

**TIME TO DEFINE ‘THE CORNERSTONE OF PUBLIC  
ORDER LEGISLATION’: THE ELEMENTS OF  
OFFENSIVE CONDUCT AND LANGUAGE UNDER  
THE *SUMMARY OFFENCES ACT 1988* (NSW)\***

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**I INTRODUCTION**

This article addresses a contradiction that has long been at the heart of the criminal law concerned with ‘public order’. Although crimes such as offensive conduct and offensive language are amongst the most frequently prosecuted offences in Australia, their legal nature is poorly understood and rarely the subject of judicial scrutiny or academic explanation. In the context of ongoing controversy over whether such offences have a legitimate place on the statute books, we confront this oversight. This article draws on the High Court of Australia’s decision in *He Kaw Teh v The Queen*<sup>1</sup> to lay out a methodology for construing the elements of a statutory offence, and then employs this approach to produce a recommended interpretation of the elements of sections 4 and 4A of the *Summary Offences Act 1988* (NSW).

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\* This article has its origins in our work as criminal law teachers, and in our respective lead contributions to the public order chapters of criminal law textbooks: Donna Spears, Julia Quilter and Clive Harfield, *Criminal Law for Common Law States* (LexisNexis Butterworths, 2011) ch 8; David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5<sup>th</sup> ed, 2011) ch 8. We would like to thank our teaching colleagues, students and co-authors for the many stimulating conversations we have had over the years on the topic of public order offences generally, and offensive conduct/language laws in particular.

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<sup>1</sup> (1985) 157 CLR 523 (*‘He Kaw Teh’*).

Brown et al have observed that:

The cornerstone of public order legislation is usually a provision that permits police to act where behaviour in a public place is regarded as offensive, insulting, abusive or indecent. Such provisions are inevitably vague and open-ended, with the characterisation of the behaviour left to the discretion of the police in the first instance, and subsequently to the discretion of magistrates.<sup>2</sup>

In New South Wales ('NSW'), the 'cornerstone' is provided by sections 4 and 4A of the *Summary Offences Act 1988* (NSW). Certainly the characteristics of vagueness and open-endedness, and susceptibility to discretion, to which Brown et al refer, are evident in the definitions of offensive conduct and offensive language. The legitimacy of these laws, and equivalent laws in other jurisdictions,<sup>3</sup> has long been a topic of debate, and appropriately so.<sup>4</sup> More than 40 years ago, Frank Walker MP (later Attorney-General of NSW) observed, in relation to the Summary Offences Bill 1970 (NSW):

One of the most arbitrary and dangerous aspects of the bill is the proliferation of vague, uncertain dragnet offences such as are to be found in ... the definition of unseemly words and later in the bill in provisions dealing with offensive behaviour.

Any practising criminal lawyer will say that such terminology operates only to give the widest possible latitude to the police and the magistrates, and thereby constitutes a serious blow to the liberty of the citizen to be free from arbitrary arrest and arbitrary prosecution. I submit that this vague terminology is jurisprudentially unsound. Certainty is the very essence of the criminal law. Every man has the right to know whether his actions at a given time are or are not criminal. Sweeping, dragnet terminology means that a particular act will be legal or illegal according to the subjective opinions of the police officers and magistrates involved.<sup>5</sup>

A decade later, Doreen McBarnet coined the phrase 'ideology of triviality' to capture the air of relative unimportance that pervades the high volume lower courts of the criminal justice system.<sup>6</sup> A related dimension of McBarnet's

<sup>2</sup> David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5<sup>th</sup> ed, 2011) 752.

<sup>3</sup> See *Summary Offences Act 1953* (SA) ss 7(1)(a) (behave 'in a disorderly or offensive manner'), (1)(c) (use of 'offensive language'); *Summary Offences Act 1966* (Vic) ss 17(1)(c) (use of 'profane indecent or obscene language or threatening abusive or insulting words'), (1)(d) (behave 'in a riotous indecent offensive or insulting manner'); *Summary Offences Act 2005* (Qld) s 6(1) (general offence of 'public nuisance' which includes behaving in an 'offensive way'), s 6(2)(a)(ii), such as using offensive language (s 6(3)(a)); *Crimes Act 1900* (ACT) s 392 (offensive behaviour); *Police Offences Act 1935* (Tas) ss 13 (offence of 'public annoyance' which includes behaving in an 'offensive ... manner' (s 13(1)(a))), 21 (offence of 'prohibited behaviour' which includes wilfully behaving in an 'offensive' manner); *Criminal Code Act 1913* (WA) s 74A(2) (behaving in a 'disorderly manner' including using 'offensive ... language' (s 74A(1)(a)) and an 'offensive ... manner' (s 74A(1)(b))); *Summary Offences Act* (NT) s 47(a) (offensive conduct including 'offensive ... behaviour' or using 'obscene language').

<sup>4</sup> See generally Brown et al, above n 2, 746–71. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) 842–56; Donna Spears, Julia Quilter and Clive Harfield, *Criminal Law for Common Law States* (Lexis Nexis Butterworths, 2011) ch 8.

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 1970, 8005 (Frank Walker), cited in Anti-Discrimination Board of New South Wales, *Study of Street Offences by Aborigines* (1982) 2 [1.3].

<sup>6</sup> Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1983) 143.

analysis is the idea of ‘legal relevance’ – the assumption that ‘the offences dealt with in the lower courts do not involve much law or require much legal expertise or advocacy.’<sup>7</sup> As McBarnet counters: ‘[i]t is not in the nature of drunkenness, breach of the peace or petty theft to be less susceptible than fraud, burglary or murder to complex legal argument; it is rather in the nature of the procedure by which they are tried.’<sup>8</sup>

We would add to McBarnet’s list of ‘lesser’ crimes a pair that are amongst the most frequently prosecuted on the NSW statute books – offensive conduct and offensive language under sections 4 and 4A of the *Summary Offences Act 1988* (NSW). During 2012, 5612 charges for these two offences were finalised in the Local Court of NSW,<sup>9</sup> and 6808 people were issued with a Criminal Infringement Notice (‘CIN’) in relation to alleged breaches of sections 4 and 4A.<sup>10</sup>

How is it that for two crimes that are enforced more than 12 000 times annually, and more than two decades after their current statutory formulation was endorsed by the NSW Parliament, it remains unclear what the elements of the crime are, and no comprehensive guidance on the elements of sections 4 and 4A has emanated from the Supreme Court of NSW? It is not our intention to lay blame at the feet of the judiciary or the ranks of criminal law practitioners. The ‘blind spot’ that motivates this article is also evident amongst academic lawyers. Public order offences are still routinely ignored in criminal law textbooks.<sup>11</sup> In those works that *do* take offensive conduct and offensive language seriously as aspects of the criminal law to which students should be exposed, the tendency is to (rightly) problematise the operation of such laws, and to *point*, without offering solutions, to the uncertainty that exists.<sup>12</sup> The scholarly literature that addresses the topic of offensive conduct and language crimes – much of which is excellent – tends to focus on the *operation* of these laws, often informed by illuminating historical, sociological and criminological perspectives, and with an

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<sup>7</sup> Ibid 147.

<sup>8</sup> Ibid 148.

<sup>9</sup> NSW Bureau of Crime Statistics and Research, ‘NSW Criminal Courts Statistics 2012’ (Report, NSW Bureau of Crime Statistics and Research, 2013) 21.

<sup>10</sup> Unpublished New South Wales recorded crime statistics for 2012 provided by the NSW Bureau of Crime Statistics and Research (on file with the authors).

<sup>11</sup> See, eg, Robert Hayes and Michael Eburn, *Criminal Law and Procedure in New South Wales* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009); Penny Crofts, *Criminal Law Elements* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2011); Louis Waller and Bob Williams, *Criminal Law: Text and Cases* (LexisNexis Butterworths, 11<sup>th</sup> ed, 2009); Kenneth J Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 3<sup>rd</sup> ed, 2011).

<sup>12</sup> See Brown et al, above n 2, 763; Bronitt and McSherry, above n 4, 842–5. For a notable exception, see Spears, Quilter and Harfield, above n 4, 154–72.

explicit normative reformist agenda.<sup>13</sup> Sections 4 and 4A of the *Summary Offences Act 1988* (NSW) have not, to this point, been the subject of close doctrinal analysis or exegesis, particularly in relation to *fault* (as opposed to *conduct*) elements.

In this article we approach the neglected crimes of offensive conduct and language, influenced by the insights of scholars such as McBarnet, adopting a still critical, but also pragmatic, perspective, by asking the following questions: can we tolerate any longer the uncertainty that surrounds the parameters of charges under sections 4 and 4A that yield thousands of convictions every year, and that, in the case of offensive conduct, carries the possibility of incarceration? If the answer to this question is 'no' (and we believe it is), is it possible to articulate with greater precision the boundaries of this area of 'criminality'? With courage and caution in equal measure, we assert that it is both possible and desirable to do so, and, in this article, we outline an approach to doing so.

In our view, every criminal offence should be capable of clear articulation in terms of conduct and fault elements – especially offences that are charged in high volumes every year and which are controversial inclusions in the statute books.<sup>14</sup> We are not naive about the possibility of achieving absolute clarity and certainty in this or, indeed, any other law. Such 'perfection' is unrealistic given, among many other considerations, the nature of legal language and the (often contested)

<sup>13</sup> Ken Buckley, *Offensive and Obscene: A Civil Liberties Casebook* (Ure Smith, 1970) ch 6; David Weisbrot, 'Sex, Words and Magistrates' (1991) 16 *Legal Service Bulletin* 297; John Stratton, 'Offensive Behaviour' (1991) 16 *Legal Service Bulletin* 132; Kevin Kitchener, 'Street Offences and the *Summary Offences Act* (1988): Social Control in the 1990s' in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Institute of Criminology, Sydney University Law School, 1992) 19; Bill Walsh, 'Offensive Language: A Legal Perspective' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of New South Wales Press, 1995) 203; Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123; Joanne Lennan, 'The "Janus Faces" of Offensive Language Laws, 1970–2005' (2006) 8 *University of Technology Sydney Law Review* 118; Jo Lennan, 'The Development of Language Laws in Nineteenth-Century New South Wales' (2007) 18 *Current Issues in Criminal Justice* 449; James Leaver, 'Swear Like a Victorian: Victoria's Swearing Laws and Similar Provisions in NSW and Queensland' (2011) 36 *Alternative Law Journal* 163; Mark Dennis, "'Dog Arse Cunts": A Discussion Paper on the Law of Offensive Language and Offensive Manner' (Discussion Paper, June 2011) <[http://criminalcle.net.au/attachments/Offensive\\_Language\\_and\\_Offensive\\_Manner\\_Discussion\\_Paper\\_Dog\\_Arse\\_Cunts.pdf](http://criminalcle.net.au/attachments/Offensive_Language_and_Offensive_Manner_Discussion_Paper_Dog_Arse_Cunts.pdf)>; Elyse Methven, 'Should Penalty Notices be Issued for Using Offensive Language?' (2012) 37 *Alternative Law Journal* 63. See also Anti-Discrimination Board of New South Wales, above n 5; Robert Jochelson, 'Aborigines and Public Order Legislation in New South Wales' (2007) 34 *Crime and Justice Bulletin* 1; NSW Bureau of Crime Statistics and Research, 'Race and Offensive Language Charges' (Crime and Justice Statistics Bureau Brief, NSW Bureau of Crimes Statistics and Research, August 1999); Aboriginal Justice Advisory Council, 'Policing Public Order: Offensive Language & Behaviour, the Impact on Aboriginal People' (Report, Aboriginal Justice Advisory Council, 1999).

<sup>14</sup> As will be discussed in more detail in Part III below, offensive language and conduct laws are controversial for reasons that include free speech infringement and their disproportionate impact on already marginalised individuals and communities (most notably, Indigenous Australians).

processes of interpretation that are involved in deriving meaning,<sup>15</sup> and the effect of discretion in decision-making.<sup>16</sup> That said, certain unresolved ambiguities in the definition of offensive conduct and offensive language under the *Summary Offences Act 1988* (NSW) can be remedied and ought to be. We are prepared to be bold in our proffered interpretations in the hope that, even if they are wrong, this article will nonetheless prompt wider engagement with questions that have escaped rigorous academic and judicial scrutiny for too long.

The legitimacy of criminal offences such as those defined by sections 4 and 4A – that turn on the concept of *offensiveness* – has rightly been the subject of rigorous critique, including by eminent criminal law theorists.<sup>17</sup> For what it is worth, our own normative position is unambiguous: offensiveness has no place in Australian law as a basis for criminality and any offences that turn on an offensiveness standard (including sections 4 and 4A) should be abolished immediately. But it is not our aim in this article to prosecute this position; a position that has already attracted much scholarly attention.<sup>18</sup> Rather, our aim is to confront the reality that sections 4 and 4A not only *remain* on the statute books in NSW, but they have been *entrenched* there for decades, and continue to be *actively enforced*. As long as this is the case, an attempt must be made to elicit judicial guidance in relation to the scope and elements of sections 4 and 4A of the *Summary Offences Act 1988* (NSW). While our proposals for interpreting these offences do not deliver abolition, they do have the potential to at least provide a legal foundation for defending charges and narrowing the scope of sections 4 and 4A, thereby reducing (if not removing) the demonstrable risks of over-policing and over-criminalisation which have too often been realised in NSW.

The body of this article is in three parts. Part II introduces the statutory provisions which define offensive conduct and offensive language, including a brief examination of the historical evolution of this form of public order offence. Part III deals with the operation of the laws, highlighting a number of concerns that have been raised about their reach in practice, including their disproportionate impact on Aboriginal people in NSW. Part IV sets out a methodology for construing statutory offences which we then apply to sections 4 and 4A of the *Summary Offences Act 1988* (NSW) with reference to the known case law.

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<sup>15</sup> See Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan, 1987); Christopher Hutton, *Language, Meaning and the Law* (Edinburgh University Press, 2009).

<sup>16</sup> Brown et al, above n 2, 119.

<sup>17</sup> See, eg, Andrew Von Hirsch and A P Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart, 2006). See also Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) ch 5 (in the context of hate speech laws).

<sup>18</sup> Von Hirsch and Simester, above n 17; Brown et al, above n 2, 763; Bronitt and McSherry, above n 4, 842–5.

## II THE LEGISLATION

The crimes of offensive conduct and offensive language are found in part 2 division 1 'Offensive behaviour', sections 4 and 4A respectively, of the *Summary Offences Act 1988* (NSW). The offences contained in this division cover a broad range of behaviour, including offensive conduct and language (sections 4 and 4A), obscene exposure (section 5), damaging fountains (section 7), damaging or desecrating protected places (section 8) and violent disorder (section 11A).

Sections 4 and 4A provide:

### 4 Offensive conduct

- (1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school. Maximum penalty: 6 penalty units or imprisonment for 3 months.
- (2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.
- (3) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

### 4A Offensive language

- (1) A person must not use offensive language in or near, or within hearing from, a public place or a school. Maximum penalty: 6 penalty units.
- (2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.
- (3) Instead of imposing a fine on a person, the court:
  - (a) may make an order under section 8 (1) of the *Crimes (Sentencing Procedure) Act 1999* directing the person to perform community service work, or
  - (b) may make an order under section 5 (1) of the *Children (Community Service Orders) Act 1987* requiring the person to perform community service work, as the case requires.
- (6) However, the maximum number of hours of community service work that a person may be required to perform under an order in respect of an offence under this section is 100 hours.

These statutory formulations of offensive conduct and language are the latest iterations of offences which date back, in Australia, to the mid-19<sup>th</sup> century. A full historical account is beyond the scope of this paper,<sup>19</sup> but it is worth noting that the common law and early legislation did not criminalise offensiveness per se but included a public disorder or 'breach of the peace'

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<sup>19</sup> See generally Brown et al, above n 2, 749–52. See also Lennan, 'The Development of Language Laws in Nineteenth-Century New South Wales', above n 13.

component. That is, they required proof that the conduct was intended, or reasonably likely to 'provoke unlawful physical retaliation'.<sup>20</sup>

Section 6 of the *Vagrancy Acts 1851* (NSW) is illustrative:

And be it enacted That any person who shall use any threatening abusive or insulting words or behaviour in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned shall forfeit and pay on conviction in a summary way by any Justice of the Peace any sum not exceeding five pounds and in default of immediate payment shall be committed to the common gaol or house of correction for any period not exceeding three calendar months.

By 1908, the 'intent to provoke a breach of the peace' element had been removed and the word 'offensive' was added to 'the string of adjectives used to describe prohibited behaviour'.<sup>21</sup> In our view, this omission substantially changed both the nature of the offence and its justification. Specifically, it blurred the edges of the criminal law's reach and expanded the opportunity for the police, and the courts, to regulate conduct that had previously been regarded as beyond the legitimate limits of the state's authority to intervene and punish; that is, conduct which does not cause harm or carry the risk of harm.<sup>22</sup> It is one of the reasons that offensive conduct and language laws, in their current formulation, have attracted criticism for being overly broad.

### A A Constitutional Question?

The permissibility, and constitutional validity, of broadly drawn public order offences that do not contain a 'breach of the peace' element were considered by the High Court in *Coleman v Power*.<sup>23</sup> Prior to the repeal of the statute in 2005,<sup>24</sup> section 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) created an offence similar to section 4A of the *Summary Offences Act 1988* (NSW): using 'insulting words to any person' (emphasis added) in a public place. Like the offences defined by sections 4 and 4A in NSW, Queensland's insulting words offence had once contained a breach of the peace component, but it was removed in 1931.<sup>25</sup>

A majority of the High Court found that the breadth of the offence defined by section 7(1)(d) was constitutionally unacceptable. Justice McHugh ruled that section 7(1)(d) was invalid by virtue of inconsistency with the implied freedom of political communication which, since 1997, the High Court has held to be implicit in the *Australian Constitution*.<sup>26</sup> Justices Gummow, Hayne and Kirby

<sup>20</sup> To use the phrase preferred by Gummow and Hayne JJ in *Coleman v Power* (2004) 220 CLR 1, 77 [193]. This case is discussed further below.

<sup>21</sup> Brown et al, above n 2, 752.

<sup>22</sup> On harm as a justification for criminalisation, see *ibid* 76.

<sup>23</sup> (2004) 220 CLR 1.

<sup>24</sup> Replaced by a 'public nuisance' offence, now found in s 6 of the *Summary Offences Act 2005* (Qld).

<sup>25</sup> *Vagrants, Gaming and Other Offences Act 1931* (Qld). See also *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ).

<sup>26</sup> *Coleman v Power* (2004) 220 CLR 1, 33 [36] (McHugh J). See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('Lange').

'saved' the provision from invalidity by narrowly construing the scope of the offence so that it only covered conduct where the words used were 'either ... intended to provoke unlawful physical retaliation, or they are reasonably likely to provoke unlawful physical retaliation from either the person to whom they are directed or some other who hears the words uttered'<sup>27</sup> – that is, by reading in a 'breach of the peace' element. This conclusion was supported by both the specific constitutional principles established in *Lange*, as well as broader free speech considerations. Justices Gummow and Hayne observed:

[Section] 7(1)(d) creates a criminal offence. The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.<sup>28</sup>

In *Coleman v Power* none of the High Court judges considered the implications of their analysis for the offensive conduct and offensive language laws which continue to operate in other Australian states and territories. Future scrutiny is likely, however, particularly given that, as Gleeson CJ noted, some such offences (and this list includes sections 4 and 4A in NSW) do not have a 'breach of the peace' element.<sup>29</sup>

The matter has not yet been addressed by the courts in NSW, but has been considered on one occasion by the Supreme Court of Victoria. In *Ferguson v Walkley*<sup>30</sup> Harper J considered the implications of *Coleman v Power* for the offence of using insulting words in a public place contrary to section 17(1)(c) of the *Summary Offences Act 1966* (Vic). On an appeal against conviction by Norman Ferguson, an Aboriginal man, Harper J dismissed the suggestion that the High Court's decision in *Coleman v Power* required him to conclude that criminal punishment for offensive or insulting words must be limited to

<sup>27</sup> *Coleman v Power* (2004) 220 CLR 1, 74 [183] (Gummow and Hayne JJ). See also at 98–9 (Kirby J).

<sup>28</sup> *Ibid* 75 [185]. Tamara Walsh has suggested that the High Court's decision had little immediate effect on the way in which the police were responding to 'offensive' behaviour, notwithstanding the intent evident in several of the judgments to 'rein in' the scope of offensiveness-based crimes, specifically, the offence of 'public nuisance' now found in s 6 of the *Summary Offences Act 2005* (Qld). See Tamara Walsh, 'The Impact of *Coleman v Power* on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland' (2006) 30 *Melbourne University Law Review* 191.

<sup>29</sup> *Coleman v Power* (2004) 220 CLR 1, 23 [8] (Gleeson CJ). Roger Douglas has suggested that the High Court's decision might prompt further constitutional challenges:

The decision may also have implications for other, overlapping, public order offences. Insofar as they apply to political discourse, abusive language laws would also seem to be bad except insofar as the abuse is calculated to produce a breach of the peace. There is no obvious reason why, by analogy with *Coleman v Power* they should not be so read down. Offensive language laws would fall foul of the constitutional freedom insofar as they enabled people to be prosecuted for offensive non-verbal political communications. Sooner or later, anti-censorship campaigners will challenge the constitutionality of indecent language/behaviour laws: Roger Douglas, 'The Constitutional Freedom to Insult: The Insignificance of *Coleman v Power*' (2005) 16 *Public Law Review* 23, 27.

See also Dennis, above n 13, 6. For further commentary on *Coleman v Power*, see Elisa Arcioni, 'Developments in Free Speech Law in Australia: *Coleman* and *Mulholland*' (2005) 33 *Federal Law Review* 333.

<sup>30</sup> (2008) 17 VR 647.



situations where the words are intended or reasonably likely to provoke unlawful retaliation. He preferred the approach of Gleeson CJ in *Coleman v Power* – one of the minority justices who did not strike down or read down section 7(1)(d) – who held that the offence could be made out where the insulting words were ‘intended or likely to provoke a forceful response’ or where ‘the use of the language, in the place where it is spoken, to a person of that kind, is contrary to contemporary standards of public good order.’<sup>31</sup>

By contrast, in New Zealand, the courts have interpreted the comparable offence as requiring a breach of the peace element. In *Morse v The Police* the Supreme Court of New Zealand, influenced by the protection of freedom of expression in section 14 of the *Bill of Rights Act 1990* (NZ), held that the offence of behaving ‘in an offensive or disorderly manner ... in or within view of any public place’ under section 4(1)(a) of the *Summary Offences Act 1981* (NZ) requires proof of a *disruption of public order* (and not mere offensiveness).<sup>32</sup>

### III OPERATION OF THE LAWS

The manner and frequency with which offensive conduct and offensive language offences have been enforced in NSW, add further weight to the case for clarification of their elements. By any measure, sections 4 and 4A of the *Summary Offences Act 1988* (NSW) are ‘high volume’ criminal offences. A large proportion of the public order charges which are heard in the Local Court each year relate to offensive conduct or offensive language. In 2012, more than 14 000 ‘public order offence’ charges were finalised in the NSW Local Court and almost 40 per cent of these were charges of offensive language (1830) or offensive behaviour (3782).<sup>33</sup>

Opportunities for both scrutiny of the circumstances in which charges are laid and close examination of the legal elements of the offences have been rare given that offensive conduct and language charges, as with most summary offences, attract high rates of guilty pleas.<sup>34</sup> The relative ‘invisibility’ of these offences from judicial consideration, has been exacerbated more recently by the introduction of the CIN scheme. Since 2007, NSW Police have had the option of

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<sup>31</sup> *Coleman v Power* (2004) 220 CLR 1, 26 [14] (Gleeson CJ). The constitutional validity of other laws creating offences broadly relating to offensive conduct have also been questioned recently, based on the implied freedom of political communication. In *Monis v The Queen* (2013) 295 ALR 259 the High Court split 3:3 on the question of the validity of the offence under s 471.12 of the *Criminal Code 1995* (Cth) of using a postal service in a way that is, amongst others things, offensive. The result of the deadlock was that decision under appeal – a decision of the New South Wales Court of Appeal upholding the legislation – was affirmed. In *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197 the High Court overturned the Full Court of the Supreme Court of South Australia’s finding of invalidity in relation to a City of Adelaide by-law that prohibited touting for business, or conducting any survey or opinion poll on a road in a way that ‘preach[es], canvass[es], harangue[s]’.

<sup>32</sup> *Morse v The Police* [2011] NZSC 45.

<sup>33</sup> NSW Bureau of Crime Statistics and Research, above n 9, 21.

<sup>34</sup> Brown et al, above n 2, 198. See Aboriginal Justice Advisory Council, above n 13.

proceeding in relation to alleged breaches of sections 4 and 4A of the *Summary Offences Act 1988* (NSW) by way of issuing a CIN (which is a penalty notice or 'on the spot' fine).<sup>35</sup>

In 2008, the first full year of operation of the statewide availability of CINs, 4078 CINs were issued for offensive conduct and 2023 CINs were issued for offensive language<sup>36</sup> and, as will be discussed below, with no equivalent reduction in court attendances for these offences. In a review of the first nine months of operation of the statewide CIN scheme, the NSW Ombudsman found that 70 per cent of the CINs issued during the review period (November 2007 to July 2008), were for offensive conduct or offensive language.<sup>37</sup> These figures clearly speak volumes and the concerns raised by the Ombudsman in relation to the use of CINs for these offences will be addressed below.<sup>38</sup> The latest available data suggest that the high volume use of CINs has continued: 4760 persons were issued with a CIN in relation to section 4 and 2048 persons were issued with a CIN in relation to section 4A in 2012.<sup>39</sup>

#### A Impact on Aboriginal People and Communities<sup>40</sup>

In addition to the frequency with which section 4 and 4A charges are laid, and CINs issued, it is not possible to discuss the operation of these offences without addressing the disproportionate impact of offensive conduct and offensive language laws on Aboriginal people. The evidence is overwhelming and disturbing. In its 1982 *Study of Street Offences by Aborigines*, the Anti-Discrimination Board of NSW found evidence of over-representation of Aboriginal people, particularly in rural, regional and remote parts of the state. Based on an examination of court appearances in 10 NSW towns with high Aboriginal populations (including a 1978 sample and a 1980 sample) the Board found that 'Aborigines charged with minor offences in public places greatly outnumber non-Aborigines.'<sup>41</sup> Using unseemly words – the equivalent of what is today section 4A of the *Summary Offences Act 1988* (NSW) – was the most common type of offence (56 per cent in 1978 and 61 per cent in 1980).<sup>42</sup> The Board noted that '[t]he words "fuck" and "cunt", used singly or together, accounted for 94 per cent of the charges of using unseemly words in 1980. The

<sup>35</sup> *Criminal Procedure Act 1986* (NSW) s 333; *Criminal Procedure Regulation 2010* (NSW) sch 3. The penalty amount is \$200 for offensive conduct and \$150 for offensive language.

<sup>36</sup> NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (Report, NSW Ombudsman, August 2009) 42–3.

<sup>37</sup> *Ibid* 52.

<sup>38</sup> See also Methven, above n 13.

<sup>39</sup> Unpublished New South Wales recorded crime statistics for 2012 provided by the NSW Bureau of Crime Statistics and Research (on file with the authors).

<sup>40</sup> This section draws on material written by McNamara for Brown et al, above n 2, 754–5.

<sup>41</sup> Anti-Discrimination Board of New South Wales, above n 5, iv.

<sup>42</sup> *Ibid* 48–9.

target or victim of this verbal abuse was most frequently a member of the police force. ... Liquor was a factor in about two thirds of cases.<sup>43</sup>

A similar picture of over-representation of Aboriginal people emerged from a 1990s study of offensive language and offensive behaviour charges conducted by the NSW Bureau of Crime Statistics and Research ('BOCSAR'). Robert Jochelson found that the four local government areas in NSW with the highest percentages of Aborigines in their populations (Brewarrina (42 per cent), Walgett (18 per cent), Bourke (23 per cent) and Central Darling (25 per cent)), had the highest rates of Local Court appearances for offensive language.<sup>44</sup> Narratives taken from police reports on arrests for offensive language and offensive behaviour revealed that

the principal distinguishing feature of the majority of incidents of offensive behaviour and offensive language is excessive alcohol consumption and/or interpersonal conflict of some kind. In the high Aboriginal country area this conflict often involves seemingly ritual confrontations between police and Aboriginal people over swearing in public places or at police themselves. Sometimes the person reported for offensive behaviour and/or offensive language seems to have taken the initiative in provoking the confrontation. Sometimes the confrontation occurs when police question or attempt to detain an Aboriginal person in relation to matters unrelated to offensive behaviour or, alternatively, when police attend an altercation or dispute among Aboriginal people or between non-Aboriginal and Aboriginal people. In circumstances where police are called to an incident, charges of offensive behaviour and/or offensive language appear most likely to ensue when police find themselves unable to calm a situation or when they themselves become the subject of abuse.<sup>45</sup>

These patterns of overrepresentation of Aboriginal people particularly in country areas and charges being laid largely in relation to confrontations with police continued through the 1990s and 2000s despite the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') recommending that '[t]he use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest and charge.'<sup>46</sup> BOCSAR data from the 2000s on the distribution of offensive behaviour and offensive language charges across NSW suggests a continuation of the patterns described above.<sup>47</sup> Recent reports by the NSW Ombudsman and the NSW Law Reform Commission (discussed below) provide further evidence in support of this assessment.

At first glance, the increased use of CINs during the last decade, as an alternative to arrest or other modes of initiation for selected offences, including minor public order offences, might be seen as consistent with the underlying objectives of the RCIADIC's recommendations. In fact, the statewide availability

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<sup>43</sup> Ibid v.

<sup>44</sup> Jochelson, above n 13, 9.

<sup>45</sup> Ibid 15.

<sup>46</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, 29, Recommendation 86(a).

<sup>47</sup> See Brown et al, above n 2, 753–5. See also New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012) 301–2; Aboriginal Justice Advisory Council, above n 13; NSW Bureau of Crime Statistics and Research, above n 13; Lennan, 'The "Janus Faces" of Offensive Language Laws, 1970–2005', above n 12; Leaver, above n 13.

of CINs since 2007 has *heightened* concerns about the disproportionate impact of offensive conduct and offensive language laws on Aboriginal people. A 2009 report completed by the NSW Ombudsman concluded that 83 per cent of the CINs issued to Aboriginal persons were for offensive conduct or language.<sup>48</sup> The Ombudsman addressed concerns that the availability of CINs for public order offences like offensive conduct and offensive language might be having a net-widening effect:

With half of all adult offensive conduct and offensive language incidents detected in NSW now resulting in CINs, there can be no doubt that the scheme is having a major impact on how police deal with these offences. Overall legal actions in relation to these two offences are increasing, and Aboriginal people remain significantly overrepresented in relation to both.

The initial state-wide data indicates that CINs are contributing to a significant net increase in legal action taken on offensive language and offensive conduct incidents. That is, some offenders are being diverted from court, but the early data indicates that the decreases in court appearances are being eclipsed by the very high numbers of minor offenders now being fined for those offences.<sup>49</sup>

The problem of inadequate scrutiny of the circumstances in which CINs are issued to Aboriginal people for offensive conduct and offensive language is heightened by the Ombudsman's finding that 'Aboriginal people are less likely to request a review or elect to have the matter heard at court',<sup>50</sup> in a context where overall rates of review request and court election are already very low.<sup>51</sup>

In its recent report on penalty notices,<sup>52</sup> the NSW Law Reform Commission raised similar concerns about the net-widening effect after finding that since the statewide introduction of CINs in 2007 there has been a 23 per cent increase in 'contacts'<sup>53</sup> for offensive language.<sup>54</sup>

In its submission to the NSW Ombudsman, the Law Society of NSW suggested that 'much of the language on which charges or CINs are based is not offensive at law.'<sup>55</sup> The Ombudsman found support for this claim, stating that '[a]lmost two-thirds of the offensive language CINs that we audited for the report were issued for language or were in circumstances where the recipient may have had a sufficient defence if the matter was heard at court.'<sup>56</sup>

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<sup>48</sup> NSW Ombudsman, above n 36, 56.

<sup>49</sup> Ibid 71.

<sup>50</sup> Ibid Foreword.

<sup>51</sup> Ibid 115.

<sup>52</sup> New South Wales Law Reform Commission, above n 47. In its 2012 report on penalty notices, the New South Wales Law Reform Commission recommended that '[r]eview by a senior police officer of Criminal Infringement Notices issued for offensive language and offensive conduct should be mandatory and should not depend on application': at 306.

<sup>53</sup> Ibid 294. This includes Court Attendance Notices ('CANs'), Youth Conferences, *Young Offenders Act* cautions and warnings, Infringement Notices and CINs: at 294 n 50.

<sup>54</sup> Ibid.

<sup>55</sup> NSW Ombudsman, above n 36, 62.

<sup>56</sup> Ibid 9.

The NSW Law Reform Commission echoed this finding:

In consultations for this inquiry we were told by lawyers representing clients issued with CINs and penalty notices for offensive language that they often tried to persuade clients to court-elect but that they were unwilling to do so and paid their penalty even if they believed that the offence was not made out.<sup>57</sup>

The Commission questioned whether it was appropriate to allow enforcement by penalty notice in the case of ‘offences that require judgment in relation to matters involving community standards, such as “offensiveness”’,<sup>58</sup> investigated whether offensive conduct and offensive language should be removed from the CINs scheme;<sup>59</sup> and gave serious consideration to recommending the abolition of offensive language.<sup>60</sup> Ultimately, the Commission stopped short of this final consideration, recommending instead that ‘the offence of offensive language in the *Summary Offences Act* ... should be further investigated as a matter of urgency’ and that ‘[t]he offence of offensive conduct ... be similarly considered.’<sup>61</sup>

So long as sections 4 and 4A remain on the statute books, the evidence gathered by both the NSW Ombudsman (2009) and the NSW Reform Commission (2012) in relation to the operation of these provisions reinforces our conviction that an attempt must be made to elicit judicial guidance in relation to the scope and elements of sections 4 and 4A of the *Summary Offences Act 1988* (NSW). It is true that ‘these offences are rarely challenged in court’,<sup>62</sup> but this fact cannot be taken as a justification for accepting the status quo. While it may currently be the case that ‘little binding precedent is available’,<sup>63</sup> this gap should be remedied. Indeed, the fact that the enforcement of offensive conduct and offensive language laws is frequently ‘hidden’ from arm’s length scrutiny (ie beyond the police) makes it especially important that clarification be provided.

In this regard, the Ombudsman noted in its 2009 report that it had previously recommended ‘in a 2005 report on an earlier CINs trial’,<sup>64</sup> that the NSW Police should provide ‘clear guidance ... on what does and does not constitute offensive language and conduct’ so that officers can determine whether a CIN is ‘the appropriate intervention’.<sup>65</sup> The Ombudsman described the Police Force’s response to this recommendation:

In response to Recommendation 5, the NSW Police Force initially undertook to issue a Law Note providing guidance on existing case law regarding whether the language used is offensive, but noting that any decision on ‘whether to lay a charge, issue a CAN, issue a CIN or issue a caution is a matter for the exercise of

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<sup>57</sup> New South Wales Law Reform Commission, above n 47, 296.

<sup>58</sup> Ibid 299.

<sup>59</sup> Ibid 307.

<sup>60</sup> Ibid 308–11.

<sup>61</sup> Ibid 311.

<sup>62</sup> Ibid 308, citing Crime and Misconduct Commission Queensland, ‘Policing Public Order: A Review of the Public Nuisance Offence’ (Report, Crime and Misconduct Commission Queensland, May 2008).

<sup>63</sup> Ibid.

<sup>64</sup> NSW Ombudsman, ‘On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police’ (Report, NSW Ombudsman, April 2005) 76.

<sup>65</sup> NSW Ombudsman, above n 36, 63.

discretion by the individual officer'. After further consideration, police subsequently advised that there was *insufficient recent and authoritative case law* in this area to support a Law Note that provided further clarification to frontline officers in this area, and instead included two case studies in materials used to train officers on the appropriate use of CINs.<sup>66</sup>

There is something deeply unsatisfactory about this explanation. Judicial guidance is long overdue, and, in the absence of adequate internal police force guidance to officers, critically important.

#### IV A SUGGESTED APPROACH TO SECTIONS 4 AND 4A

This part of the article is in three sections. First, drawing on the High Court decision of *He Kaw Teh*,<sup>67</sup> and the judgment of Brennan J in particular, we set out a methodological approach for construing the elements for statutory offences generally. Following *McBarnet*,<sup>68</sup> we advocate this approach because, contrary to assumptions about the relative simplicity of 'lesser crimes', many statutory offences (typically dealt with in the Local Court) are legally very complicated. In particular, they raise questions about whether mens rea is required for a particular actus reus component or whether the element is strict or absolute. Many of these issues are rarely judicially considered whether in the Local Court – perhaps an unsurprising result given the 'ideology of triviality' that pervades the jurisdiction<sup>69</sup> and with its high volume case load of summary offences (along with indictable offences triable summarily<sup>70</sup>) – or at an appellate level. However, it is precisely because judicial consideration has been uncommon that we advocate for attention and clarification. The methodology we set out here provides precision in identifying the relevant actus reus (prohibited conduct or physical elements) and mens rea (fault or mental elements), if any. Secondly, we will apply this approach to sections 4 and 4A with reference to the known case law and, finally, provide a suggested approach as to how the elements should be construed.

##### A Methodology

Despite the proliferation of statutory offences that do not necessarily conform to the classic actus reus and correlating mens rea formula, it is appropriate, and necessary in our view, to approach the construction of all criminal offences by asking: what constitutes the actus reus; and what, if any, is the correlating mens rea requirement? Relatively minor summary offences, like offensive conduct and offensive language, are no less deserving of rigorous technical analysis of their elements than serious indictable offences, like drug importation. Indeed, because

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<sup>66</sup> Ibid (emphasis added).

<sup>67</sup> (1985) 157 CLR 523.

<sup>68</sup> *McBarnet*, above n 6, 147–50.

<sup>69</sup> Ibid 143.

<sup>70</sup> *Criminal Procedure Act 1986* (NSW) sch 1.

of the paucity of case law construing such offences the need for such analysis may be even greater.

### 1 *Actus Reus*

Following *He Kaw Teh*, the actus reus of an offence may be broken down into:

- the act or conduct (act, series of acts or omissions or a combination, or a state of affairs);
- the circumstances (or context) in which the conduct is performed (or omission made); and
- the results or consequences of the conduct.

Not all offences will have a circumstance and/or consequence component but all will have an act or conduct aspect. According to Brennan J, “[t]hese elements – conduct, circumstances and results – are what Dixon CJ in *Vallance v The Queen* called “the external elements necessary to form the crime.”<sup>71</sup>

In relation to circumstance components, Brennan J drew a further distinction, which we think is often overlooked, and which is central to our analysis of sections 4 and 4A. According to Brennan J a circumstance, as an element of an offence, may be either a circumstance that is an *integral* part of the act or a circumstance that *attends* the doing of an act.<sup>72</sup> Justice Brennan gives the example of rape from the English case of *Director of Public Prosecutions v Morgan*.<sup>73</sup> In the speeches in the House of Lords, the external elements of the offence were treated as sexual intercourse (conduct/act) and non-consent (integral circumstance). These were said to be integral parts of the whole act.<sup>74</sup> Similarly, Brennan J found that the offence (as it then was) under consideration in *He Kaw Teh* – importing ‘prohibited imports’ contrary to section 233B(1) of the *Customs Act 1901* (Cth) – comprised an act (of importing) with an integral circumstance (narcotic goods).<sup>75</sup> By contrast, the offence of assaulting a member of the police force in the due execution of his or her duty – the offence considered by the High Court in *R v Reynhoudt* – was found by the majority in that case as having an actus reus comprising an assault (act) of a police officer in execution of duty (attendant circumstance).<sup>76</sup>

As we will discuss below, the distinction between circumstances that are integral and those that are attendant will not always be an easy one to draw. However, the implications of how a circumstance component is characterised can

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<sup>71</sup> *He Kaw Teh* (1985) 157 CLR 523, 565 (citations omitted).

<sup>72</sup> *Ibid* 571, 575.

<sup>73</sup> [1976] AC 182.

<sup>74</sup> *He Kaw Teh* (1985) 157 CLR 523, 571–2.

<sup>75</sup> *Ibid* 584.

<sup>76</sup> (1962) 107 CLR 381. It is noted, however, that Brennan J doubted whether this was correct and it is likely that since *He Kaw Teh*, if the High Court were to reconsider the issue, that proof of knowledge or recklessness would be required: *He Kaw Teh* (1985) 157 CLR 523, 574. See also Brown et al, above n 2, 675.

be great. Most notably, Brennan J argues in *He Kaw Teh* that while an *integral* circumstance may readily require the mental element of 'knowledge', an *attendant* circumstance may not.<sup>77</sup>

## 2 *Mens Rea*

There is a presumption in the common law that all criminal offences require proof of mens rea in relation to each element of actus reus.<sup>78</sup> That presumption may be displaced in certain circumstances, in which case a 'lesser' fault element may attach to a particular actus reus component or it may attract no fault element at all (ie absolute liability). Mens rea, of course, refers to 'guilty mind', however, as Brennan J said in *He Kaw Teh*:

It is one thing to say that mens rea is an element of an offence; it is another thing to say precisely what is the state of mind that is required. ... The particular mental states that apply to the several external elements of an offence must be distinguished, not only as a matter of legal analysis, but in order to maintain tolerable harmony between the criminal law and human experience.<sup>79</sup>

Typically the relevant mens rea for the corresponding actus reus components are: intent for the act/conduct; knowledge or recklessness for a circumstance; and intent, recklessness or knowledge for the consequence component.<sup>80</sup>

## 3 *Rebutting the Presumption*

The case of *He Kaw Teh* makes it clear that the presumption of mens rea may be rebutted where to do so would be more consonant with the purpose of the Act. The case establishes that three considerations in particular are to be taken into account: the words of the statute; the subject matter with which the statute deals; and the utility of imposing strict liability.<sup>81</sup>

### (a) *Words of the Statute*

The offence must be analysed to determine whether the legislature has either clearly expressed an intention that mens rea is required or there is a necessary implication that it is so required.<sup>82</sup> Where an offence contains words such as 'knowingly', 'dishonestly' or 'willfully' it will be difficult to displace the presumption of mens rea. The absence of such words, however, does not imply that the offence is one of strict or absolute liability. An analysis should be made not only of the relevant provision but also the context in which the offence is to be found.

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<sup>77</sup> *He Kaw Teh* (1985) 157 CLR 523, 571.

<sup>78</sup> *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Wright J); *He Kaw Teh* (1985) 157 CLR 523, 528 (Gibbs CJ), 565–6, 582 (Brennan J).

<sup>79</sup> (1985) 157 CLR 523, 568.

<sup>80</sup> *Ibid* 568 (Brennan J).

<sup>81</sup> *Ibid* 528–30 (Gibbs CJ), 566–8 (Brennan J).

<sup>82</sup> *Ibid* 529 (Gibbs CJ), 566 (Brennan J).



(b) *Subject Matter*

Where the offence may be said to be what Gibbs CJ and Brennan J referred to as ‘truly criminal’, as opposed to regulatory, it is more likely that mens rea is required.<sup>83</sup> This dichotomy is not unproblematic; it is vaguely drawn,<sup>84</sup> and there has been little subsequent judicial clarification. For present purposes it should not be too readily assumed that a relatively minor (or ‘trivial’) offence should necessarily be regarded as regulatory in nature, rather than ‘truly criminal’. The fact that an offence is enforced via conventional criminal justice system agents and processes – including the involvement of police in apprehension, charge and prosecution – is a consideration that tends to militate against a ‘merely regulatory’ categorisation.<sup>85</sup>

Other subject matter indicia that may be relevant to the task of determining the applicable mens rea include the penalty for the offence and the moral or public obloquy that the person may suffer if convicted of the offence.<sup>86</sup> Generally, an offence that may result in a term of imprisonment – particularly a substantial one – is more likely to be an offence of mens rea as opposed to an offence punishable by a fine.

(c) *Utility of Imposing Strict Liability*

The third consideration was described by Gibbs CJ in *He Kaw Teh* as an inquiry into whether putting the defendant under strict liability will assist in the enforcement of the regulations, indicating that there must be something that the accused can do in order to avoid the relevant unlawful conduct: ‘[c]learly, however, no good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an innocent agent to import narcotics.’<sup>87</sup>

In relation to this third consideration, Brennan J stated:

However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. A statute is not so construed unless effective precautions can be taken to avoid the possibility of the occurrence of the external elements of the offence. ... The requirement of mens rea is at once a reflection of the purpose of the statute and a *humane protection for persons who unwittingly engage in prohibited conduct*.<sup>88</sup>

<sup>83</sup> Ibid 530 (Gibbs CJ), 566–7 (Brennan J).

<sup>84</sup> Richard Hyde has observed that the concept of ‘regulatory crime’, used in contradistinction to ‘truly criminal’ offences, is ‘a notoriously elusive and difficult concept’: Richard Hyde, ‘What is “Regulatory Crime”? – An Examination of Academic, Judicial and Legislative Concepts’ (2012) 4 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2012/issue4/hyde4.html>>.

<sup>85</sup> In these terms, the offences defined by ss 4 and 4A of the *Summary Offences Act 1988* (NSW) may be distinguished from an offence such as selling unsafe food under s 14 of the *Food Act 2003* (NSW), which is part of a food safety regime where the primary regulatory strategy is standards compliance and the relevant enforcement body is the NSW Food Authority.

<sup>86</sup> *He Kaw Teh* (1985) 157 CLR 523, 530 (Gibbs CJ), 583 (Brennan J).

<sup>87</sup> Ibid 530.

<sup>88</sup> Ibid 567–8 (emphasis added).

#### 4 The Integral/Attendant Circumstance Distinction

In *He Kaw Teh*, Brennan J held that where a circumstance is integral to the act, there is a strong presumption that the relevant mens rea will be intent or knowledge. By contrast, where the circumstance is attendant, it may be that a lesser mental state applies. That is, the presumption is weaker, and more easily displaced, in the case of an attendant circumstance:

[I]f there be a legislative intention to apply a mental element to the circumstances different from the mental element applicable to the act involved in the offence, it is necessary to decide what circumstances are defined to be an integral part of the act (to which intent and therefore knowledge *will ordinarily apply*) and what circumstances are defined to be merely attendant (to which no mental element may be intended to apply or to which a mental element less than knowledge may be intended to apply).<sup>89</sup>

...

As intent is the mental state ordinarily required in respect of the doing of an act involved in the commission of an offence, any mental state less than knowledge would not be *presumed* to apply to the circumstances which give that act its character. A mental state less than knowledge can apply more readily to circumstances attendant on the occurrence of an act involved in the commission of an offence being circumstances which make the act criminal. The absence of an exculpatory belief can apply to such circumstances where the *prima facie* requirement (knowledge) is excluded.<sup>90</sup>

In our view, the key question can be put as follows: is the circumstance in question essential to giving the conduct in question its criminal character? If yes, the circumstance is integral. If no, the circumstance is attendant. Or to put it another way: is it meaningful to talk of the conduct being criminal in the absence of the said circumstance? If no, the circumstance is integral. If yes, the circumstance is attendant.

Justice Brennan applied his reasoning to the offence of importing a 'prohibited import' contrary to section 233B(1), and found that:

Importing simpliciter is not an act nor is it defined to be a prohibited act in par. (b). Importing narcotic goods is an act; it is the act referred to in par. (b). The character of the act involved in the offence depends on the nature of the object imported. The paragraph thus impliedly requires an intent to do the prohibited act – importing narcotic goods – and thus requires knowledge of the nature of the object imported. It is impossible to divide the act involved in an offence under par. (b) into an act and circumstances attendant on its occurrence. The external elements of an offence under par. (b), unlike the offence considered in *Reynhoudt*, cannot be divided. An intention 'to do the whole act that is prohibited' – the view of Dixon CJ in *Reynhoudt* – is, in my opinion, the only view which the language of par. (b) permits.<sup>91</sup>

Following Brennan J, we suggest that where a circumstance is integral to the act, the relevant mens rea should be knowledge. If the circumstance is attendant to the act, while there is a presumption of knowledge, the corresponding fault element may be interpreted as strict or absolute – if this is more consonant with

<sup>89</sup> Ibid 570–1 (Brennan J) (emphasis added).

<sup>90</sup> Ibid 575–6 (Brennan J) (emphasis added).

<sup>91</sup> Ibid 584 (citations omitted).

the purpose of the Act taking into account the words of the statute; the subject matter with which the statute deals; and the utility of imposing strict liability.<sup>92</sup>

As we will explain below, this analysis has important implications for clarifying the elements of the offences defined by sections 4 and 4A of the *Summary Offences Act 1988* (NSW).

### B Construing Offensive Language and Conduct: The Case Law

Applying this methodology to sections 4 and 4A of the *Summary Offences Act 1988* (NSW), the actus reus may be broken down into three elements; a conduct component and *two* circumstance components:

- conduct or language (the act/conduct);
- the conduct or language is offensive (the first circumstance); and
- the conduct was *in* or *near* or *within view* or *hearing from a public place* or school or that the speech was *in* or *near* or *within hearing from a public place* or school – referred to in this article as the ‘proximity’ requirement (the second circumstance).

We note that this distinction – between the two different circumstance components in the definition of offensive conduct and language – is often glossed in the case law and academic commentary.<sup>93</sup>

In relation to the first circumstance, following Brennan J in *He Kaw Teh*, we argue that it is the offensive nature of the act (conduct or speech), which gives it its criminal character. Offensiveness is an essential precondition of the act potentially attracting the attention of the criminal law. As such, we take the view that the circumstance of ‘offensive’ is *integral* to the act – it not being possible to divide the conduct involved in the offence into an act and circumstance attendant on its occurrence. By contrast, the second circumstance – proximity – may be viewed as a circumstance *attendant* on the occurrence of the act.

We argue this because whether or not the conduct or language was offensive is the primary determinant of the criminality of behaviour – hence the categorisation of this element as integral. However, whether or not the conduct or language could be seen in or heard from a public place is a secondary consideration which goes to the desirability, utility and practicality of holding the accused to account for his or her breach of society’s offensiveness standard. While it is a necessary element of the offence it does not go to the heart of the accused’s culpability. It follows that proximity is appropriately characterised as an attendant circumstance.

Thus, the actus reus of the offences defined by sections 4 and 4A are: speech or conduct committed voluntarily (act/conduct); offensiveness (integral circumstance); and relevant proximity to or in a public place (attendant circumstance). Later in this article, we will consider the consequences of our

<sup>92</sup> See *He Kaw Teh* (1985) 157 CLR 523, 528–30 (Gibbs CJ), 566–8 (Brennan J).

<sup>93</sup> See *Pregelj v Manison* (1987) 88 FLR 346 (‘Pregelj’); Brown et al, above n 2, 769.

proffered categorisation of actus reus components for how we view the correlating mens rea.

### 1 *The Act: Conduct or Speech*

The first element to be proved is that the person engages in either conduct (behaviour) or speech (language or words). As the case law demonstrates, there is an enormous variety of conduct or speech that may potentially fall within this aspect of the actus reus. For example, it may include wearing a t-shirt that includes swear words ('Too Drunk To Fuck'),<sup>94</sup> climbing onto a pedestal of a statue and hanging a political placard over it ('I will not fight in Vietnam'),<sup>95</sup> as well as the more garden variety cases involving a person swearing, typically at a police officer, in a public place.<sup>96</sup>

As with any conduct/act component of the actus reus, it must be committed voluntarily.<sup>97</sup>

### 2 *Circumstance One: 'Offensiveness'*

'Offensiveness' is not defined in the *Summary Offences Act 1988* (NSW) but its meaning has been developed through the case law. Although, as discussed in Part III of this article, concerns have been raised about how the test of offensiveness is applied in particular circumstances, the preferred interpretation of this element of the offences defined by sections 4 and 4A has been well canvassed in the case law, and clearly explained in the academic commentary.<sup>98</sup> For the sake of completeness, and before moving onto the key remaining area of uncertainty – the fault elements for offensive conduct/language – we will summarise the guidance that has been provided by the case law.

#### (a) *Objective Test of the Reasonable Person*

It is well settled that the test for whether something is 'offensive' is an objective one of the reasonable person. It has been said that something is offensive if it is

such as is calculated to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man, notwithstanding that no member of the public is present, or (if there be members of the public present) that nobody is offended ...<sup>99</sup>

The reasonable person is said to be 'reasonably tolerant and understanding, and reasonably contemporary in his reactions'.<sup>100</sup> As a result, it is not necessary for the prosecution to prove that a particular person was in fact offended,

<sup>94</sup> *Police v Pfeifer* (1997) 68 SASR 285 ('Pfeifer').

<sup>95</sup> *Ball v McIntyre* (1966) 9 FLR 237.

<sup>96</sup> See, eg, *Police v Butler* [2003] NSWLC 2; *Jolly v R* (2009) 9 DCLR (NSW) 225.

<sup>97</sup> *Ryan v The Queen* (1967) 121 CLR 205, 213 (Barwick CJ); *He Kaw Teh* (1985) 157 CLR 523, 568 (Brennan J).

<sup>98</sup> See, eg, Brown et al, above n 2, 755–63.

<sup>99</sup> *Inglis v Fish* [1961] VR 607, 611 (Pape J). See also Spears, Quilter and Harfield, above n 4, 155.

<sup>100</sup> *Ball v McIntyre* (1966) 9 FLR 237, 245 (Kerr J).

although such evidence is admissible and, indeed, it may be difficult to prove the offence without it.<sup>101</sup>

This does not, however, mean that the context (including how words were spoken, the time of day or night, or whether the offence occurred after police entered a highly charged environment) and potential audience are irrelevant in determining whether something is objectively offensive.<sup>102</sup> Something done or said in one context (such as a pub) may not be offensive, but if done in another may well be so (such as in a playground with young children about).

### *(b) Changing Community Standards*

What is objectively offensive may also change over time with changes in community standards. This is particularly apparent with swear words such as ‘fuck’.<sup>103</sup>

### **3 Circumstance Two: Proximity**

We are of the view that the second circumstance, which requires that the offensive language or conduct be committed in or with some proximity to a public place, is an attendant circumstance. The required proximity to, and the concept of, ‘public place’ are discussed separately below.

Under section 4 the offensive conduct must be committed ‘in or near, or within view or hearing from, a public place or a school’, whereas for an offensive language charge under s 4A the language must be used ‘in or near, or within hearing from, a public place or a school’.

The meaning of ‘public place’ is exclusively defined in section 3(1) of the *Summary Offences Act 1988* (NSW) as:

- (a) a place (whether or not covered by water), or
- (b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, but does not include a school.

This statutory definition<sup>104</sup> is broad and focuses on whether the public *use* or go to the place, regardless of whether it is a private premises or only a small number or class of persons use the place.<sup>105</sup>

<sup>101</sup> *Connolly v Willis* [1984] 1 NSWLR 373, 384 (Wood J).

<sup>102</sup> *Hortin v Rowbottom* (1993) 61 SASR 313, 322 (Mullighan J); *Connolly v Willis* [1984] 1 NSWLR 373, 379 (Wood J); See also Spears, Quilter and Harfield, above n 4, 156.

<sup>103</sup> *Police v Butler* [2003] NSWLC 2, [6], [22], [34], [37] (Magistrate Heilpern); David Heilpern, ‘*Police v Shannon Thomas Dunn*, Dubbo Local Court’ (1999) 24 *Alternative Law Journal* 238. See also Brown et al, above n 2, 755–60; New South Wales Law Reform Commission, above n 47, 297–9.

<sup>104</sup> The definition in s 3(3) expressly excludes the definition of public place in s 8 of the *Crimes Act 1900* (NSW). It is noted that there are separate definitions of ‘premises’, ‘school’ and ‘vehicle’ in s 3(1); see also s 3(2).

<sup>105</sup> *Re Camp* [1975] 1 NSWLR 452, 454 (The Court); *McIvor v Garlick* [1972] VR 129, 133–6 (Newton J). For further discussion of the significant case law on what may constitute a public place, see Spears, Quilter and Harfield, above n 4, 164–5.

There is no requirement that a person be in the public place at the time the offence is committed.<sup>106</sup> This is because of the 'protective' purpose of the legislation: the public should know they are protected from offensive language in public or within hearing of such places.<sup>107</sup>

#### 4 *Mens Rea*

As discussed above, offensive conduct or language charges involve three *actus reus* components: an act/conduct (speech or behaviour) and two circumstance components (the conduct or language is offensive and the conduct or language is in or within the required proximity to a public place). While the case law discussed above does not break the offences down in this way, there is sufficient judicial consideration of each of these conduct elements to provide relevant guidance. The same cannot be said about mens rea.

In spite of the frequency with which offensive conduct and language charges are laid or penalty notices issued, the law regarding the mens rea for these offences is unsettled. Part of the problem lies in the paucity of NSW appellate authority on the issue.<sup>108</sup> In addition, the authorities that are available, whether from NSW or other Australian jurisdictions, tend to conflate what should be *discrete* questions about the fault element (if any) that attaches to each component of the *actus reus* into a *global* inquiry as to whether the *offence* is one of mens rea.<sup>109</sup> Consistent with the principles laid down in *He Kaw Teh*, we argue that a more nuanced approach is required; one that identifies what, if any, mental state applies to each component of the *actus reus*. It is for this reason that we have considered in detail above how the conduct elements of offensive conduct and language should be construed. This is an essential first step in order to be able to assess what, if any, correlating fault component should be regarded as constituting an element of the crime.

##### (a) *Mens Rea as to Conduct*

The NSW Court of Criminal Appeal has never effectively considered the question of the mens rea for the offences defined by sections 4 and 4A of the *Summary Offences Act 1988* (NSW). The only relevant guidance comes from a very small number of cases stated to single judges of the Supreme Court of NSW on appeal from the Local Court. In the one reported decision,<sup>110</sup> *Jeffs v Graham*,<sup>111</sup> Yeldham J considered an appeal against an offensive conduct conviction under the predecessor legislation to sections 4 and 4A of the *Summary*

<sup>106</sup> *Stutsel v Reid* (1990) 20 NSWLR 661, 663 (Loveday J). The presence or absence of a person in the place may, however, be relevant to penalty.

<sup>107</sup> *Ibid* 664 (Loveday J); see *Jolly v R* (2009) 9 DCLR (NSW) 225, 230 [22] (Cogswell DCJ).

<sup>108</sup> Brown et al, above n 2, 763–9.

<sup>109</sup> See, eg, *Jeffs v Graham* (1987) 8 NSWLR 292; *Pregelj* (1987) 88 FLR 346; *Pfeifer* (1997) 68 SASR 285. Each of these cases is discussed below.

<sup>110</sup> See also *Patterson v Alsleben* (Unreported, New South Wales Supreme Court, Newman JA, 5 June 1990); Dennis, above n 13, 8–9.

<sup>111</sup> (1987) 8 NSWLR 292.

*Offences Act 1988* (NSW), namely section 5 of the *Offences in Public Places Act 1979* (NSW). The phrase ‘shall not conduct himself or herself’ (a phrase not relevantly different to the wording of sections 4 and 4A: ‘must not conduct himself or herself’ and ‘must not use offensive language’) was held to ‘require at least that there should be a voluntary act by the person charged.’<sup>112</sup> Justice Yeldham ruled that the offence ‘does at least require the Crown to prove beyond reasonable doubt that the person charged had voluntarily engaged in the conduct complained of.’<sup>113</sup> It appears that the term ‘voluntary’ may have been used here as a synonym for intentional, but Yeldham J only seemed to require this mens rea in respect of the act/conduct component of the actus reus. In other words, the prosecution must prove that the accused intended to speak (in the case of offensive language) or behave intentionally (in the case of offensive conduct). This is of course a very minimal requirement and would rarely be in issue. The question of mens rea in relation to what we have identified as the two circumstance components of the actus reus for offensive conduct and offensive language offences was not considered in *Jeffer v Graham*.<sup>114</sup> The resulting ambiguity is one of the consequences of the traditional tendency not to subject public order offences to the same sort of precise technical scrutiny and exegesis that is commonplace in relation to more serious crimes.

The NSW Court of Criminal Appeal has not considered the question, and so it appears to remain an open question as to whether mens rea is required for the two circumstance components. Below we discuss the two primary but conflicting interstate authorities dealing with mens rea in offensive language and behaviour offences.

*(b) Offensiveness: Strict Liability vs Intent*

The issue of whether the circumstance of ‘offensiveness’ requires a mens rea element was considered in the South Australian case of *Pfeifer*.<sup>115</sup> Pfeifer was charged with behaving in an offensive manner contrary to section 7(1)(a) of the *Summary Offences Act 1953* (SA) for wearing a T-shirt (given to him by his mother) in a shopping mall, with the name of the band ‘Dead Kennedys’ and the words ‘Too Drunk To Fuck’. In considering whether the offence required a mental element, applying *He Kaw Teh*, Doyle CJ (DeBelle and Lander JJ agreeing) held that the presumption of mens rea had been rebutted and that the offence was one of strict liability. Thus, the prosecution must prove that the relevant conduct is offensive and that the person did not honestly and reasonably believe that the conduct was not offensive. Chief Justice Doyle held:

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<sup>112</sup> Ibid 295.

<sup>113</sup> Ibid 296.

<sup>114</sup> The Supreme Court considered the question again in *Patterson v Alsleben* (Unreported, New South Wales Supreme Court, Newman JA, 5 June 1990), but Newman JA appears primarily to have adopted the ambiguous terminology used by Yeldham J (‘voluntary’ when presumably intentional is meant), and failed to differentiate between the different actus reus components in relation to which *He Kaw Teh* requires discrete fault element inquiries to be made.

<sup>115</sup> (1997) 68 SASR 285.

It appears to me to be a provision intended to protect members of society from disturbance and annoyance through offensive behaviour, intended to prevent the sort of disputes and disturbances that might arise if such behaviour is not prevented by law with the consequence that members of society react to it or resist it in other ways. To convict only those who intentionally or knowingly offend will achieve a good deal, but does not go that extra step of requiring members of society to take care to ensure that they do not breach generally accepted standards of behaviour.<sup>116</sup>

*Pfeifer* was applied in *Police v Rosser*<sup>117</sup> and affirmed in *Police v Atherton*.<sup>118</sup> In South Australia, therefore, it would appear to be established that this offence (or more precisely the element of offensiveness) is one of strict liability.

It is important to note that the offence in South Australia differs from the NSW provision, in respect of the second circumstance relating to location or proximity. The South Australian offence requires that the person is *in* a public place whereas the NSW provision is broader capturing conduct committed within the relevant proximity to a public place (the second circumstance). We would argue, therefore, that Doyle CJ has only addressed the circumstance element of 'offensiveness', finding it to be a strict liability component.

In *Pregelj*, the Northern Territory Court of Criminal Appeal construed a provision more similar to the offences defined by section 4 of the *Summary Offences Act 1988* (NSW).<sup>119</sup> Section 47(a) of the *Summary Offences Act* (NT), relevantly, makes it an offence to engage in 'offensive ... behaviour ... in or within the hearing or view of any person in any ... public place'. In this case, a police officer was walking along a foot-lane at approximately 8.50pm, when he saw through a lit bedroom window a naked white man having sexual intercourse on the floor of the room with a naked Aboriginal female. The facts indicate that the house was seven or eight metres from the lane; there was a one metre fence separating the lane from the house; and the bottom of the window was close to the floor. Justice Nader concluded that 'there was evidence, to be inferred from each of them [the appellants] saying that they thought they were out of sight behind a wall (to which I have referred), that the appellants did give thought to the possibility of being seen from outside the house.'<sup>120</sup>

By contrast to the decision in *Pfeifer*, the Court (Nader, Kearney and Rice JJ) held that the offence is one of mens rea. While the separate judgments of Nader and Rice JJ (Kearney J concurring with the orders of Nader J) do not expressly articulate their conclusions in these terms, we would argue that each focuses on a different circumstance component in coming to their findings.

On the one hand, Nader J, after applying *He Kaw Teh*, appears to focus on the circumstance of 'offensiveness' stating that 'offensive behaviour' requires that the accused intended to offend:

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<sup>116</sup> Ibid 292.

<sup>117</sup> (2008) 185 A Crim R 305.

<sup>118</sup> [2010] SASC 87, [15] (Duggan J).

<sup>119</sup> (1987) 88 FLR 346.

<sup>120</sup> Ibid 349 (Nader J).



The gravamen of offensive behaviour is the offending of another person, and the offending must be intended ... having taken precautions to conceal themselves, they did not intend to offend, nor did they foresee the possibility of offending anyone. By 'intent to offend', I mean 'do an act with knowledge that the activity would, or at least could, offend'.<sup>121</sup>

On the other hand, Rice J, having found that the act of sexual intercourse per se could not be said to be offensive but was rather a 'natural and lawful human behaviour', focused on the second circumstance, 'within the view of any person'.<sup>122</sup> Thus, Rice J held that section 47 was only intended to proscribe sexual intercourse in circumstances where the conduct was intended to be viewed by others. This imports an element of 'prurience' into the conduct.<sup>123</sup>

### C A Suggested Approach to Mens Rea in NSW

The above discussion indicates that while it is clear that under sections 4 and 4A of the *Summary Offences Act 1988* (NSW) there must be an intent to perform the relevant conduct, it is an open question as to what, if any, mental state applies to the two circumstance components of the actus reus: offensiveness and proximity. The South Australian decision of *Pfeifer* points in the direction of the circumstance of 'offensiveness' being a strict liability component, whereas Justice Nader's decision in *Pregelj* points in the opposite direction, indicating that it requires an intent to offend – meaning knowledge (or recklessness) that the relevant conduct is offensive. In terms of the circumstance of proximity, *Pfeifer* provides no guidance and Justice Rice's judgment in *Pregelj* points to a requirement that the Crown must prove that the accused intended to be in, within view or hearing of a public place whilst performing the relevant conduct.

In the absence of judicial guidance in NSW, and given the conflicting nature of the authority from South Australia and the Northern Territory, we venture our own interpretation of the corresponding mens rea elements as follows (drawing on Justice Brennan's distinction in *He Kaw Teh* between circumstances that are integral and those that are attendant to the act).

First, following *Jeffs v Graham* there must be an intention to perform the act/conduct. This component seems settled.

Secondly, as argued above, we regard the first circumstance – 'offensiveness' – as integral to the act. Clearly, the mere act of speaking or engaging in some form of conduct is not what is prohibited by sections 4 and 4A. Rather, it is only when the speech or conduct (the act) has the attribute of being offensive (the *integral* circumstance) that the speech or conduct might, assuming all other elements are satisfied, be regarded as criminal in character. In our view, therefore, it is not possible to divide the core conduct element into an act and a circumstance attendant on its occurrence. This appears to have been the conclusion reached by Nader J in *Pregelj*:

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<sup>121</sup> Ibid 360–1.

<sup>122</sup> Ibid 367.

<sup>123</sup> Ibid 368.

Behaviour that does not offend, at least potentially, cannot be offensive. Behaviour, offensive in other circumstances, committed in complete privacy cannot be offensive. It cannot be in the nature of any conduct to be offensive without including in the definition of the conduct the circumstances which render it offensive. Therefore, on one view of it, the offending of a person, actually or potentially, is an integral element of the proscribed conduct.<sup>124</sup>

Following Justice Brennan's approach in *He Kaw Teh* – that an integral circumstance component of the actus reus of an offence attracts the same mens rea presumption as the physical act component (discussed above) – we argue that a charge under sections 4 or 4A should not be regarded as made out unless there is evidence of an intention to do the *whole act* – being the physical act *plus* the integral circumstance. It follows that it is an element of the offences defined by sections 4 and 4A that the accused *knew* – or foresaw that it was possible (that is, was *reckless*) – that the conduct or language was offensive.

This conclusion is supported not only by an application of the integral/attendant circumstance distinction embraced by Brennan J in *He Kaw Teh*, but via reasoning from the 'first principles' approach to identifying the fault element(s) of a statutory offence, including the presumption of mens rea for which *He Kaw Teh* still stands as Australia's leading authority. Thus, the word 'offensive' has been defined in the case law (discussed above) as 'such as is *calculated* to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man.'<sup>125</sup> The word 'calculated' imports the notion of intention.<sup>126</sup> Therefore, we argue that there is a necessary implication that the word 'offensive' connotes mens rea.

We conclude<sup>127</sup> this even though there are a number of other offences contained in part 2 division 1 (in which sections 4 and 4A fall), which expressly provide for a mens rea requirement ('wilfully' being used in sections 5 ('obscene exposure'), 6 ('obstructing traffic'), 7 ('damaging fountains'), and 8(2) ('damaging or desecrating protected places')) while sections 4 and 4A are silent on the question.<sup>128</sup> Furthermore, our conclusion that mens rea is required for the circumstance of 'offensiveness' is not swayed by the availability in sections 4(3) and 4A(2) of a defence of 'reasonable excuse for conducting himself or herself in the manner alleged'. Certainly the presence of a 'reasonable excuse' defence is relevant to the statutory construction exercise, but it is not determinative. As Yeldham J held in *Jeffs v Graham*, the provision of a defence of 'reasonable

<sup>124</sup> Ibid 360.

<sup>125</sup> *Inglis v Fish* [1961] VR 607, 611 (Pape J) (emphasis added). See also Spears, Quilter and Harfield, above n 4, 155.

<sup>126</sup> See also Dennis, above n 13, 4, 8.

<sup>127</sup> Justice Yeldham came to a similar conclusion in *Jeffs v Graham* (1987) 8 NSWLR 292, 295.

<sup>128</sup> The offences contained in ss 6A ('unauthorised entry of vehicle or boat'), 8A ('climbing on or jumping from buildings and other structures'), 9 ('continuation of intoxicated and disorderly behaviour following move on direction'), 11 ('possession of liquor by minors') and 11A ('violent disorder') are also silent as to mens rea.

excuse' is not 'an indication' that the prosecution does not bear the onus of proving mens rea.<sup>129</sup>

While the subject matter, particularly in terms of penalty (which is at the lesser end of the spectrum of criminal penalties), may point towards a rebuttal of the presumption, the final test of the utility of imposing strict liability in our view does not. Both *Pregelj* and *Pfeifer* demonstrate that a strict liability standard would carry a real risk that 'luckless' persons – that is, those 'who unwittingly engage in prohibited conduct'<sup>130</sup> (such as two adults engaged in consensual sexual activity in their home<sup>131</sup> or a young man wearing a t-shirt that was a birthday gift from his mother, carrying the name of a song by one of his favourite bands) could be caught by the offence. As the quote above from Brennan J in *He Kaw Teh* suggests, the utility test goes to the general fairness in the operation of the law: '[t]he requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct.'<sup>132</sup>

Furthermore, the broader context of the potential unfairness that surrounds the operation of offensive conduct and offensive language laws (discussed in Part III of this article) provides additional support for the conclusion that rebuttal of the presumption in favour of mens rea is not justified.

Finally, as to the actus reus element of proximity, we have argued above that it should be regarded as a circumstance *attendant* upon the act; not integral to it.

Justice Brennan held in *He Kaw Teh* that the strong presumption in favour of mens rea for an integral circumstance element is weaker in the case of an attendant circumstance.<sup>133</sup> However, it is still necessary to determine whether the (weaker) presumption should be regarded as rebutted, taking into account the words of the statute, the subject matter, and the utility of imposing strict liability.

Our conclusion is that this aspect of the actus reus – ie the proximity requirement – for the offences defined by sections 4 and 4A involves strict liability. There is nothing in the words or subject matter of the offences that suggest that knowledge is required in relation to this element and the utility of a strict liability reading is evident. It will generally be within the power of an individual to take reasonable steps to determine whether their conduct or language is taking place in or near or within view or hearing of a public place or school. That is, the protective purpose of the legislation is advanced by creating an obligation on individuals to take reasonable care in relation to proximity. Arguably, a potentially 'luckless' accused in relation to this circumstance<sup>134</sup> may be able to utilise the reasonable excuse defence for so conducting himself or herself under sections 4(3) or 4A(2).

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<sup>129</sup> *Jeffs v Graham* (1987) 8 NSWLR 292, 295.

<sup>130</sup> *He Kaw Teh* (1985) 157 CLR 523, 567–8.

<sup>131</sup> And who were not aware they could be seen from outside and who had made an effort to position the rug on which they were lying accordingly.

<sup>132</sup> *He Kaw Teh* (1985) 157 CLR 523, 568 (emphasis added).

<sup>133</sup> *Ibid* 575–6.

<sup>134</sup> For instance, such as in *Pregelj*, where the accused thought they had taken steps not to be seen.

Drawing a different conclusion as to the fault element that attaches to two different circumstance components may be regarded as unusual. However, it would be a mistake to assume that all circumstance elements should be considered as of equal significance to the criminality of the conduct in question. As we argued above, the offensiveness and proximity elements of the offences defined by sections 4 and 4A play different roles in establishing the boundaries of the proscribed conduct. The 'reading in' of two different fault elements in relation to two different circumstance components is clearly contemplated by Justice Brennan's analysis in *He Kaw Teh* and is, in our view, a justifiable and appropriate conclusion in relation to the crimes of offensive conduct and offensive language.<sup>135</sup>

## V CONCLUSION

Granted, the manner in which the offences defined by sections 4 and 4A of the *Summary Offences Act 1988* (NSW) are enforced – CINs and high volume guilty pleas in the Local Court – affords relatively limited opportunities for detailed judicial examination. Nonetheless, we have argued in this article that it is unacceptable that, for two crimes that are enforced more than 12 000 times each year in NSW, frequently in controversial circumstances, it remains unclear what the elements of the crimes are. Clarification would be welcome in a number of quarters. First, students in criminal law courses and practising criminal lawyers would not be left to grapple with the applicability of the opaque discussion of the elements of offensive conduct by the NSW Supreme Court,<sup>136</sup> and to extrapolate from appellate rulings on comparable (but not identical) offences in the Northern Territory<sup>137</sup> and South Australia.<sup>138</sup> Secondly, and more importantly, as recognised recently by the NSW Ombudsman and the NSW Law Reform Commission,<sup>139</sup> police officers who make critical decisions every day about the scope of sections 4 and 4A, and their applicability to behaviour they encounter, would receive much needed guidance. The guidance they currently receive is

<sup>135</sup> Note that the equivalent provision in the Tasmanian *Police Offences Act 1935* has expressly provided for different fault elements in relation to the two circumstances of offensiveness and proximity:

**21 Prohibited behaviour**

A person must not, wilfully and without reasonable excuse, do any act or behave in a manner that a reasonable person is likely to find indecent or offensive in all the circumstances, if that person knew or should have known that his or her conduct was being, or may have been, viewed by another person.

Penalty:

Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months, or both.

Thus, s 21 requires that the accused *wilfully* act in an offensive manner (the offensiveness circumstance) while requiring either that he or she *knew* or *should have known* that the conduct could be viewed (the circumstance of proximity).

<sup>136</sup> *Jeffs v Graham* (1987) 8 NSWLR 292.

<sup>137</sup> *Pregelj* (1987) 88 FLR 346.

<sup>138</sup> *Pfeifer* (1997) 68 SASR 285.

<sup>139</sup> See above Part III.

demonstrably inadequate, producing real risks of over-policing and over-criminalisation. We believe this situation is untenable and ought to be challenged and resolved. Finally, and most importantly, individuals stung by the harshness and possible unfairness of a penalty notice or charge for allegedly breaching sections 4 or 4A would, with the benefit of a clear and comprehensive articulation of the elements of the offence, have the option (not easily exercised, we concede) of contesting the police assertion that their conduct or language was criminal. Everyone who faces the prospect of criminal punishment should be given this opportunity. Even those charged with 'trivial' crimes.