opening comments that in 1979 the Police Association of New South Wales paid for a full page advertisement criticizing the *Offences in Public Places Act*, especially s. 5. But that is where he left it, we are now in April 1983. He quoted figures of 7 000 convictions over a period of four years, but he didn't quote any figures relating to convictions prior to the *Offences in Public Places Act*. How many people did, in fact, appear before the court prior to 1979, how many of those were convicted, how many of those were found not guilty? What is the percentage since the *Offences in Public Places Act?* He hasn't given you those figures. Figures add up to what you wish to believe.

I agree with certain suggestions made by Dr Woods that the toleration of public behaviour by the law must depend upon social behaviour at a given time. I believe the law should be for the majority of people not for a small minority. I also agree that great difficulty is always experienced in framing street offence legislation to achieve a proper balance.

Dr Matthews told you of his problems, the problems of the residents of Darlinghurst and what they have had to put up with since 1979 when the offence of prostitution was removed from the Statutes of New South Wales. On Anzac Day the present government saw fit to bring into operation the *Prostitution Amendment Act* which said amongst other things that prostitution is an offence in a public street when it is near to certain buildings such as dwellings, hospitals, schools and churches, but there is no offence of being in a public place for the purposes of soliciting for prostitution. Can you picture Hyde Park or any other park where families go for picnics, walks, etc., at weekends. It is an offence for a prostitute to solicit on the thoroughfares through those parks but not in the park itself; i.e., not in the public place. Certainly the government has done something but have they gone far enough? Have they assisted the people of our community to enjoy your way of life in New South Wales. I don't think they have.

In my paper I quoted a statement (page 30) made by the then Attorney-General when introducing the *Offences in Public Places Act*, referring to s. 5:

> This section is designed to include all genuinely and realistically offensive behaviour in or near public places or schools and refers to all such behaviour whether constituted by actions, words or gestures.

He further stated at a public forum that the government had deliberately not given any guidelines to the interpretation of s. 5 as he expected the courts to interpret the section having regard to the community standards at any given time or place. Has that happened? We are now in April 1983. I ask the question—Why was this seminar called this evening? The reason being

because it is still unsure law. Nobody really knows what is meant by those words of the then Attorney-General. Courts have been endeavouring to interpret the words since 1979. Certainly there have been many convictions, but as Dr Woods pointed out the majority of them were pleas of guilty.

There was an interview on the 19th September, 1979, between the then Attorney-General and Carolyn Jones in the radio programme "City Extra", and in answer to criticism by the Police Association (I think I am right in saying this it is the advertisement that Dr Woods referred to) the Attorney-General said:

> I can explain the difference between the old Offensive Behaviour section and what happens under the new section 5 of the *Offences in Public Places Act*. Before under the old Offensive Behaviour section if you offended a policeman you were guilty of a criminal offence. It didn't matter if everyone else was not offended by that particular behaviour. Provided the policeman was personally genuinely offended then you were guilty of a criminal offence, could be convicted and sent to gaol. If it was only a trivial offence then you wouldn't be sent to gaol but nevertheless you got a conviction against your record. The only way you could get an acquittal was if the magistrate thought the policeman was lying. That was basically the nuts and bolts of the Act—the test of community standards was the individual policeman's opinion of what happened. The government felt that wasn't the fair thing. We felt that community standards should be judged by more general tests so we introduced the reasonable man concept . . .

I am the first to agree that you must have an opinion of a reasonable person, but who is a reasonable person? All of you at this seminar are reasonable people. Would your attitude change if the circumstances of a particular incident changed? If you, in fact, were on the receiving end of something, rather than being near and watching it take place. Would you as a reasonable person change your attitude? That is what the government in 1979 said was happening with the *Offences in Public Places Act*.

Section 5 of the Act reads:

> A person shall not, without reasonable excuse, in, near or within view or hearing from a public place or school behave in such a manner as would likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted.

What do those words mean? Can you conjure in your mind an instant taking place when you ask "Am I seriously affronted, am I seriously alarmed?" *Alarm* according to the shorter Oxford Dictionary "news of approaching hostility, a sound to warn of danger, a sudden attack or surprise";

Affront is "assault to the face openly";

Serious is "not light or superficial . . . of grave demeanour or aspect; attended with danger; giving cause for anxiety";

Justifiable is "capable to being justified or shown to be just, fitted to justify the claim or the like".

Mr Marsden in his paper gave you a definition of "reasonable" as uttered by Sir John Kerr in the matter of *Ball and McIntyre* (1966, 9 F.L.R. pp. 237, 241, 245). I agree with what Sir John Kerr said on that occasion but I would like to add this: a "reasonable man" denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would or should be understood. I said earlier that a man can change day by day, hour by hour, minute by minute. The police officer who is out in the street observes an incident take place and has to make up his mind in a moment as to whether some person is "seriously affronted", or "seriously alarmed", and if the surrounding circumstances of that particular incident are such that call for an arrest or for some action and much later a determination by a magistrate or by a judge. Those people some months later who examine what took place become very critical of the man who had to make up his mind in a moment.

The *Prostitution Act*. On page 38 I indicated that it was impossible to secure a conviction for "live on the earnings of prostitution" because of the proviso to the Act. Convictions had been recorded but it has been on the evidence of the prostitute coupled with some other corroborative evidence to assist the prosecution. I mentioned s. 6, and a matter in the District Court relating to massage parlours and advertising for such refers to the case before His Honour Judge Cameron-Smith at Murwillumbah on the 17th February, 1982. It was an appeal against the findings and determination by a magistrate that the appellant had used for the purpose of soliciting for prostitution premises held out as being available for the provision of massage or services of a like nature. The decision, given by the judge where he upheld the appeal, was examined, and legal advice was sought by the Police Department. It was agreed on the advice given that the judge had given a correct interpretation of the section and therefore no other prosecutions have been launched because of the defect in the legislation relating to s. 6. That matter has been raised on a number of occasions with the appropriate authorities but nothing has been done at this stage.

The *Disorderly Houses Act*. This Act has no teeth. An order can be made by the Supreme Court declaring a house a "disorderly house for the purposes of prostitution", and all the occupants have to do is to move to other premises and that is the end of it. The police are then forced to take action against the owner of the other premises.

The *Prostitution Act* amendment (25th April, 1983). This particular amendment still permits prostitution from a home and I can't see that the Act is going to improve the situation as far as Darlinghurst is concerned. Figures supplied to me this morning indicate that 10 females and 4 males have been arrested since the 25th April for soliciting for prostitution in the area where they had been soliciting previously. I have on a number of occasions over the last few weeks made observations of the area in the company of members of the vice squad and my sympathy certainly goes to Dr Matthews as I realize what the residents have to put up with, but as late as last night prostitutes were still operating from houses but not in the public street. They were inside gates of houses, on the lawns, on the front verandahs. Does the government really want to stamp out prostitution? Do they wish to assist the people so that they can walk through these areas

without being accosted? Are they trying to assist the people of this State so that they can walk in these areas without having to put up with behaviour of people which would result in charges being laid under s. 5 of the *Offences in Public Places Act?*

An interesting point is that shortly after the commencement of the Act in 1979 a consultative committee was formed (*see* p. 32). That committee consisted of a cross section of the community and it was charged with examining the *Offences in Public Places Act* and reporting back to the government. Their last meeting was on the 7th June, 1980, and at that meeting they passed a motion that the committee would again meet when an authoritative decision from the Supreme Court was available. That is almost three years ago. About five months ago at a meeting, where the Police Department was represented, with members of the government including the Crown Advocate, an expression of opinion was given to the words "seriously alarmed" or "seriously affronted". It was agreed that the balance of s. 5 of *Offences in Public Places Act* was merely a re-statement of the law as it existed for many years, that law being the "objective test". But it was also agreed that the phrase "seriously alarmed" or "seriously affronted" needed interpretation. The words "alarmed" or "affronted" could have their usual dictionary meaning but the construction put on the word "seriously" has in my opinion created a grave problem and the only way to overcome that is by legislation.

In my paper I have quoted only one case from the Petty Sessions, one from the District Court, and one from the Supreme Court, but I have used that as a cross-section of thinking by the judiciary, and surely something should be done. My greatest concern is for members of the community. The standards our parents set for us many years ago must influence our behaviour during our lives, but I feel that we still need guidance to know what standard of behaviour is expected of us when in public. Legislation covers the aspect of the wearing of seat belts, helmets, random breath testing, the opening and closing of shops, licensed premises etc. We all agree that those laws are there for our benefit as members of the public. Surely it is not too much to ask that proper guidelines for behaviour in public be established. The high unemployment rate, the apparent massive increase in drug dependence (as indicated by Dr Matthews) has caused a drift of people towards the city. A lot of them have no place to live. This is all reflected in our present living standard.

Police enforce the law on behalf of the community. Indeed they cannot effectively enforce the law without the support of the community. The exercise of police judgment has to be independent, as is the exercise of the professional judgment of a doctor or lawyer. The image of police in the eyes of the public is complex and intractable shaped by our peculiarly Australian culture. We live in a stratified society where at one end we have certain groups who are invariably hostile towards authority of any kind; in the middle we have a large apathetic mass who are vaguely pro-police, who neither know nor care what is happening as long as they are not affected, and at the other end we have a small group who keep shouting "They have too much power! Strip them of their authority! Let us have freedom in the streets! Let us do what we want to do when we want to do it!" What would you sooner have?

COMMENTARY

J. R. Marsden,
A Solicitor of the Supreme Court of N.S.W.

Inspector Sweeny in his paper divides it into 3 parts:

(a) A basic commentary on the defects that have arisen as a result of the introduction of the *Offences in Public Places Act* 1979.

(b) A commentary on the lack of police powers in respect of soliciting for the purpose of prostitution.

(c) A statement relating generally to the *Intoxicated Persons Act* 1979.

I will seek to comment on them in that order.

However, the Inspector commences his paper with the words:

> Legislation may be conceived by lawyers and enacted by parliamentarians, but if the result in the law leads to a lack of faith by police in the practicability of its implementation, the whole system must suffer and the interests of the community would inevitably be detrimentally effected. (page 27)

Duty and responsibility of the police in any democratic society is to carry out the law to its full extent as laid down by the democratically elected parliament. It is not the responsibility of the police as a public servant to be involved in making his or her decision as to the practicalities of the implementation of the law as laid down by the government. It is the duty of the police officer that if he or she believes that there has been a breach of law as laid down by the government to carry out an arrest and to place the individual before the courts charged with the charge then present the courts with the facts. The decision of the court and the effectiveness of the penalty is a matter for the government.

The three Justices in the English Court of Appeal in *R* v. *Chief Constable of Devon and Cornwall, Ex Parte*, the Central Electricity Generating Board stressed that the police had both a responsibility and a duty to preserve the peace, and even if they had no power of arrest, they ought to do what ever is necessary by way of restraint to prevent breaches of the peace.

Defects

The Inspector in paragraph 3 on page 27 goes on to say, "the best the supreme authority can ever hope to achieve is to make laws to suit the vast majority". This is certainly a true statement but the minority cannot be ignored, the people that are different, the people that do not necessarily exist in the main stream of our community or for that matter, do not wish to. There cannot be a law that says we all have to be the same, behave the same, think the same, it is a free and democratic society.

Inspector Sweeny, at some length, criticises s. 5 of the *Offences in Public Places Act* on the basis of uncertainty and gives examples of certainty in repealed legislation or in legislation in other States. Thus, in the old *Summary Offences Act* we had such wonderfully certain definitions as:

> Section 7—a person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence . . .

are the adjectives of riotous, indecent, offensive, threatening or insulting any more certain or specific as seriously alarm or serious affront?

> Section 9—a person who in or within hearing from a public place or a school uses in any manner, any unseemly words is guilty of an offence . . .

what does unseemly words mean? How many different decisions of the Courts were there as to the definition of unseemly words? How many different Magistrates interpreted it in different ways? How many times do we have words being used in the theatres, on television and yet when an individual used the same words in a police station he was found guilty of unseemly words and could have and on some occasions did, go to jail for 3 months.

The old *Summary Offences Act* from its inception was a very political act, it was political in that it dealt largely with minor crimes with forms of behaviour that do not transgress universally accepted norms. Because the forms of behaviour proscribed are minor transgressions there are many who believe that they should not be offences at all.

The *Summary Offences Act* came into being in 1970 and it was mainly brought into being to deal with the growing public dissent and the rapidly increasing opposition to Australian participation in the war in Vietnam. Students, trade unionists and ordinary citizens were taking to the streets in droves and that Act came into being to stop them and to give the police wide powers of arrest in those circumstances.

In 1976, a new State Government was elected in New South Wales and it was part of its policy plank to repeal the *Summary Offences Act* and replace it with more realistic legislation, thus it was a decision of the people that the old *Summary Offences Act* be repealed.

It should be remembered that the *Offences in Public Places Act* was not the only Act that came into being as a result of the repeal of the *Summary Offences Act*. In fact 16 Acts replaced the *Summary Offences Act*, some of them were:

1. *The Intoxicated Persons Act.*
2. *Landlord and Tenant (Summary Offences) Amendment Act.*
3. *Public Assemblies Act.*
4. *Offences in Public Places Act.*
5. *Gaming and Betting Act.*
6. *The Enclosed Lands Protection (Summary Offences) Amendment Act.*
7. *Prostitution Act.*
8. *Crimes (Summary Offences) Amendment Act.*

It should also be remembered that very few offences were abolished by the repeal of the *Summary Offences Act*. However the most important that were abolished being drunkenness, vagrancy and soliciting.

The following offences were transferred to the *Crimes Act* where I think you will all agree they more properly belong:

1. Fraud to obtain money.
2. Goods in custody.
3. Framing a false invoice.
4. Housebreaking implements in possession.
5. Prying.
6. Resisting police.
7. Consorting (a ridiculous and stupid offence).
8. Suspected persons.

The police still have all that area of law in which to arrest people plus certainly plenty of avenues contained in those various offences which are now in the *Crimes Act* in which persons can be arrested. In addition to that there are other sections of the *Crimes Act* such as s. 576 relating to "indecent exposure", of for that matter there are the more exciting Common Law offences which have not become trendy with the New South Wales police force such as the offence of "scandalous conduct" or "aid and abet scandalous conduct".

There is no doubt that as the present laws now emerge a police officer has a far reaching discretionary power in the making of arrests, a power which has grave implications especially in situations where on the spot arrests are made. The use of police powers in these circumstances will

depend very much on the standard of training, the mode of conduct, and the personal integrity of the police officer exercising the power. Any formulation of a power of arrest must necessarily strike a satisfactory balance between the individual right to liberty and the public right to protection. These opposing interests necessarily require a sound arrest policy to be embodied within a legal framework if an ultimate objective of justice is to be achieved. It would be hoped that with the development of time and more sophisticated methods of police administration, that the occasions for arrest without warrant will become less numerous.

The major criticism of Inspector Sweeny relates to s. 5 of the *Offences in Public Places Act* which of course replaced a number of sections of the old *Summary Offences Act*, they being:

(a) Offensive etc. behaviour.

(b) Writing or drawing unseemly words or obscene or indecent figures or representatations.

(c) Unseemly words.

(d) Indecent exposure.

(e) Actions of obstruction, annoyance or danger.

(f) Making fires or letting off fireworks.

(g) Using noisy instruments.

(h) Gathering arms.

The new s. 5 aims in fact to cover all those matters and I believe has successfully done so. Mr Jim Cameron M.L.A. said at the time that the Act was debated in Parliament that the new section was designed to ensure that there would never be a conviction. How wrong Mr Cameron can be.

The New South Wales Police Association on 20th August, 1979, took out a full page advertisement in the *Daily Telegraph* where it was stated that the police force of this State could no longer guarantee your safety from harassment—again, how wrong the advertisement was, how misleading such advertisement was.

Inspector Sweeny says that there has been considerable amount of criticism by magistrates, District Court judges and Supreme Court judges in respect of s. 5 of the *Offences in Public Places Act* and quotes, at some length, the decision of Mr Justice Yeldham where Mr Justice Yeldham makes some surprising and rather outlandish comments about s. 5. It's interesting to note that in his judgment Mr Justice Yeldham seems to have indeed a lack of understanding of Kings Cross in the evenings. I re-read the decision of Mr Justice Yeldham and the only thought that crossed my mind was, it is a pity that judges who sit in high places don't get down to the nitty gritty and deal with the every day citizen, the every day member of the community and see what really happens. Inspector Sweeny quotes one Supreme Court judge; one District Court judge and one Magistrate.

The old *Summary Offences Act* was being abused by the police. It was being used to arrest any Tom, Dick or Harry that they wished to arrest and bring him before the court on any type of offence. The most common offence that came before the courts in those days was the charge of unseemly words and the most common allegation was "pig copper" or "copper cunt". The situation was that if two police officers stated in their evidence that they were called those words and the defendant denied it, the defendant was convicted and the defendant had a criminal record. It simply gave the police too great a power of arbitrary arrest.

The new section s. 5 places on the arresting officer some onus, an onus to prove that the behaviour complained of was serious to such an extent that it would cause serious alarm or affront to a reasonable person in all the circumstances. Now this is clear, serious means exactly what it says, alarm and affront means exactly what it says, and the courts over many years have been regularly referring to that reasonable man.

In *Ball and McIntyre* 1966 9 F.L.R. 237 and 241 and 245, Kerr *J.* as he then was described the reasonable man as "reasonably tolerant and understanding and reasonably contemporary in his reactions . . .". I am sure no-one could quibble with that definition given by Sir John Kerr. There certainly has been no fall-off in convictions when one looks at the conviction rate after the abolition of the *Summary Offences Act*. It also has not been difficult for police to secure a conviction under s. 5 of the *Offences in Public Places Act*. They have been secured against persons urinating in the street when it has been a well lit street in the middle of a main shopping complex but not for example on a deserted road near Mt Kosciusko during a snow storm. And let me assure you that under the old Act a person was convicted of offensive behaviour for urinating on a deserted road near Mt Kosciusko during a snow storm.

I said above that it has become trendy for the police, when they themselves do not think that they have sufficient facts to support a charge under s. 5, to now lay an outmoded ridiculous charge being a common law misdemeanour and commonly called "scandalous" conduct. The charge says that X on the blank day of blank in the City of Sydney in the State of New South Wales was guilty of scandalous conduct which openly outrages public decency in that he did wilfully and scandalously expose his naked person to the view of diverse persons, liege subjects of our Sovereign Lady the Queen to the evil example of others in like offending.

Inspector Sweeny had something to say in his paper in relation to nude beaches. Is there, in fact, anyone that could not be covered by that rather stupid offence? Then of course indecent exposure under s. 576 of the *Crimes Act* clearly says, and I quote:

> Every indecent exposure of the person which is punishable at Common Law or by statute if seen by 2 or more persons shall be equally an offence imposeable if such exposure was or could have been seen by 1 person.

I don't know what more power the police need in relation to these type of offences. However I do note that in a decision of the Supreme Court on an appeal *Regina* v. *Reinsch* 1978 New South Wales Law Reports page 483, His Honour Mr Justice Begg said, and their Honours Chief Justice Street and Ash agreed, when referring to a charge of scandalous conduct, that in their opinion, and I quote:

> In fact the evidence would have supported proceedings under the *Summary Offences Act* 1970 . . . I would have thought on the facts of the present case that the appellant could have been charged under the *Summary Offences Act*, thus avoiding the extremely laborious procedure of indicting him, and requiring him to stand trial before a jury.

One would have also thought that if behaviour was scandalous conduct it would also be conduct that would seriously alarm and affront someone. My personal view is that if the New South Wales Police Force lack faith in the practicality of the implementation of s. 5 of the *Offences in Public Places Act*, they do not do so genuinely but rather for politically motivated purposes, an intentional attack on the policies of the present State Government.

The behaviour of individuals in public, and when that behaviour should be proscribed as criminal, is an immensely complex human problem, and police to answer it tend to think in rather concrete practical terms. A major problem in the criminal justice system is that of police discretion, of a public officer using common sense instead of brute force or power—s. 5 in a small way requires both the use of common sense and the exercise of some discretion, discretion as to whether conduct amounts to "serious alarm or/and affront". It is an essential element of the offence that the affront should be a serious one, the objectives of the new legislation was and is to eliminate trivial junk, that police were using to arrest those who were not part of this norm.

Prostitution Act

Inspector Sweeny clearly sets out the law relating to prostitution in this State as at the time of writing this paper. Inspector Sweeny says, and I quote:

> Four years ago by the repeal of the *Summary Offences Act*, soliciting and loitering for the purpose of prostitution was decriminalised setting the scene for hitherto unknown freedom on the streets. (Page 36)

Thank God for freedom on our streets, thank God that we still have freedom on our streets.

Inspector Sweeny says residents of Kings Cross and the nearby suburbs of Darlinghurst complained bitterly of prostitutes and clients:

(a) Having sex in public view—wouldn't one have thought that that may cause serious alarm and affront to the reasonable person, have the police sought to charge persons under s. 5? I am sure that you realize the answer is "yes" and have succeeded

(b) Used contraceptives being thrown into gardens—again have the police sought to enforce s. 5 when this has been done?

(c) Clients exposing themselves at the front doors of residences—the police have power here as in the case I referred to earlier, *R.* v. *Reinsch*, the court upheld that that type of behaviour amounted to scandalous conduct.

Thus, where is the lack of power of arrest? It must be clearly admitted that police have charged prostitutes under s. 5 and have succeeded in such prosecution. It is certainly interesting to declare that 90 per cent of prostitutes work in this manner because they have serious drug addiction problems but statistics need to be produced in order to support such an allegation. It should be remembered that in the mid 1960's the Palmer Street operations where literally hundreds of girls operated out of little shacks in Palmer Street and literally hundreds and hundreds of men walked up and down the street into the wee hours of the morning, it was never suggested that those prostitutes were behaving in that manner because they were drug dependent. It may be trendy now to blame the prostitute problem on drug dependence but to do so one must have undoubted and unqualified evidence.

The old system of prostitution being illegal, girls operating on the streets, being arrested once or twice a week, taken before the court and fined $70, $80 or whatever it was, released to continue work, was a sham. It bought the law into disrepute. That type of behaviour led to allegations of graft and corruption in the police force, allegations that the prostitutes paid a weekly bribe to various police officers to be allowed to continue in the street areas in which they operated.

The whole issue of prostitution is something that should be carefully examined. Too often we have regarded it as somehow "wrong", never pausing to wonder why. In a capitalist society, almost everything has a price. Our labour, especially lawyer's labour most of all has a price. Money has become the way of establishing the relative value of all things. Why then, do we object so much to the sale of sex? It is wrong for the Inspector to throw in medical problems as a red herring in the argument. The new trendy venereal disease of genital herpes is easy to throw in, particularly when no facts are there to support the suggestion.

The comments by Inspector Sweeny appear to be that prostitution, loitering and soliciting ought to be subject to the criminal law. The policy of this government is that it ought not to be. The government has been re-elected by the people in an overwhelming majority despite the fact that loitering and soliciting have been repealed as offences in our criminal law by the government. The democratic process says that the policies of this government are accepted by a majority of the people. There is certainly some suggestion that the government intends to bring legislation down somehow controlling the areas from where prostitutes operate. I see nothing different between that attitude and local councils having some control re residential and commercial and industrial areas.

I do not think it is unreasonable to say if you're going to sell something you must sell it from a commercial or semi-commercial area. However, I do see a real problem in trying to enforce laws against prostitution when the majority of the community does not consider it criminal and when it can only amount to a system of police arbitrary regulating the activities of prostitutes.

Intoxicated Persons Act

The *Intoxicated Persons Act* is one of the great legislative gems in the history of the Wran Government. It is one of the most humane pieces of legislation ever to pass the Parliaments of this State. However, unfortunately, the Act has:

1. been abused by the police, and

2. the intention of the Act for economic reasons has not been effectively carried out by the Government.

In 1975 there were 54 158 appearances for public drunkenness in the Courts of Petty Sessions in New South Wales. The offenders differed from others in that of those appearing before the courts 60% were over 40 years of age, whereas the majority of offenders for other classes of offences are under 25. It was not necessary that expert medical evidence be available to establish whether the accused was drunk. The opinion of the policeman who made the arrest and observed the defendant's behaviour was admissible and the fact of the drunkenness depended on what would be considered such by an ordinary reasonable person. Thus basically anyone could be picked up for drunkenness and it was the policeman's word against that of the accused. It simply was not good enough. In addition to that drunkenness clearly is a medical problem. A study by Lundman known as *Routine Police Arrests Practises. A Commonwealth Perspective* 1975, summarizes his findings thus:

> It appears that 3 factors relate most directly to police selection of certain drunkenness offenders for formal processing by the Criminal Justice system:
>
> 1—Offender conspicuousness;
>
> 2—Offender powerlessness, and
>
> 3—Offender disrespect . . .

he goes on to say that offender disrespect at the time was the one precipitating most arrests and Lundman comments when looking at that particular arrest method says, "despite the frequency of this finding it is necessary to remind ourselves that it is not illegal or criminal to be disrespectful to the police".

Inspector Sweeny does not, in his paper, call for any changes to the law relating to intoxicated persons. However, there are two problems with the legislation. They are:

1. Due to lack of funds the government has not been able to nominate many proclaimed places and in most states the local police station is the proclaimed place—thus, persons taken into charge under the *Intoxicated Persons Act* are still held at police stations.

2. The New South Wales Police Force has abused the spirit of the Act. The Act has been used to arrest minority groups. Some three years ago it was used regularly to arrest transexuals, transvestites or gays in the Cross or Taylor Square area. The Council of Civil Liberties have numerous cases of allegations of persons being arrested who had not been drinking at all but were held in cells under the *Intoxicated Persons Act.*

This abuse of the Act was foreshadowed when the Act was debated on the second reading of the bill by the then Shadow Attorney-General, the late John Maddison and he, while praising the Government for the humane approach that was taken in the Act, said he feared that the Act could be abused by the police in this manner and it has been so abused. True it is that that abuse is not so prevalent now but some two or three years ago it was being used simply to arrest persons and holding them in cells for no apparent reason.

The only way the abuse of the Act can be overcome is by the Government to proclaim places throughout the State where persons who are arrested under the Act can be immediately taken without the necessity of them even visiting a police station.

Inspector Sweeny talks on apparent defects in legislation relating to street offences: thus, summing up,

(a) The new legislation in 1979 abolished only three offences, soliciting, drunkenness and vagrancy—is there any reason why people who are poor, alcoholics or mildly anti-social should be treated as criminals? They certainly were under the old law.

(b) It is suggested that the new law took away a great deal of powers from the police in relation to their power of arrest for street offences. At the time of the debate on the new laws the acting Police Commissioner, a former police prosecutor, and shortly thereafter Police Commissioner, Mr Lees, in a training scheme report for police, said, "You can be assured the new law does not limit police powers of arrest".

(c) In the first month of operation of the new laws there were over a hundred arrests under the new laws, there had been numerous convictions and very little criticism in the courts, quotes from Inspector Sweeny's paper of the court criticism is very minimal.

PRESENTATION OF COMMENTARY

John Marsden

I was asked to comment on the paper presented by Senior Inspector Sweeny called "Apparent Defects in Legislation Relating to Street Offences". I hope to comment on the paper with my personal view that the street offence legislation in this State is far too strong and gives the police far too many powers. So starting from that view I saw absolutely no defects in the legislation that existed in this State in relation to street offences and that basis was set out when Inspector Sweeny at the commencement of his presentation said: "Law should be for the majority of people not for a small minority". Am I to understand from that that any person who is a member of a minority, or if we are minorities in the community, then the law ought not to take any note of it? They can be ignored, they can be treated as second class citizens and they can be picked up and thrown into the dungeons of this city because they happen to be a minority. That is not what I thought democracy was about. If it is what the police force thinks democracy is about I am surprised.

Inspector Sweeny similarly said towards the end of his presentation (page 45) that public guidance from the government and from legislation was needed for standards of behaviour in public. I think every individual sets their own standards of behaviour, and I can see no reason why any government should lay down laws relating to our private behaviour, our moral behaviour, or the general standards of behaviour in the public of our community. If we are responsible persons in a free and democratic society we will behave responsibly. The government only sets standards for those who don't behave responsibly or behave in a manner that is highly offensive to the general members of the public, and that is what the government sets its legislation about.

I have said in my commentary that the duty and responsibility of the police in any democratic society is to carry out the law to its full extent as laid down by the democratically elected parliament. In 1975 the now government went to the polls with a public policy of the abolition of the *Summary Offences Act* and bringing down new legislation. They were elected. They went back to the polls three years later. They were elected with an increased majority with the same policy. Therefore they have a mandate from the people to abolish the old *Summary Offences Act* and to bring down new legislation and that mandate should be carried out because that is what democracy is about.

The vast criticism in Inspector Sweeny's paper of the new s. 5 in the *Offences in Public Places Act* is on the basis of uncertainty. He says that the interpretation of the word "serious" or "seriously" is causing a great deal of problem for the courts and he quotes a magistrate, a District Court judge and a Supreme Court judge, but I want to put to you: Is it any more confusing than s. 7 and s. 9 of the old *Summary Offences Act*, which referred to "a person who or within view from a public place or school behaves in a riotous,

indecent, offensive, threatening, insulting manner"? Now, those adjectives are just as hard to interpret; or, for example, "any person who within hearing of a public place or school uses in any manner any unseemly words is guilty of an offence". I would submit that it is a lot easier to interpret "serious" or "seriously" rather than "unseemly". What are "unseemly words" and to whom? I often am amazed how words that were in public use in the theatres, on stage productions, on TV, suddenly became "unseemly words" in a police station. I thought that maybe the people in the police station had not a broad outlook on life and had rather a narrow and sheltered upbringing and they found them "unseemly", whereas we were hearing them in the streets, in the theatres, and on TV.

Any formulation of a power of arrest must necessarily strike a satisfactory balance between the individual right to liberty and the public right to protection. These opposing interests necessarily require a sound arrest policy to be embodied within a legal framework if an ultimate objective of justice is to be achieved. To do that the police of the State, the government's police force, must be willing to act in accordance with the legislation that the government has brought down.

One of the problems that have occurred with s. 5 of the *Offences in Public Places Act* is the fact that there are certain sections of the police force who have deliberately and intentionally told the public they are unwilling to enforce the Act; unwilling, as they have said: "Because of the new law we can't do anything about it". Dr Matthews told you that he had had that experience. I would respectfully suggest that some of the incidents that Dr Matthews has outlined that occurred near his front yard, if they couldn't have been charged under s. 5 and a conviction recorded then I would be very, very surprised. There are very few magistrates in this State, as I know them, that wouldn't have recorded a conviction in such circumstances. It is hoped however that within the development of time and a more sophisticated method of police administration, better standards of education and experience for police, the occasions for arrest of this nature, i.e. arrests without warrant, will become less numerous. It might be noted the learned Chief Stipendiary Magistrate of this State was quoted in one of the newspapers as calling for changes relating to powers of arrest and suggesting that there are many offences that could be dealt with by way of infringement notices. He should be applauded for that stand. It is to be hoped that some people in government might listen to him. The matters that he raised are matters that are probably dear to a number of people and are certainly of interest.

The old *Summary Offences Act* just simply gave the police too much power and we must admit there are police who are dishonest, police who are uneducated, the same as there are lawyers who are dishonest and lawyers who are uneducated. That power allowed persons to be arrested unnecessarily, and they ended up with criminal convictions. For the rest of their life they were stamped with a criminal conviction. There had to be some control taken by the government to place this type of legislation in a more reasonable manner. And remember, remember why the old *Summary Offences Act* was

brought into being. It was brought into being to bring down the anti-moratorium demonstrations during the Vietnam days. The then government of this State brought it in for that purpose and for that purpose alone, and it gave the police wide powers of arrest. I quite frankly will not forget the case under the old *Summary Offences Act* where a person was found guilty of offensive behaviour for urinating at midnight on a mountain road at Kosciusko in the middle of a snowstorm. He was found guilty by the magistrates court of offensive behaviour. The learned District Court judge on appeal thought otherwise.

Of course, as well as s. 5 of the *Offences in Public Places Act* we do have many other offences and there is plenty of room within the scope of those offences for police to charge people. I have referred in my paper to the common law offence of "scandalous conduct", and surely some of this behaviour that occurred outside of Dr Matthews' house would come within that scope. That offence goes on to say that "a person is guilty of scandalous conduct which openly outraged public decency in that he did wilfully and scandalously expose his naked person to the view of diverse persons liege subjects of our sovereign lady the Queen to the evil example of others in like offending". Surely there is a lot of room there for arrest on matters that have been referred to as not coming within the scope of "serious alarm and affront".

The Inspector went on to talk about the *Prostitution Act* and the basic decriminalization of soliciting in 1979. The whole issue of prostitution is something that I believe should be carefully examined. Too often we have regarded it in our community as somehow wrong, never pausing to ask ourselves why it was wrong. In a capitalist society almost everything has a price, especially lawyers' labour most of all has a price. Money has become the way of establishing relative values of things and I for the life of me can't see then why we object to the sale of sex. It is just another commodity for sale. If we get away from the trend of considering it wrong, we can then look at legislation to overcome the problems. I think that Inspector Sweeny said that having regard to the legislation that came down on Anzac Day it doesn't go far enough. I think he said: "How would you like to see prostitutes operating in Hyde Park?" (page 42). The legislation covers that. On the eastern side of one end of Hyde Park is St Mary's Cathedral, on the other side is the Jewish Synagogue, so in that case we are near a church. We go down to the next section. On one side is Sydney Grammar School. We are near a school. Just up a bit is Police Headquarters and I don't think they would wish to operate there so I quite frankly don't think you have a problem in Hyde Park. There may be a problem in Centennial Park but I think that probably in Centennial Park you are too far away from the business area and I don't think prostitutes would seek to operate from there because I don't think business would be very good. However, the government has tried to bring in this new legislation, and I was horrified, as a member of this community, to see in this morning's paper the Detective Sergeant in charge of the Vice Squad criticizing the legislation within 24 hours of its coming into operation. A public servant carrying out his duty goes to press and criticizes the legislation before it has had an opportunity to be put into

effect. I think if we want to, as enforcement officers, criticize it in the press we should firstly give it a trial and see if it works. I find it not objectionable to have legislation that controls where soliciting takes place. I find it objectionable, totally objectionable, to place any restrictions or infringements on an individual's right to be a prostitute if he or she wishes to be one. Inspector Sweeny asks ". . . Does the government really want to stamp out prostitution?" (page 44). I don't believe, nor have I heard it said by this government, that it is the policy of this government that it wants to stamp out prostitution. If it is the policy of the government then the government should stand up and say so. It hasn't done so yet.

The other piece of legislation is the *Intoxicated Persons Act* and I agree entirely with Dr Matthews. Unfortunately that has failed on two bases. One, it has failed because there has not been sufficient funds to provide proper houses of refuge for people who are taken in under that Act. Secondly, it failed because it was originally in 1980–1981 abused by the police, but not so much now, a matter that was referred to in the Parliamentary Debate on that legislation. The then shadow Attorney-General John Maddison said in praising the legislation that it was a most humane piece of legislation. He added: "But I fear that it could be abused by the police because of the power of arresting and taking people in". The Council of Civil Liberties with which I am involved had during the period of three months in 1981 over 80 complaints of abuse in that legislation. We had persons who were different, transvestites, transexuals, gays, were held under that legislation. Some of them never having had a drink in their life.

Summing up, the new legislation in 1979 abolished really only three offences: soliciting, drunkenness, and vagrancy. And I ask quite frankly: Is there any reason why people who are poor, alcoholics, or mildly anti-social should be treated as criminals? I certainly hope not. It is suggested throughout the debate over this law over many, many years that the new law took away a great deal of power from the police in relation to their powers of arrest for street offences. At the time of the raging debate, advertisements in newspapers, etc., the acting Police Commissioner (a former Police Prosecutor and one of the most competent Police Prosecutors that have been known in this State and shortly thereafter Police Commissioner) Mr Lees, in a training school report said to the police: "You can be assured that the new law does not limit police powers of arrest."

Dr Woods has said that in talking about defects in street legislation, about criticisms of s. 5, we are flogging a dead horse. It is well and truly buried. I hope so, but I am not too sure. The government does sometimes bow to pressure and those who believe in the right of the individual to be free in a democratic society should make their voices heard that we do not want legislation that gives the police excess powers.

DISCUSSION PAPER

STREET OFFENCES: SUGGESTED NEW PROVISION

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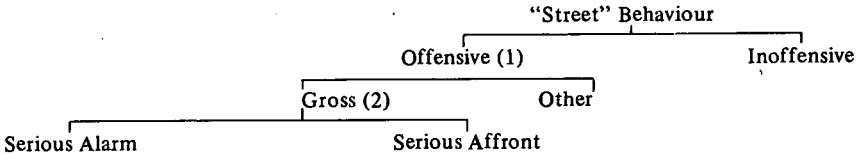
I am the convenor of this seminar.

I have had first-hand experience of the troublesome public behaviour ("street" behaviour) existing in Sydney, from Kings Cross in the centre, through the surrounding suburbs, to the beaches at the periphery.

I have studied the relevant literature, from Professor Hawkins' *The Honest Politician's Guide to Crime Control* (University of Chicago Press, 1970), through the N.S.W. Anti-Discrimination Board's *Study of Street Offences by Aborigines* (1983), to the most recent newspaper reports.

In what follows, I have attempted to adhere to the State Government's social policy, as far as it can be ascertained. I have also attempted to meet the practical needs (*See* Senior Inspector Sweeny's paper) of the police, for whom, as an ex-prosecutor, I have a very real sympathy.

The following diagram sets out in a nutshell the concern of this seminar:



(1) Essentially dealt with in s. 7 of the old *Summary Offences Act* 1970 (N.S.W.).

(2) Essentially dealt with in s. 5 of the present *Offences in Public Places Act* 1979 (N.S.W.).

Section 7 of the old *Summary Offences Act* provided:

> A person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence. Penalty: Two hundred dollars or imprisonment for three months.

Section 5 of the present *Offences in Public Places Act* provides (emphasis added):

> A person shall not, without reasonable excuse, in, near or within view or hearing from a public place or school behave in such a manner

as would be likely to cause reasonable persons justifiably in all the circumstances to be *seriously* alarmed or *seriously* affronted. Penalty: $200.

I submit, with respect, that s. 5 should be amended to read as follows:

(1) A person shall not, without reasonable excuse, in, near or within view or hearing from a public place or school—

(a) behave in such a manner as to cause serious alarm;* or

(b) (i) expose his sexual organs or buttocks;

(ii) urinate;

(iii) defecate;

(iv) masturbate himself or any other person; or

(v) have sexual intercourse;

provided that a person may lawfully expose his sexual organs or buttocks on a beach designated as a nudist beach by the Governor by regulation.†

Penalty: $200.‡

(2) For the purposes of this section, "sexual intercourse" has the meaning ascribed to it by subsection (1) of section 61A of the Crimes Act 1900, as amended by subsequent Acts.§

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* The offence of "serious alarm" would overlap with some existing offences; e.g., assault, which (excluding battery) consists in the creation in another of a reasonable *fear* of the immediate infliction of bodily harm, or affray, which consists in either tne brandishing of a fearful weapon to the *terror* of Her Majesty's subjects, or fighting to the same effect.

It would be a "reasonable excuse" for an accused to show that a "reasonable person" would not "justifiably in all the circumstances" (to use the words of the present s. 5) have been seriously alarmed.

The leaving of a bleeding sheep's head in a telephone booth (*See* Dr Woods' paper) might amount to attempted "serious alarm".

† The offence of "serious affront" would cover soliciting or intoxication manifesting itself in a gross form. It would also cover the behaviour of Lake and Dobson (*See* Senior Inspector Sweeny's paper), unless Coogee Beach was designated as a nudist beach under the proviso in paragraph (b). It would not cover the behaviour of Edwards (swearing).

‡ So far as the maximum penalty is concerned, I think, with respect, that $200 is totally inadequate.

§ Section 61 A (1) provides that "sexual intercourse" means—

"(a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by—

(i) any part of the body of another person; or

(ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes;

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;

(c) cunnilingus; or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c)."

PRESENTATION OF PAPER

J. Oxley-Oxland

It is not usual for the convenor of a Sydney University Institute of Criminology seminar to put in a submission for such seminar. The reason that I did so was because I could not obtain an intermediate third paper—a paper creating a workable accommodation between the essential demands of the first paper and those of the second. (By way of parenthesis, I should add that I consider the first paper to be, in reality, not Dr Woods' offering, but rather Mr Marsden's commentary on Senior Inspector Sweeny's paper.)

In my attempt to get an intermediate third paper, I approached two members of the judiciary who seemed to have a substantial interest in the present State Government's legislation in the field of criminal law. The one could not oblige me; the other was only too happy to do so. But then he was attacked under cover of Parliamentary privilege for his alleged reactionary attitude towards such legislation, and felt compelled to withdraw. Thereafter, I tried to obtain a third paper from amongst the magistracy, but without any success—which was hardly surprising in the circumstances.

(By way of parenthesis again, an attack similar to that launched in the Legislative Assembly is to be found in Mr Marsden's paper at pages 49 and 50. The best I can say for it is that at least it was not made under cover of Parliamentary privilege. However, apart from its questionable epithets, it professes superior experience, which is a very hazardous thing to do—as many an "expert" witness after cross-examination will ruefully admit. Mr Marsden has apparently spent quite some time in Kings Cross. Has he ever done so as a policeman or a prosecutor, let alone a judge?)

I have said that I put in my submission "because I could not obtain an intermediate third paper—a paper creating a workable accommodation between the essential demands of the first paper and those of the second". That suggests that I considered my submission the equivalent of such a paper. The suggestion is correct. My submission seeks to implement successfully the recommendation made by Mr Justice Yeldham in the now famous case of *White* v. *Edwards*. His Honour stated:

> Before parting with this case I would merely add this: The question of the type of conduct in public places which it is desired to prohibit and penalize is, of course, a matter of the legislature and not the courts. But in deciding to penalize particular types of conduct, it is essential, for obvious reasons, that members of the community, and those charged with the enforcement of laws such as that now under consideration, should have reasonably clear guidance as to what conduct is permissible and what is not. I would strongly recommend that s. 5 be amended or redrafted so that the necessary guidance, which at present is absent, might be given.

In a nutshell, my submission seeks, as Dr Woods puts it at page 14 of his paper, "to achieve an appropriate synthesis of the general and the particular".

APPENDIX 1

EXTRACT FROM A PRELIMINARY REPORT BY THE BUREAU OF CRIME STATISTICS AND RESEARCH ON THE OFFENCES IN PUBLIC PLACES ACT*

TABLE 1

Outcome x Plea: Section 5 Cases August, 1979 to October, 1982

Outcome	Plea						Per cent
	Guilty	Not Guilty	Ex Parte	No Plea	S. 75B	Total	
Not Guilty ..	18	328	8	4	0	358	5.0
Other Dismissals	399	140	26	598	3	1 166	16.3
Rising of Court..	71	4	0	1	0	76	1.1
Fine	4 819	432	133	0	19	5 403	75.8
Recognizance ..	109	16	0	0	0	125	1.8
Total	5 416	920	167	603	22	7 128	100.0
Per cent ..	76.0	12.9	2.3	8.5	0.3	100.0	

Overall, 21 per cent cases were dismissed, though only 5 per cent were found not guilty. In about 10 per cent of cases one or both parties failed to appear. The vast majority of defendants (76 per cent) pleaded guilty, and the same proportion received fines. It is interesting to compare these figures with those for the whole of 1978 under the *Summary Offences Act*. There, 27 per cent of cases were dismissed, and only 66 per cent of offenders were fined. Perhaps because the new legislation requires police to be more discerning in their enforcement, the result is a better conviction rate.

The Bureau's study of the 1978 and 1980 samples shows that the range of behaviour covered by the old and the new Acts are virtually the same, though there has been a change of emphasis types of behaviour. Table 2 shows a comparison of the two study samples with the particular types of behaviour for which defendants were charged.

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* This extract was distributed at the seminar by Senior Inspector Sweeny.

TABLE 2

Behaviour: 1978 and 1980 Study Sample

Behaviour	1978	1980
	Per cent	Per cent
Words	60.5	43.2
Masturbating	1.7	3.9
Nude Sunbathing	1.3	3.4
Bodily Exposure	2.1	3.4
Urinating	10.3	11.4
Sexual Proposition/Harassment	0.7	2.1
Soliciting	1.8	3.4
Fighting	13.8	16.7
Carrying/Using Weapon	0.7	1.3
Carrying/Throwing Weapon	0.7	3.5
Physical Harassment	1.7	1.9
Annoying/Disruptive Behaviour	4.2	5.5
Kissing	0.1	0.0
Excreting	0.0	0.3
Total	100.0	100.0

Words, fighting and urinating, in that order, were the major categories of offence in both samples. In 1978 they formed 85 per cent of cases, and 71 per cent of cases in 1980. The use of words, a less serious form of behaviour, accounted for 60 per cent of offences in 1978, but this fell to 43 per cent in 1980. However, rises were recorded in the percentages of more serious behaviour such as sexual harassment (0.7 per cent to 2.1 per cent), fighting (13.8 per cent to 16.7 per cent), carrying and using weapon (0.7 per cent to 1.3 per cent), carrying and throwing missiles (0.7 per cent to 3.5 per cent), and annoying/disruptive behaviour (4.2 per cent to 5.5 per cent). This clearly shows that while the range of behaviour covered by section 5 is the same that covered by the old legislation, section 5 is a much more effective weapon against genuinely serious behaviour than the old *Summary Offences Act*.

DISCUSSION

Dr Sandra Egger,
Assistant Director, Bureau of Crime Statistics and Research, N.S.W.

I must convey my apologies for the Director, Dr Sutton, who unfortunately couldn't attend this seminar.

Firstly, I would like to comment on some of the papers presented this evening by way of referring to two evaluation studies that the Bureau of Crime Statistics and Research has conducted at the direction of the Attorney General: one on the *Intoxicated Persons Act*, the second on s. 5 of the *Offences in Public Places Act*.

The criticisms made of the *Offences in Public Places Act* may be summarized as follows: firstly, the law is not precise enough and secondly, conflicting judicial interpretations have made the law unworkable. If we turn to the first point it is alleged that the law governing street offences should be precise and the circumstances carefully defined. Whilst in theory such a state of affairs may be desirable it is in practice the real world where the law operates, and human behaviour unfortunately defies such neat categorisation. The *Offences in Public Places Act* has one offence in s. 5 to deal with street behaviour. The *Summary Offences Act*, which many speakers have said was a vast improvement, in fact had three equivalent offences: offensive behaviour, unseemly words, and indecent exposure. The Bureau in its analysis of the fact sheets for a sample of charges laid under the *Offences in Public Places Act* and under the *Summary Offences Act* identified fourteen distinct categories of behaviour and they are referred to in the **Table 2** (page 63) of the document handed out by Inspector Sweeny. However, this was a narrowing down of 37 categories of behaviour which were coded from the raw fact sheets. These thirty-seven catergories were devised by amalgamating hundreds of quite distinct fact situations.

If I can illustrate by the most common fact situation, that of "words" which comprised 40 per cent of s. 5 charges and approximately 60 per cent of the summary offences charges. Even this most coherent offence group was, in fact, a hotch potch of at least seventeen different major unseemly phrases using a variety of the unseemly words in many different combinations. When you take into account the question of who was present, to whom the words were spoken, and the location of the offence, all, I am sure you will agree, very important considerations, the number of required offences would be in the thousands for words alone. To frame precise offences to cover each and every one of these possible combinations would be a daunting and, I would suggest, quite fruitless task.

The second criticism is that conflicting judicial interpretations have made the law unworkable. This is quite false. Again **Table 1** (page 62) clearly shows that there have been over 7 000 appearances for s. 5 as at September, 1982. Overall for s. 5, 21 per cent of cases were dismissed (although only 5 per cent found "not guilty"). Under the *Summary Offences Act*, 27 per cent of the cases were dismissed. However, the important consideration is of those cases where the accused person pleaded "not guilty". The s. 5 conviction rate was higher for those "not guilty" pleas than the equivalent *Summary Offences Act* sections: only 17.5 per cent of the "not guilty" pleas were found "not guilty" under the *Offences in Public Places Act* as compared to 24.5 per cent under the *Summary Offences Act*. Thus the study by the Bureau of Crime Statistics and Research was unable to demonstate that the underlying approach to the *Offences in Public Places Act* was wrong or that the law is not working. If the law is not working it is not at the level of the courts but presumably further back in the decision whether or not to lay a charge. If this is so then responsibility for such problems must presumably rest with the police attitudes to the legislation.

Several criticisms have been made of the *Intoxicated Persons Act* at this seminar. The thrust of these criticisms from both Dr Matthews and Inspector Sweeny is that although such reform is well intentioned, it has been a failure because of inadequate planning and/or insufficient resources. I would like to correct this picture by reference to the initiatives that have in fact been taken in this area. Firstly, Inspector Sweeny in his paper says that there are only twelve proclaimed places other than police stations operating in New South Wales. In fact there are 31 proclaimed places in New South Wales run by voluntary agencies, local councils, women's groups, aboriginal collectives, and other community bodies. Fifteen of these are located in the city and sixteen in country areas. As of September last year the government had spent over $5,000,000 in facilitating the setting up of proclaimed places all over New South Wales. In 1982, these alternative proclaimed places accommodated over 33 000 intoxicated persons in one year. Hardly an indication of inadequate resources I would think.

Secondly, Dr Matthews alleges that such facilities are run on a 9 to 5 basis. In a study the Bureau conducted of all proclaimed places in New South Wales we found that in fact none operated on a 9 to 5 basis. Some indeed closed between these hours on the grounds that the number of detentions does not warrant a service outside the peak period when they are all operating, i.e., during the evening and the early hours of the morning.

Thirdly, the role of economic factors should also be emphasized in the area of intoxication although it has been primarily discussed with reference to prostitution at this seminar. Many proclaimed places are reporting that the average age of their skid row clientele has declined because of increasing unemployment, homelessness, family stresses etc. To punish these people further, by charging them with a criminal offence, would be an inhuman and counter-productive response, and would certainly go against the prevailing trend all over the world in forward thinking jurisdictions (e.g., in many States in the U.S.A. and in Scandinavia) where the criminal jutice system response to intoxication is being phased out.

Bron McKillop, Senior Lecturer in Law, Sydney University Law School

I want to say two things: Firstly, in relation to the nature of the change it seems to me has been effected by the 1979 Act, the *Offences in Public Places Act*, over the 1970 Act. It seems to me that that perhaps has not been sufficiently appreciated and may have given rise to some of the problems in implementing the new Act. The 1970 Act, as I understand it, with all its various provisions dealt with a mix of proscribed types of behaviour such as indecent exposure, threatening behaviour, throwing a missile into a public place, lighting a fire, or letting off firecrackers in public places, plus generalized notions of offensiveness, unseemliness and indecency. I think that mix was an uneasy mix and it doubtless owed its origins to historical considerations. It seems to me that that the new section 5 purports to condense the matter that had previously appeared in the 1970 Act, but the thrust of that section now is to make the offence the *effect* in two specific ways of unspecified types of behaviour on reasonable persons and is really quite a significant change. We are no longer concerned with behaviour *per se*, we are now concerned with the effect of behaviour on reasonable persons.

But the difficulty I have with s. 5, and this is the second thing I want to say, is that the two ways in which reasonable people are now to be affected for criminal purposes are somewhat different in their nature. "Alarm" seems to me to be concerned with public order and safety, going back historically I suppose to the old concern about "breaches of the peace" which was what a lot of the earlier public order legislation was about. But "affront" is concerned with notions of offensiveness, more in the area of morality than in the area of public order and safety. Now it seems to me that these two different bases for the new offence do not lie well together. The difficulty has to some extent been compounded in my view by the decision that Dr Woods referred to in *Lake and Dobson* which held that s. 5 contained only one offence and that a charge in the language of s. 5 was not bad for duplicity. In effect the Crown could provide either or both "serious alarm" or "serious affront".

It does seem to me that you will have problems where you have to try to enforce a criminal provision which is dealing with two rather different things. It is a different thing altogether to enforce public order and public safety, than it is to enforce offensiveness. The latter immediately get you into the area of morality and into enforcing one morality against another. In areas such as indecency or obscenity or the sort of language that is acceptable then it does seem to me that you are on much less firm ground for criminal sanctions than in the area of public order and safety.

Sergeant Lloyd, Police Prosecuting Branch, Police Department, N.S.W.

I suggest that there is one aspect of the deficiency in s. 5 that has not been the subject of any attention at this seminar, and it is a deficiency arising out of uncertainty. It has been my experience of Petty Sessions (and it

certainly must be a very different experience to that of Dr Woods) that a particular act which will give rise to a conviction before one magistrate will give rise to a dismissal before another. That soft of problem is universal in the experience of police prosecutors around the metropolitan area and in the country areas. It stems from an associated deficiency in the terminology of the section and the magistracy do not know how to apply it with consistency. What seems sufficient to amount to "serious affront" for one will not amount to "serious alarm" or "affront" for another. It is in that area in which I suggest our Supreme Court has been less than helpful in *Lake and Dobson*, or in any other decision for that matter, in giving a guide for firstly to policemen on the street, and secondly for the magistracy in how they should in fact apply the section.

I would adopt as a personal point of view the comments of Dr Matthews in that I agree with the general thrust of the government's efforts in framing s. 5 as a section which is capable of reflecting contemporary community standards in the decisions of the courts. However, I suggest that the inclusion of the word "seriously" has, from experience, proved not to be effective. The fact that the Supreme Court won't come to the party and assist us as police in interpreting the section is clear evidence of that. Although I do not look to go back to the *Summary Offences Act* I do most certainly now look to the government for amendment, and whatever that amendment is I can see that it is going to need interpretative assistance from the courts.

George Klein, Drug Counsellor, Health Commission of N.S.W.

I do not have any legal acumen at all but I would like to comment on some of the things that Mr Marsden has been saying.

I concur with Dr Matthews both in respect to the economics of prostitution and the concurrence of drug addiction and prostitution in the Darlinghurst area. My own clinical experience is that we see enormous numbers of drug-addicted prostitutes, women who may spend $300 to $400 a *day*, i.e. about $2,000 a week, supporting their narcotic addiction. You are talking about $100,000 a year going to dealers. Very often these women have to work seven nights a week on the street, and I think it is naive, to say the least, to talk about freedom in a capitalist society when, in fact, what we are witnessing is a new form of slave labour. Basically what I am doing is voicing some irritation, albeit respectful irritation, at what I see as the champions of civil liberties taking up what I think is perhaps a misguided cause. I do not think that the law should underwrite slave labour under any circumstances and I have good clinical experience to support the view that a great deal of street prostitution in Darlinghurst and East Sydney area is simply to support drug addiction. I might also add that the nature and variety of opportunities for treatment of drug addiction in New South Wales is comparatively resource rich compared with the rest of Australia. Nonetheless, I think there is a great deal of social pressure on people to remain in the drug scene and I look forward greatly to the "hard evidence", as Mr Marsden put it, supporting this view. I think it is actually high time that the citizens of New South Wales knew about the scope of drug addiction in this State particularly amongst the very young.

Interested Person

I am a prostitute and was one of the many ones working in Darlinghurst earlier. We have now shifted and may we say that we apologise for disturbing the sleeping people of Darlinghurst. It is simply because we are like lost sheep we don't know where to go; whatever corner, whatever area, and whatever street we go to we are told to get off the streets, I must admit the police have been good to us but the thing is we just don't know where to go and that is where all the trouble is. We can't go to the Kings Cross area because all the girls have been there for 10, 15 and 20 years and they don't want the Darlinghurst people there at all. I think that we should know where we have to go and work.

The thing is, we have worked in offices, hotels, and restaurants like all you people and we have lost our jobs. I am nearly 50 and I can't get work anywhere else, I have to pay rent and I live in a very nice apartment. I don't touch drugs and my friends here are not in the heroin or drug business, so I would like to stand for them too. An earlier speaker was talking about the drug crowd. We do not want to be involved in that. We are not involved, we never touch drugs, we do not touch heroin, we are old enough, we are in our 30's and 40's and 50's and we do not want to be involved, so I think we should have another area.

I am here because we have been kicked out of the Darlinghurst area, and I am glad we have gone, too, because people have got to sleep. We have now gone down to William Street. We have gone down there because all the shops down there are closed. There are no hotels, there are no hospitals, there are no churches, and for the time being we are going there because we don't know where to go. We are not too sure what is going to happen with the government and the police and where we are going. We do need the money to pay our accommodation, our fares, our power, our telephones, our hair, our makeup. We have got to look nice, you know, so I hope we can stay down there for the time being, anyway. So give us a bit of help.

Interested Person

I would like to confess that I, too, am a prostitute, and I am actually proud of it. I am proud of it because it is the only thing that I can do. I come from New Zealand and I have a Diploma in Public Relations but I also believe in what I feel and in what I want to do. I am a transexual and I am proud of it. But the limitations in society have barred me from getting a normal employed position. I must sympathize with Dr Matthews with his insomnia, that he is able to stay up all night and watch all the girls. I must really sympathize with him. But are the girls *really* doing what you are saying? I worked in that area and after the programme on "60 Minutes" I decided to walk down the street and have a look for myself. I hardly ever saw condoms, I hardly saw syringes. Whether they were cleaned up after the programme or not I don't know. Could this be just one area Dr Matthews is talking about?

I want to put a question to Dr Woods. You say public perception is important whether it is well based or ill founded. But how important, or how significant is public opinion?

Phillip Chown, Final Year Law Student, University of N.S.W.

I speak as a concerned homosexual, a member of the minority group from the Kings Cross/Darlinghurst area that is often subject to the abuses of the police force. My comment is more sociologically oriented, and is that in a society that has social morés in the magistracy and the judiciary, that don't yet quite understand the realities of particular minority groups, it is very important that public street offences legislation take into account the opportunity for a judge or a magistrate to consider circumstances in relation to the number of factors that can apply to an offence. The statistics quoted from the Bureau of Crime Statistics indicate the potential range of considerations that a magistrate or a judge would have to take into account. For example, two men kissing or two women kissing in a gay bar would not seriously alarm the patrons of that bar whereas perhaps the same act in a kindergarten or in a different place would "seriously alarm and affront". These factors are more easily taken into account when the legislation doesn't lay down specific criteria. My comment then goes back to the police, and I think if legislation does impose on the police a certain amount of obligation to establish a charge then it is up to them to establish that charge at law in the court, not to merely go through paper processes that virtually confirm that charge at the court level once they initiate proceedings. Therefore they should use the legislation and seek to prosecute charges and see whether some actions really to "seriously alarm" or whether they do not—oft times they do not.

A concerned Resident of Darlinghurst

I speak as a concerned resident of Darlinghurst who has been part of the experimental group who have witnessed the introduction of the *Offences in Public Places Act* and the repeal of the *Summary Offences Act*. We would like to say, as Dr Matthews said, that we saw that the government had good intentions at the time but we have lived through this practical experience and we have had one of the girls say that she has disturbed our sleep. There have been a lot of other disturbances, and it has not only been by the girls but it has been by the spectators. We have now seen an amendment come in two days ago and so far the first two days have shown us that the girls can still abuse passers by if they are walking up the street to their home, call them names because they refuse to partake in what they are selling.

I say to Mr Marsden that none of us is saying that you should fail to sell sex, it should be available, but we do think that like other commodities and consumer items in our community that when abuses take place governments should step in and controls be introduced. This has happened in the car selling business, where licences have been introduced, it has been introduced with the sale of liquor. I think it has been acceptable and a benefit to the general public that the sales of these products, which are subject to abuse and far reaching problems in the community, are controlled. We are not making any morality judgments. We are just saying we are simple residents and we have been forced to accept the most intolerable conditions through no fault of our own. We lived in an area which was chosen by prostitutes to be their new area of work.

This new amendment has one very great failing. It says you may solicit as long as you are not on a public street. Doesn't this still mean that girls, as spectators, can still cause a great deal of havoc to people as they are passing by? Mr Marsden made the comment that we all hear words which are regarded as offensive in theatres and on TV. None of us would disagree with this but on TV or in a theatre we have the choice; in a theatre we pay to go to see a play that presumably we have read a critique about. We know that we are going to see, and if we do not like it we may choose to leave. However, in walking down a public street we do not have a choice if that is the only route to our home. I think a public street is for the use of all. On TV you have the choice of changing the channel but you don't have that choice on a public street where the only means of communication to your home are via unseemly behaviour and people abusing you or your husband or your children, touching your child and saying send him up here for a cuddle, having people knock on your door in the middle of the night and then ten to twelve men urinate through your front gate once you have answered the door. I could go on for many hours but I don't wish to go through individual citations of things I have seen.

I have heard the man who said he was in prostitution in some form, and that he didn't really think that he had ever seen syringes or condoms. I have picked up so many condoms in my front garden. I fill bags with them and I am not exaggerating. I have seen syringes and I have seen all forms of sex performed in public streets whilst we were going through the experimentation of the implementation of the *Offences in Public Places Act.* All I am pleading with the government, and all the people who advise the government, is to please take notice of the practical implications. Above all I think we need licensing of prostitution to encompass the problems that the speaker from the drug counselling clinic has brought to light—that some girls are spending $100,000 a year on drugs through no fault of their own.

Bernard W. J. Gook, Rector, St John's Church, Darlinghurst

In Darlinghurst Road, our Rectory stands opposite our friend's flat and it is our pleasure to have her coming to Church three times a year in friendship.

I think it is very difficult for people to realize the effect upon the general public around our place. A large number of our older people have been scared stiff at the things that have been happening in the buildings and don't need to exaggerate or even to go over it again because it has been made quite clear by the last speaker.

The thing that concerns me a great deal is that we sleep in the front room of our house, which is right on Darlinghurst Road, and we hear tremendous noises until the early hours of the morning including the clip clop of the two horses that carry the two policemen around the area. I do not want to be sarcastic about them, and I don't want to be rude either, but I know this that when I have walked out in the early hours of the morning,

or late at night, I see them going along with their horses but the prostitutes are just having a good old laugh. They are doing their thing and are stopping all and sundry, and they are fighting the few shop keepers who have kept open late at night. I have had shopkeepers say to me the "pro" came in and threatened as she took something off the counter and didn't pay for it. I said, "Well, call the police" but the reply was "Call the police! That's the last person you call". I really mean that. I have called the police and I have seen the police come and take a man. I have said "That man is drunk, and not only that but he is mentally ill. I can't get him in my car". The police take him outside, and I watch. They take a boot to the man and he gets thrown into the waggon head first.

I would like to think that that was not true, but I do know that it is all part of the drunk/drug scene. The attitude is that they are a sort of animal to be dealt with, I believe that this attitude is something we ought not to have in our streets at all. I believe that behind it is an ill mentality. I have been here 27 years in Australia and I was brought up in a pub in London and I have never seen a drunk dealt with like that before. I feel that we allow a tremendous amount of brutality in our city, the prostitutes included. I don't plead for their trade but I plead for them personally. I believe that they should be picked up. I believe that instead of paying the police they should be charged by the police for what they are doing which is against the law. I hope that the lawyers and the people who know how to produce laws will alter the wording of the Act so that a policeman cannot walk by on the other side.

M. Duncan, Student, University of Sydney

I would like to say that I think over the past 10 years we have probably heard governments of both complexion at the Federal level raise the world wide economic recession as a difficulty. It is interesting to see that it is being raised again as a defence to criticism of the New South Wales Parliamentary draftsman or the Attorney-General's department. I don't think that it works terribly well as a defence because if you take the present law, or take the law under the *Summary Offences Act* as it was, economic conditions would have deteriorated in the same way under both. The same problems would have occurred so I don't think that is a relevant argument.

We do have a real problem. There is a problem with residents in the area of Darlinghurst and presumably elsewhere where prostitutes operate and drug dealings go on. There is a real problem from the point of view of the police and Inspector Sweeny spoke about that. The police are not sure exactly what the law means. They do not know exactly how they should act in applying it, but there is also the question that Mr Marsden raised of civil liberties. There are two extremes. There is an extreme conservative position and that would be that prostitution is a terrible thing, an evil, and it should be stopped, and that intoxication is dreadful and that should be stopped, too. There is also an extreme position, that I think Mr Marsden expressed, which is that we really should have true civil liberties and be able to do what we like.

The difficulty is that we do live in a democracy and we must come to some middle ground. How to come to that middle ground, I would suggest, is reasonably simple. There is a great problem in that the police at the moment are not acting. Any provision such as s. 5 is going to be open to doubt simply because it was expressed in English. If all our laws were written in symbolic logic then we might not have nearly as many problems, but we do not write laws like that and I don't suggest that we should start. What I do suggest is that the way these words are interpreted is by the courts and that in order for the police to come to some knowledge of how they should apply the Act and of finding out exactly what the Act means they should bring prosecutions in the courts and allow the courts to decide. The police as public servants have a public duty to act. That is what they get paid for, and if they make mistakes those mistakes will be revealed by the court.

Andrew Haesler, Solicitor, Redfern Legal Centre

I would firstly like to endorse the comments of a number of people here that the criminal law is not particularly effective at dealing with the effects of social or economic ills. I say that because no matter what legislation has been applied in the last 20 years there have still been vast numbers of people convicted and vast numbers of people brought before the courts, and some types of offensive actions will continue no matter what legislation exists.

I would also like to endorse the comments made by the Attorney-General Mr Walker when the *Summary Offences Act* was repealed. One of the main reasons for repealing the Act was to reduce the number of convictions for minor or public street offences.

The next point I would like to make is in regard to Inspector Sweeny's comment when he summarised s. 5 of the *Summary Offences Act* (page 31). As a lawyer who practices in the Petty Sessions jurisdiction I can say that that type of summary where you take the individual words in s. 5 is probably the best of presenting a defence case in a s. 5 matter. You present to the magistrate exact meanings of the words "alarm", "affront", "seriously", "justifiably", "circumstances" and you present your client's case to him in the terms of that section in such a way as to show that reasonable people in the circumstances would not be "seriously alarmed" or "seriously affronted". If that case is presented by analysing the section you achieve at least some measure of justice achievable within the context of a Court of Petty Sessions.

When you look at the later decisions of the Supreme Court you do not get much guidance, and if you read the judgment of Justice Yeldham or the judgment of the Court of Appeal in *Lake and Dobson* their attitude is that they don't wish to provide that judgment at present. They have stated that it is still too early, or that circumstances should not be constrained by a judgment of the Court of Appeal or a judgment of the Supreme Court. I think perhaps it is time that some of the judges here considered it their duty

to provide some sort of interpretation of s. 5, and it is about time we got this interpretation from more than just individual magistrates. In that I would like to endorse the comments of Sergeant Lloyd, the police prosecutor, who made a similar recommendation.

In regard to a matter that has not had much discussion, the *Intoxicated Persons Act*, I would like to say to Mr Marsden that unfortunately there are still a large number of abuses of that Act. This week alone I have had over ten very young, very scared people come through my office. They live in the Darlinghurst area and a number of them have been picked up at various stages for being intoxicated. I have said to them, "Prove to me that you weren't intoxicated when you were picked up", and they say, "I was held for 8 hours. How can I prove that now?" Those sorts of attitudes and those sorts of statements are continually being made and, as a lawyer, it is incredibly frustrating not to be able to pursue those matters much further because proof is not there.

John Pearson, Solicitor, Marrickville Legal Centre

I deal mainly with juveniles, I would like to take up one point that was made by Inspector Sweeny in his paper. He states that there has been an alarming increase in the number of juveniles appearing on the streets of Darlinghurst. I would have thought that if the argument that he was seeking to advance was that the changes in the law have brought about an increase in street offences, then by raising problems of juveniles he would have been countering his own argument. There has been no change in the law relating to juveniles in relation to matters of this sort, and by saying that there has been an increase of the number appearing on the streets would seem to indicate that the basis of that are social and economic, and not legislative.

The second point I would like to make is to take up the last speaker's comment in relation to the *Intoxicated Persons Act*. I would like a specific alteration in the law that as places are set aside as proclaimed places then police stations in the relevant area cease to operate as proclaimed places. Dr Egger earlier mentioned that there are a number of places that have been set aside and I think that while police have the option of using the police cells or the proclaimed place, abuses may continue to occur. They could be reduced by a requirement that they use the alternative proclaimed place.

Philip Segal, Solicitor, Aboriginal Legal Service, Moree

I feel it would be appropriate for some contribution to be made on behalf of the aboriginal people who to a very large degree are the subject of the *Offences in Public Places Act* s. 5 and the *Intoxicated Persons Act*. I will confine my comment on the *Intoxicated Persons Act* to say that it will work

very well when all areas where there are intoxicated people are provided with civilian facilities for helping those unfortunate people. No doubt many of you have seen the film or the play, "The Elephant Man". That is perhaps the most eloquent plea for an alcoholic that can be made if you just transpose the alcoholic into the place of the elephant man. I suppose despite the resources, approximately $5 million, that have been allocated the facilities just don't exist in Moree and many of the other towns that I come into contact with, and the police are still policing in the same way as they used to. From a lawyers point of view I would rather see a person detained for 8 hours and released free of a criminal record than picked up for saying the four letter word, appearing before a magistrate, then going away with a fine and conviction for his trouble. To that extent, anyway, perhaps that section is working.

But one of my personal feelings is that the use of words *per se* should not be a criminal offence. It is a view that I have formed only after considerable experience in this field for the law under the "unseemly words" legislation as it was and under s. 5 legislation as it is. The very helpful statistics which have been placed at the disposal of this meeting indicate that in round figures it is about half of all the "unseemly words" as they were, or "serious affront" and "alarm", as it is are for the use of words, and probably it is nearly always the magic four letter words coupled with various others. In nearly all of those cases it is the simple evidence of a police officer who gives evidence to the effect "Yes, I heard the words used". A defendant can only get in the witness box if he feels he is being unjustly accused and say "No, I didn't use the words". The defendant is almost invariably affected by alcohol and almost invariably convicted. He is just disbelieved. One of the reasons that he is disbelieved is because on the one hand you have the policeman and on the other hand you have the intoxicated witness who can't be believed. It is almost an indefensible defence if someone tries to say "No, I didn't do it". If you try to argue that the words aren't such as would seriously "affront and alarm" you are confronted with a magistracy who almost all think that the four letter word will always seriously affront and alarm. I earnestly suggest that the Legislature should look into the matter to decide whether the use of words should be a criminal offence at all.

A Resident of Darlinghurst

I am a resident of Darlinghurst and I uphold what Richard Matthews has said. I just want to make two points. I cannot understand why brothels can operate in any area seemingly with very great privileges that no other business can operate under. Mainly they can open up with no fear of being told to close down, they don't have to comply with any Council regulations, they can just open up and remain open to 6 o'clock at night in a residential area or anywhere they please. If there are laws stopping them then they are not used. There is something wrong with it, so there should be something done about that.

I would like to ask one question of the panel. Tonight when I was coming down here I passed a strata block of units in Liverpool Street. There were two prostitutes standing at the entrance to that block of units. They were soliciting and they asked me if I wanted a girl. I didn't reply—I normally don't—and they hurled abuse at me when I didn't answer. It poses a question to this new law. What rights do the people in that block of units have when they are going in and out of their building? I presume those girls are outside this current law because they are not standing on the footpath, they are standing within one inch inside somebody's else's property or they may rent one of the units in that place. They are certainly affecting the other people that live in that block of units and they are certainly affecting me as a person walking past them in a residential area. I just feel that residents should be given back some of their normal residential rights which are being lost in freeing it up in other areas.

Victor Zammit, Kings Cross Chamber of Commerce

A class of people at Kings Cross, the business people, are not very impressed with the recent changes three days ago. It appears to me that the problem is going to be shifted from Darlinghurst to the Kings Cross shops at Darlinghurst Road. In the past, prior to the girls moving to the area around Darley Street, we had some of the girls outside the shops in Darlinghurst Road. Now the Kings Cross Chamber of Commerce lobbied because these girls were blocking the entrance to the shops. We were successful and the girls moved out elsewhere close to the area around Darley Street. Now the recent changes will make the girls come back to the areas outside of the shops again, so it would appear to me that the person who drafted the changes must have a wild sense of humour of shifting the problem from Darlinghurst to back to Kings Cross. I would suggest very strongly that there will be a strong lobby from the business people at Kings Cross to get rid of the girls from outside the shops.

Dr G. D. Woods

I have a few brief things to say. Firstly, somebody raised the question of whether or not the public perception about these things, however ill founded or otherwise, is important and it seems to me that in fact it is, because we live in a democratic community or at least a community where people are elected into power and that election depends to some extent on public perception.

Secondly I take seriously the comment by George Klein the drug counsellor that the prostitution of persons who are heroin addicted is almost akin to a kind of slavery. I don't make any further comment on that but I simply say that I regard that as a very serious and penetrating point.

Thirdly I noticed, and this was a matter which was referred to by Mr Marsden, that in this morning's paper an article referring to some comments by Mr Shepherd of the Vice Squad criticised the recent legislation—the legislation which after very careful consideration and after intense lobbying, "pro" by such people as Dr Matthews and others who have spoken at this seminar and "contra" by persons such as the gentleman from the Kings Cross Chamber of Commerce—aimed at going someway towards solving the sort of problems we have been talking about. I think that it is extraordinary that a senior police officer should make such a public comment in such a short time after the enactment by the government of serious legislation directed at a serious problem, and again I simply make that comment.

Also, in respect to what Mr Shepherd is reported to have said, particularly the question of living off the earnings of prostitution. He mentions, in the comment attributed to him, that there is some difficulty about proving offences of living off the earnings of prostitution. Well, in 1981, for example, there were 53 appearances in petty sessions for that offence, there was a conviction rate of 85 per cent, 4 per cent were found not guilty, 4 per cent withdrawn or dismissed.

The other point I wish to make is, it seems to me, that there is some misunderstanding of the legislation. Indeed, it is certainly the intention of the legislation that persons should not be criminalized for their behaviour which occurs off public streets. Again, one would hope that persons who have an interest in the legislation both from the viewpoint of being residents and from the viewpoint of being police officers would "give it a go" and wait and see how it works before being critical of it. It is a serious attempt to deal with a difficult problem. In addition to the legislation there is now established a Parliamentary Select Committee to deal with the problem, to take submissions from people. I hope that those who have made submissions critical of the new legislation who have constructive views about how to solve the problem will put them in careful written form before that Committee.

Dr Richard Matthews

I would like to make a couple of brief points. I think we have been a little bit bogged down here with the problem of prostitution *per se*. I don't really believe that prostitution itself is the problem. It is certainly not a moral issue as far as I am concerned. What is a greater problem in Darlinghurst than the prostitutes and the customers (who tend to be furtive), are the people who are attracted by the street theatre provided by street prostitution, people who because of the advent of street prostitution in Darlinghurst now see Darlinghurst labelled as a place where they can indulge in the sort of behaviour they would never dream of indulging in their own suburb—a sort of playground for boys' nights out. That is one of the problems that has arisen as a result of street prostitution.

The second point is that much has been made this evening about disturbances to my sleep. That, while it is not pleasant, is not really the problem either. The problem as I see it is predominately a health problem. The other thing that street prostitution has provided is a vast cash flow which is sucked up like a vacuum cleaner by the drug pushers. There are a number of ladies, and these ladies at this seminar are obvious exceptions, the majority of whom are narcotics users, and the advent of street prostitution in our area has once again labelled our area as a place where drugs are freely available. There have been large numbers of syringes. My objections is not the aesthetic problem of finding a syringe on my front steps, it is the very real health problem. If you pick that syringe up and you happen to stick the needle in your finger you are at a very significent risk of getting hepatitus B which is a very serious and potentially fatal illness. The second health problem when prostitution is largely uncontrolled, as it is now, is the problem of venereal disease. You do not need to be told the sort of problems that occur where the girls, particularly those who are heroin addicts, are working as prostitutes. The first and foremost idea in their mind is to get enough money for heroin and the last thing on their mind are health considerations and regular check ups.

Senior Inspector Sweeny

I would like to answer some questions that were asked of the panel tonight from the floor. To answer the last resident from Dalinghurst; no, the law does not act to prevent prostitutes from operating from doorways or the front of houses.

In reply to Mr Segal from Moree: I think the police would appreciate it if there were sufficient proclaimed places so that those persons who are affected by intoxicating liquor could be looked after properly instead of being placed in cells where the facilities are not available to assist them medically or otherwise.

In answer to the Rector from the church at Darlinghurst: if you observe these things did you take any action, did you report the matters so that it could be rectified?

In summary: those that asked questions at this seminar, those that made comments, leave me with just one thought, I feel it is the concensus of the people at this seminar that something has to be done.

John Marsden

I also note the comments of Mr Klein, the drug counsellor, in relation to the problems of narcotics and prostitution and I take very serious note of those problems. However, I don't forget my own youth when Palmer Street was the place of prostitution. You could go down there on a Friday and Saturday night and you would find two or three hundred prostitutes operating and a couple of thousand men walking up and down. It hasn't changed a great deal—it has just moved to another area.

I am very sympathetic with the residents and I believe that prostitution should be moved into commercial areas.

Finally, let me say I am extremely perturbed at three speakers at this seminar who have again raised the problem of the *Intoxicated Persons Act*, I thought we had overcome the abuse of that Act. I invite those persons to make the information available to me. I have been keeping a dossier in relation to it for four years since it came in in 1979. I would appreciate your support and your help in respect to supplying that.

I don't know whether the consensus here was that we should do something about it. I believe the concensus at this seminar is that we should still try and protect individual liberty, civil liberties, while protecting society as a whole.

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1980	43.	Police Discretion in the Criminal Process.
1980	44.	Aboriginals and the Criminal Law.
1980	45.	Victims of Crime.
1980	46.	Index—Volumes 1–36.
1981	47.	The Old as Offenders and Victims of Crime.
1981	48.	Criminal Evidence Law Reform.
1981	49.	Child Welfare in the 80's.
1981	50.	Crime and the Professions—The Provision of Medical Services.
1982	51.	Community Justice Centres.
1982	52.	Costs and Benefits in Planning Crime Prevention.
1982	53.	The Criminal Trial on Trial.
1982	54.	Domestic Violence (including Child Abuse and Incest).
1983	55.	Crime and the Professions—The Legal Profession.