“Dog Arse Cunts”

A Discussion Paper on the Law of Offensive Language and Offensive Manner

“Why don’t you fuck off you dog arse cunts?”

“Cisco” Reid in the presence of Sgt Bob Stutsel
at Anson Street, Bourke 10 February 1990 at 1.15am.
Stutsel v Reid (1990) 20 NSWLR 661 at 662 per Loveday J.

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INTRODUCTION

This paper is written from an Aboriginal Legal Service ("ALS") defence perspective.

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DEFINITION OF "OFFENSIVE"

Common law authority has remained unchanged for a significant period in this area of the law. Whilst the Summary Offences Act (1988) NSW does not offer a definition, the decision of O'Bryan J in *Worcester v Smith* [1951] VLR 316 as affirmed (and expanded upon) in *Ball v McIntyre* (1966) 9 FLR 237 is generally accepted. It is suggested, however, that whilst the law appears well settled there is great scope for uncertainty in the interpretation and application of the judicial pronouncements on the topic.

In *Worcester v Smith* [1951] VLR 316 at 318 O'Bryan J held that "offensive" meant "…such as is calculated to wound the feelings, arouse anger or resentment or disgust in the mind of a reasonable person…".

Kerr J in *Ball v McIntyre (1966) 9 FLR 237* adopted the definition stated by O'Bryan in *Worcester v Smith* and further stated at 241:

> *"It follows from what was said in this case [Anderson v Kynaston [1924] VLR 214] and I agree with and adopt it, that some conduct which is hurtful or blameworthy or improper is not offensive within the meaning of the section. What has to be considered in the particular case is whether the conduct in question, even if in some sense hurtful or blameworthy, or improper, is also offensive within the meaning of the section. It is important, I think, for this point to be made because it is sometimes thought that it is sufficient to constitute offensive behaviour if it can be said that conduct is hurtful, blameworthy or improper, and thus may offend."*
>
> *"Conduct which offends against the standards of good taste or good manners, which is a breach of the rules of courtesy or runs contrary to commonly accepted social rules, may well be ill advised, hurtful, not proper conduct."*
>
> *"People may be offended by such conduct, but it may well not be offensive within the meaning of the section".*

The definition above has been adopted in the cases in NSW including *Spence v Loguch* NSW Supreme Court, 12 November 1991 unreported Sully J, *Conners v Craigie* NSW Supreme Court 5 July 1993 unreported McInerney J, and *Beck v State of New South Wales; Beck v Commissioner of Police New South Wales* [2012] NSWSC 1483.

It should be noted that many of the commentaries prefer to cite *Ball v McIntyre* (1966) 9 FLR 237 in stating the definition of offensive, notwithstanding that the definition has its true origins in *Worcester v Smith* [1951] VLR 316. This is likely due to the more expansive discussion of the definition contained within this authority.

Tactical Use of the Definition – (i) Intention

So what is a defence practitioner to make of this definition? The key issue from the defence perspective is the word "calculated". The word has never been specifically defined in the case law on "offensive". It should be argued that "calculated" means "intended". This imports into the concept of "offensive" the notion of mens rea. Such an argument is generally accepted at the Local Court level. Police have demonstrated a marked reluctance to appeal in recent years. The argument is well sustained by the High Court of Australia decision in *He Kaw Teh* [1985] HCA 43, (1985) 157 CLR 523; 15 A Crim R 203 concerning the presumption of mens rea for statutory offences. This decision is discussed below under the heading "The Mens Rea of Offensive".

The tactical advantage of arguing that "offensive" contains within it an element of intent is obvious. It is harder for the prosecution to prove. Depending on the facts of the case, it is often open to argue that whilst the actus reus of any charge of offensive may have been objectively proved, the actus reus may not have been accompanied by the requisite intention to be offensive. An example might be urinating in a public place with some attempt to conceal that behaviour (e.g. behind a tree). Numerous examples of supposedly "offensive" language may also lend themselves to this argument.

Tactical Use of the Definition – (ii) "Mind the Gap" offered by the definition.

A second tactical issue is utilising the discussion of the definition appearing in *Ball v McIntyre* (1966) 9 FLR 237. As noted in the extract of the judgment above, matters may be characterised as hurtful, blameworthy, improper, impolite, contrary to the standards of good taste or good manners, amount to a breach of the rules of courtesy or contrary to commonly accepted social rules, ill advised, hurtful, not proper conduct AND YET NOT BE LEGALLY OFFENSIVE.

As to whether or not the actus reus alleged will fall into this gap offered by the common law; each case will turn on its own facts.

Tactical Use of the Definition – (iii) "Broadening the gap" – a broader definition of offensive??

A case that may be of particular relevance to ALS practitioners can be found in *Nelson v Mathieson* (2003) 143 A Crim R 148 (see also [2003] VSC 451). In this case "chroming" (i.e. paint inhalation) in a public place by an Aboriginal juvenile was held not to satisfy the definition of "offensive". In considering this issue Nathan J referred to the traditional authority of *Worcester v Smith* (1951) VLR 316 as to the definition of "offensive" and gained assistance as to "contemporary standards" (which is part of the concept of the "reasonable person") for the purposes of determining what was "offensive". Nathan J stated at [14]:

"More recently and pertinently, Harper J in Pell v Council of the Trustees of the National Gallery, considered a blasphemy case depicting the Christ associated with human urine. He had to consider what were the currently recognised standards of propriety. He considered that such a question was one for the tribunal of fact itself as indeed that has been the judicial authority for a century or more. However, he said that that task should be undertaken having regard to society as "multicultural, partly secular and largely tolerant if not permissive". Similarly, in this case concerning offensiveness, prevailing community standards should be assessed."

Further, at [17]:

"...it is still a requirement that the conduct has the effect of wounding the feelings, arousing anger, resentment, disgust or outrage in the mind of the reasonable person who may have or could have viewed, or been the object of that conduct. In my view, the words should be interpreted ejusdem generis. Wounded feelings, anger, resentment, disgust, outrage, all denote, immediate and strong emotions or reactions. A reaction to conduct which is merely indifferent or at its highest anguished, is not the same as being offended. Merely being put out, or affronted by conduct, does not warrant the imposition of a criminal penalty upon the actor. A person may be appalled by conduct and yet his or her own personal feelings not be wounded by it. For example, spitting or urinating in a public place but attempting to conceal may appal the reasonable passer-by, but that person would not expect the perpetrator be visited with a criminal sanction. It could however be offensive if there was no effort to conceal it."

Nathan J in *Nelson v Mathieson* (2003) 143 A Crim R 148 has therefore sought guidance from the earlier decision of the Supreme Court of Victoria in *Pell v The Council of the National Gallery of Victoria* [1998] 2 VR 391 in determining the question of contemporary standards. This case concerned the then Catholic Archbishop of Melbourne, Dr George Pell seeking an injunction against the defendant to prevent the showing of the photograph "Piss Christ" by Andres Serrano, a photo portraying a crucifix immersed in urine. The artist was a Christian and his thoughts on the matter included: "It dawned on me that piss would give a nice yellow" in a published article prior to the exhibition. Dr Pell alleged a breach of the Victorian Summary Offences Act s.17(1)(b) of "exhibiting or display of an indecent or obscene figure", and also the common law misdemeanour of blasphemous libel. Harper J stated at 395:

"The question of whether this photograph is indecent or obscene is, given its religious context, and given that the court must have regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society is not easy…"

"There is no evidence before me of any <u>unrest</u> of any kind following or likely to follow the showing of the photograph in question."

> *"In these circumstances, I am not in a position to say that a breach of the criminal law* would be committed were the work to form part of the Serrano exhibition."

What did Harper J mean by "unrest" in the context of his judgment in *Pell*? It is suggested that in context this judicial utterance alludes to the concept of "civil unrest" or a *"breach of the peace"*.

It is of further interest to note that three of the majority justices in *Coleman v Power* [2004] HCA 39; 220 CLR 1 (Gummow and Hayne JJ at [183] and Kirby J [226] and [255]) dealt with Queensland legislation dealing with "insulting words" infringing the Constitutional freedom of communication on matters of government and politics by "reading down" the legislation as being limited to matters involving an actual or reasonably apprehended imminent "breach of the peace". Further Gleeson CJ, in a dissenting judgment (having determined that the legislation presented no difficulty from a Constitutional law viewpoint) stated at [15] – [16]:

> *[15] "It is impossible to state comprehensively and precisely the circumstances in which the use of defamatory language in a public place will involve such a disturbance of public order, or such an affront to contemporary standards of behaviour, as to constitute the offence of using insulting words to a person. An intention, or likelihood, of provoking violence may be one such circumstance. The deliberate inflicting of serious and public offence or humiliation may be another. Intimidation and bullying may constitute forms of disorder just as serious as the provocation of physical violence. But where there is no threat to the peace, and no victimisation, then the use of personally offensive language in the course of a public statement of opinions on political and governmental issues would not of itself contravene the statute. However, the degree of personal affront involved in the language, and the circumstances, may be significant."*
>
> *[16] "The fact that the person to whom the words in question were used is a police officer may also be relevant, although not necessarily decisive. It may eliminate, for practical purposes, any likelihood of a breach of the peace."*

It is suggested that the common law either may be evolving to the point where the "gap" between merely impolite or improper words or conduct and that which is deserving of criminal sanction is determined by reference to concepts of "breach of the peace" and reasonable apprehension of an imminent breach of the peace. If the common law evolves to that stage (or if it is already there) the advantages to ALS practitioners are obvious. How much harder will it be for police to prove a charge of "offensive"? How much harder will it be to justify related charges of "resist" and "assault police" in terms of police being "in the execution of their duty" – i.e. engaging in a *lawful* arrest based upon a reasonable suspicion that the "offensive" has been committed?

Alqudsi v Commonwealth [2015] HCA 49 at [22]-[23] confirms that an accused may seek to have issues of constitutional invalidity determined on application by the trial courts.

Tactical Use of the Definition – (iv) Cross Examination of Police

Police officers are often very helpful witnesses for the defence in matters of this nature. Police are sometimes just too ashamed to lie under oath and say that they found the actus reus alleged "offensive". They will often state if asked that they did not personally find the actus reus offensive. Young male police officers are particularly adept at falling into this trap. Once such a concession has been obtained, cross-examination should seek to characterise the police officer as one of the "reasonable persons" in the circumstances who was present at the time. In the event that a police officer states that they found the actus reus offensive, cross examination should seek to characterise them as less than reasonable in this view. Cross examining them on their general experience as a police officer will often have the effect of such a position appearing to lack credibility, or alternatively being "thin skinned." Utilise the definition in cross-examination. Often the witness will take a while to catch on – by which time of course it is too late. A hypothetical example of such a cross examination follows:

- "How old are you constable?"
- "How tall are you?"
- "How much do you weigh?"
- "So you would agree that you are a solidly built young man?"
- "How long have you been a police officer?"
- "In your career as a police officer, you have had to attend to all manner of duties?"
- "So when this *16 year old girl…* told you to *"…Kiss my arse…"* did it ***wound*** your feelings?" [add mocking emphasis].
- "Did it hurt you *on the inside?"*
- "Did you suddenly feel a deep sense of anger and outrage involuntarily welling up inside you?"
- "Did it cause you a deep sense of disgust?"

Then steer the evidence into the "gap" offered by the definition:

- "But it certainly wasn't proper conduct?"
- "It was very ill mannered of the defendant?"
- "The [actus reus] was unacceptable in the circumstances?"
- "Contrary to what you would regard as the commonly accepted social standards given the circumstances?"

Then seek to steer the evidence on to even more favourable ground in terms of the "broader definition" – i.e. cross-examine to establish that there was no breach of the peace and no reasonable fear of an imminent breach of the peace.

Be careful to pick your case (and your police officer) for this line of attack. Do not copy the exact questions in this example. Make up your own variation if you wish to retain some element of surprise.

Such evidence from police is relevant and admissible on the question of community standards, the question of whether the hypothetical reasonable person would consider

the matter worthy of criminal sanction, and the likelihood of any breach of the peace occurring. Similarly, the fact that the evidence may go to the ultimate issue for the court to decide is no bar (see Evidence Act 1995 (NSW) s.80). Police prosecutors may seek to "shut down" this line of cross-examination on the basis that it is irrelevant, as the test of whether or not something is offensive is objective. Be aware of the decision of *Connolly v Willis* [1984] 1 NSWLR 373 at 384 where Wood J stated:

> *"While the evidence of bystanders or observers is relevant and admissible, it is not strictly essential to the prosecution because of the objective test posed, although a conviction may be difficult to secure in its absence. It follows that the evidence of Detective Superintendent Burke was relevant and admissible. The fact that he was a police officer went only to the weight of his evidence and not to its admissibility. It follows that the learned Magistrate was in error to exclude this evidence."*

MENS REA OF "OFFENSIVE"

It is suggested that the word "calculated" in the generally accepted definition of "offensive" necessarily imports the requirement of mens rea. Put simply, "calculated" must mean "intended". If not, what possible meaning does "calculated" have for the purposes of the definition?

The decision of the High Court in *He Kaw Teh* (1985) 157 CLR 523; 15 A Crim R 203 concerning the presumption of mens rea for statutory offences is perhaps best summarised in the words of Brennan J at p. 566:

> *"... It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and its subject matter, it is excluded expressly or by necessary implication ... Earlier doubts as to the existence of the presumption or as to its strength ... have now been removed."*

It is suggested that since the decision of the High Court in *He Kaw Teh* (1985) 157 CLR 523; 15 A Crim R 203; there is a need to move forward in conformity with the views of the High Court. Despite this, the NSW courts have yet to give a clear decision in relation to this point. At best, the question has been left open. Authorities from other jurisdictions appear inconsistent.

ALS practitioners should be at the forefront of the argument as to "offensive" containing within it the notion of intent. There is potentially much work to be done in this regard. In the end the argument should always come back to the High Court authority in *He Kaw Teh* (1985) 157 CLR 523; 15 A Crim R 203. Some of the commonly cited authorities from NSW and other jurisdictions are outlined below. ALS practitioners should be familiar with all of them in order to be properly prepared for legal argument on such an issue. Some of these cases may be cited against you. If so, rely upon *He Kaw Teh*.

Mens rea – authorities from NSW

In *Jeffs v Graham* (1987) NSWLR 292, Yeldham J did not find it necessary to determine the question of whether intent to be offensive was an element of offensive, (as opposed to an intention to commit the acts / words constituting the offence) as he determined that the prosecution must "at least" prove beyond reasonable doubt that the conduct engaged in was voluntary.

In *Patterson v Alsleben* NSW Supreme Court 5 June 1990 unrep. Newman J purported to adopt what was said in *Jeffs v Graham* but actually took the issue much further by giving judgment with the effect of closing the question Yeldham J had left open. He stated at p.5:

> *"I find that in order to prove an offence under section 4 of the present Act [i.e., Summary Offences Act 1988 (NSW)] the prosecution must establish, beyond reasonable doubt, that the defendant voluntarily engaged in the conduct, the subject of the complaint."*

In *Conners v Craigie* NSW Supreme Court 5 July 1993 unreported McInerney J takes the view that "the objective test" needs to be applied in considering whether the language is offensive and that the "reasonably tolerant bystander" is an "objective observer" (see p.7). He regards the Magistrate's view that the language was not offensive because it was not directed personally at the people present in the personal sense, but as members of the white race as "irrelevant in such an objective assessment" (see p.8). In taking the "objective" approach, McInerney J, by implication appears to assume that intention to offend is not an element of the offence. Given that intent is by its nature a subjective matter, it would appear that McInerney J has taken the same approach as Newman in *Patterson v Alsleben*.

The later NSW authorities of *Conners v Craigie* (1994) 76 A Crim R 502 (Dunford J) and *Burns v Seagrave* [2000] NSWSC 77 do not deal with the question of intent.

Mens Rea – authorities from other jurisdictions

The authorities from other jurisdictions are in conflict. Some examples follow.

In *Pregelj v Manison (1988) 31 A Crim R 383* the Northern Territory Court of Criminal Appeal held that Offensive Behaviour under the Summary Offences Act (NT) s.47(a) was one where the prosecution were required to prove beyond reasonable doubt that the defendants intended to behave offensively. The facts in that case were that the defendant and a co-accused were having sexual intercourse in the bedroom of a premises at night with the lights on. A laneway ran adjacent to the property. The fence between the laneway and the house was only approximately 1 metre in height. An off-duty police officer, whilst walking down the laneway saw the sexual act in progress. He reported the matter, and the defendants were arrested. The appeal to the NT CCA was upheld as the prosecution had failed to prove intent beyond reasonable doubt. It was held that the Magistrate and Judge at first instance had been in error for failing to consider this issue. Nader J stated at p.399:

> *"I am aware of some cases of offensive behaviour, decided over the years during which the common law doctrine of mens rea had developed and which has recently been so fully expounded in some of the judgments in He Kaw Teh (1985) 157 CLR 523; 15 A Crim R 203 in which cases it has been said that an intention to offend is not an ingredient. However, I am not at all sure that applying, say, the principles expounded by Brennan J in He Kaw Teh, a court would be correct to say today that mens rea does not apply to all the external ingredients of offensive behaviour. Of course, it must be kept in mind that offensive behaviour provisions take a variety of forms, and special considerations may arise from that fact."*

South Australian decisions present a mixed line of authorities as to whether mens rea is an element in proving "offensive" under the relevant provisions in that State.

In *Daire v Stone (1992) 56 SASR 90*, the defendant was charged with "disorderly behaviour" under the Summary Offences Act 1953 (SA) s.7, the same section which creates offences of offensive behaviour and language. The facts alleged that the male defendant followed two young ladies around a retail department store looking at them and "eyeing off" (in the evidence of one of the girls). Legoe J held that mens rea had not been proven and quashed the finding of the Magistrate. In doing so he stated at p.93:

> *"…the prosecution must prove beyond reasonable doubt that there is a conscious and deliberate course of conduct by the accused person which constitutes this interference with the comfort of other people such as to leave the tribunal of fact with no reasonable doubt that the conduct of the accused person was intentionally done to bring about such an interference."*

In *Stone v Ford (1993) 65 A Crim R 459* Bollen J affirmed the principle outlined in *Daire v Stone* (1992) 56 SASR 90. This case involved a charge of offensive behaviour (and is thus more directly on point from a NSW perspective). The facts were similar to those in *Daire v Stone* – i.e. the defendant followed a female through a shopping centre looking at her. Bollen J at p.464 stated:

> *"I would like to hold that the object of s.7 and the mischief at which it is aimed makes conduct contemplated by s.7 an offence because Parliament meant that sort of conduct to be an offence if it was deliberately done even if there was no intention to be offensive. But I do not think that I can in 1993 so hold. Not only are Daire v Stone and Pregelj v Manison each against it but higher authority stands in the way. That higher authority has brought about a change or a change in emphasis in considering the question of mens rea in statutory offences. Perhaps it is not so much a change as a clearer illumination than formerly existed in or into that question. It is, or course, He Kaw Teh (1985) 157 CLR 523; 15 A Crim R 203. I will not say more about his well known case. Indeed, the less a judge at first instance nowadays says about mens rea in statutory offences the better. The law, I think is clear. Suffice to say that He Kaw Teh, fortified by the reasoning of Legoe J and that of the majority of the Court of Criminal Appeal in the Northern Territory, demands, in my opinion, that I uphold the submission offered by Mr Barrett. Mens rea of the type which he mentioned, the intention to be offensive in the sense contemplated by s.7*

must be proved before there can be a conviction for an offence under that section."

In *SA Police v Pfeifer [1997] SASC 6172* Doyle CJ (with whom Debelle and Lander JJ concurred) ruled that it was not necessary to prove an intention to offend for a charge of offensive behaviour. In doing so, he overruled *Daire v Stone* and *Stone v Ford*. The facts in this matter were that Pfeifer walked into the Elizabeth City Shopping Mall. The Magistrate found that at that time there were "2000 to 3000 Christmas shoppers of all ages in the vicinity. He was wearing a T-shirt emblazoned with a printed picture (of the band members) headed "Dead Kennedys – Too Drunk to Fuck". The words "Too Drunk to Fuck" were the title of a song performed by the group. Pfeifer had received the T-shirt as a present from his mother for his 19th birthday.

Doyle CJ stated at [54]-[55]:

"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 consequences 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."

"For those reasons I conclude any presumption that intent or knowledge is an essential element of the offence is rebutted. If it is established that the relevant conduct is offensive in the required sense, a person charged will be convicted if the prosecutor proves that the person did not honestly and reasonably believe that the conduct was not offensive. If the magistrate dismissed the complaint because an intention to offend, or knowledge that the conduct would offend, was not proved, the magistrate erred."

Pfeifer was affirmed in *Police v Atherton* [2010] SASC 87, with the Supreme Court confirming the offence was one of strict liability.

Nelson v Mathieson (2003) 143 A Crim R 148, a Victorian Supreme Court decision, disturbingly determines that intent is not an element (see at [13]). In making this determination Nathan J cites the following authorities: *Proust v Bartlett* (1972) SASR 472 at 480, and *Saunders v Herold* (1991) 105 FLR at 1. One of these authorities pre-dates *He Kaw Teh* (1985) 157 CLR 523; 15 A Crim R 203, whilst the other does not.

Motive

The issue of motive has been regarded as relevant in some of the authorities. It is suggested that the issue of motive is very much a part of the issue of intent.

In *Watson and Williams v Trenerry [1998] NTSC 22* the appellants were charged with Disorderly Conduct under the Summary Offences Act (NT) s.47(a). The facts of the matter were that the appellants participated in a protest outside the Indonesian

Embassy in Darwin to mark the 20th anniversary of the Indonesian occupation of East Timor. Each of the appellants participated in the burning of Indonesian army flags which had been soaked in kerosene. Twenty flags were burnt in this way (one for each year of occupation). The flags were dropped on the roadway at the centre of a circle of protestors as they finished burning. The police were present by pre-arrangement with the protest organisers. The Fire Brigade was present with the pre-arrangement of the police. The Fire Brigade extinguished the pile of burning remnants on being directed to do so by the police. The protestors then cleaned up the mess. Many of the other people present at the protest were, in the words of the Magistrate at first instance "Timorese folk".

Angel J held that motive was a relevant consideration in determining whether the offence was proven. He stated:

> *"...I am of the view that the manifest motive of the appellants in doing what they did is a relevant circumstance. The fact that the flags were objectively seen to be burned in the course of a political protest is, I think, a relevant circumstance. In my view the motive manifested to others by words and deeds is relevant. Motive was held relevant in Ball v McIntyre (1966) 9 FLR 239 at 244-245.*

ARE "FUCK" AND "CUNT" (OR THEIR DERIVATIVES) OFFENSIVE AT PRIMA FACIE?

The superior courts in NSW have not taken a consistent approach in relation to this issue. Worthy discussions of the law in this area can be found in *Police v Shannon Dunn* (1999) 24(5) AltLJ 238 and *Police v Butler* [2003] NSWLC 2 (access Butler through Caselaw NSW website), both decisions of Heilpern LCM. Note that as Local Court decisions they are not binding.

In *McNamara v Freeburn* NSW Supreme Court 5 August 1988 unreported Yeldham J dealt with an appeal from a magistrate. The defendant had been arrested outside Maroubra Seals Club at 3.40am when he said to police: "Get fucked, you cunts, I'm trying to help my mate". The magistrate held that the prosecution had failed to establish a prima facie case. Yeldham J was not convinced that the magistrate had erred in law and dismissed the appeal.

In *Evans v Frances* NSW Supreme Court 10 August 1990 unreported Lusher AJ held that the words uttered by the defendant were prima facie offensive. The language complained of was: "You pricks I want my fucking keys" and "I lost them down the club and those cunts won't let me in". Also "You fucking useless cunt". Lusher stated:

> *"To convert the reasonable man into one who is not so thin skinned as not to be distressed or offended by such language in my submission is not to apply the test of the reasonable man".*

In *Commissioner of Police v Anderson* NSW Supreme Court, Court of Appeal 21 October 1996 unreported a Sergeant of police was charged under Police Departmental Regulations with using offensive language. The terms of the regulations were

substantially similar to those under the Summary Offences Act 1988 (NSW) offence of Offensive Language. The Sergeant was alleged to have shouted at a colleague, saying "Constable, fucking get over here." And "Why aren't these fucking messages on the fucking pad?". This was followed by "I don't fucking care. I want them on the fucking pad and you put them on at this time." And "How many fucking messages are you putting on?" followed by "Well put on three and fucking get someone else to put the others on." Comment was made by Meagher JA (obiter) to the following effect:

> *"There was no evidence that persons in the public area were ever offended, nor that the public area was frequented by gentle old ladies or convent school girls. Bearing in mind that we are living in a post-Chatterly, post-Wolfenden age, taking into account all circumstances, and judging the matter from the point of view of reasonably contemporary standards, I cannot believe that Sergeant Anderson's language was legally "offensive"."*

South Australian decisions on indecent language offer some guidance. In *Romeyko v Samuels* (1972) 2 SASR 529 Bray CJ held at 563:

> *"...in my view it is equally erroneous to hold that the common four letter words are necessarily indecent in every context, and to hold that they can never be indecent at all."*

The facts that the words used may not be intended to have their literal meaning may be relevant. In a decision on indecent language Hogarth J in *Dalton v Bartlett (1972) 3 SASR 549* stated:

> *"The primary purpose of language is to convey a message to others. It seems to me that the decency or otherwise of language used on a particular occasion must depend upon the meaning it conveys, rather than the form of language when divorced from its meaning."*

Dowse v State of New South Wales [2012] NSWCA 337 dealt with the question of offensive language. Basten JA stated at [24]:

> *"...as emphatically stated by Bray CJ in Dalton v Bartlett (1972) 3 SASR 549 at 555, in relation to the related offence of indecent language and in respect of similar words, "whether or not words like these when used in a public place on any particular occasion are indecent is, in one sense, a question of fact to be decided by the application of an evaluatory standard after due consideration of the circumstances and the context". There are many circumstances in which such language will not contravene s 4A, but that is not to say that there are none in which it can."*

Whether the words are used as intensives or expletives to give emphasis may also be relevant. The South Australian decision (concerning indecent language) of *Horton v Rowbottom* (1993) 68 A Crim R 381 offers some guidance in this respect. In that case two police officers attended a private residence. The appellant was arguing with his de facto wife. Police alleged that he used the following words: "… fucking bitch won't let me leave" and "I want to fucking leave". This was followed by "… fuck off Glenda, it has nothing to do with you, you can fuck off". When arrested he said "Fuck

off man". His de facto's sister arrived at a later point in time whereupon the appellant said "… what are you doing here, it's fucking none of your business". Mullighan J at 389 held:

> *"The learned special magistrate decided that the word "fuck", and presumably its derivatives, is necessarily indecent regardless of the context. That is an error of law and whether the words of the appellant, in context, are indecent must be determined on appeal. It is clear that the appellant did not use the alleged indecent words in their primary sense. He was using them as "intensives" or "expletives" and to give emphasis to the message he was seeking to convey. In my view the language of the appellant was certainly coarse and I would expect it to be offensive to, and regarded as indecent by, some sections of the community. However, I do not think that these days it would satisfy any of the tests which are set out in the cases. Such language is now used in ordinary conversation by both men and women in its primary sense, without offending contemporary standards of decency. There was nothing about the context in which the appellant used the language which renders it indecent in the relevant sense."*
>
> *"The appellant used the language to persons well known to him in the context of a family argument and when in a highly emotional state. Apparently, it was language with which all the parties to the conversation were familiar. Having carefully considered all the appellant said, it is not appropriate to regard his language as indecent and this ground of appeal must succeed."*

It is suggested that the better view is that found in *Romeyko v Samuels* (1972) 2 SASR 529. It is tactically wise to argue the "facts" on the "second leg" of *May v O'Sullivan* (1955) 92 CLR 654 (i.e. the court would have a reasonable doubt in finding "offensive" as a fact) rather than the "first leg" (i.e. prima facie). This is so because the resulting favourable judgment represents a finding of fact and is therefore far less able to be made the subject of any successful appeal by police to the Common Law Division of the Supreme Court of NSW.

OFFENSIVE MANNER NOT ESTABLISHED BY OFFENSIVE LANGUAGE ALONE

Summary Offences Act (1988) NSW s.4(1) creates the offence of Offensive Manner. Subsection 2 states that "A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language".

This distinction (between manner and language) was recently considered in *Burns v Seagrave* [2000] NSWSC 77. It is apparent from this decision that whilst language alone is not enough to make out the "manner" element of Offensive Manner, language can be used in the weighting of a defendant's manner to determine whether the manner was offensive within the meaning of the section. The facts in *Burns v Seagrave* were that the defendant attended Kings Cross Police Station to complain about drug dealing in the Kings Cross area. At various stages of the discussion with police he said: "I don't have to give you anything, you fat spiv. You're nothing but a useless fat spiv. I don't have to talk to you, you giraffe". In a further exchange the defendant said: "I'm not speaking to you, you're not my type". His manner was

variously described as irate, angry, aggressive, raising his voice, pointing and waving his hands in the air, upset, agitated, rude and abusive, constantly interjecting, arguing with and insulting police in a loud tone of voice. Interestingly, the majority of these descriptions refer to the use of language. Simpson J held as follows:

> *"The same argument was advanced [as that before the magistrate]; that is that, properly characterised, all that was alleged against the plaintiff was the use of offensive language and that this could not have permitted a finding that he conducted himself in an offensive manner. Despite their researches, neither counsel was able to locate any decision establishing the line between "merely ... using offensive language" and behaving in an offensive manner. The word "merely" is significant. In the prosecution statements to which I have already referred there was quite extensive reference to the manner in which the plaintiff allegedly behaved physically. This included his tone of voice, as well as the words used, and physical gestures that accompanied the alleged language."*
>
> *"Although it is correct that the language allegedly used by the plaintiff was predominantly the behaviour upon which reliance was placed, it is not correct to identify the allegation as entirely confined to the language he used. It was not claimed that his conduct was offensive "merely" because of the language. What was alleged was that the whole of his conduct, including but not limited to language, was offensive. I do not accept that, because of sub s.(2), what was alleged against the plaintiff, when looked at in its totality was incapable of amounting to an offence against sub s.(1)."*

THE REASONABLE PERSON

So just who is the "reasonable person" who may have their feelings wounded, feel outrage, anger or disgust? This can be difficult to ascertain. Suffice to say that the Clapham omnibus has not been sighted in Wilcannia, Bourke or Walgett in recent times.

In *Ball v McIntyre* (1966) 9 FLR 237 Kerr J stated at p.245:

> *"...I recognise that different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that the so-called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions."*

The reasonable person is not thin skinned: *Re Marland (1963) DCR 224* is cited in the Lexisnexis commentary as authority for this proposition, however if you obtain a copy of the case it actually says no such thing. However, the notion that "the reasonable person" is not thin skinned is somewhat obvious in the author's humble view and does not require authority to justify a submission to that effect.

In *Evans v Frances* NSW Supreme Court 10 August 1990 unreported Lusher AJ says of the reasonable person:

> *"A reasonable person is neither a social anarchist, nor a social cynic, whose views of changes in social standards is that they are all in one direction, namely the direction of irresponsible self indulgence, laxity and permissiveness."*

French CJ in *Monis v The Queen* [2013] HCA 4 at [44] said of the reasonable person:

> *"The reasonable person is a constructed proxy for the judge or jury. Like the hypothetical reasonable person who is consulted on questions of apparent bias, the construct is intended to remind the judge or the jury of the need to view the circumstances of allegedly offensive conduct through objective eyes and to put to one side subjective reactions which may be related to specific individual attitudes or sensitivities. That, however, is easier said than done."*

The principle that a reasonable person is "reasonably contemporary" whilst sound in law, raises the prospect that what may be regarded as offensive at one point in time may not be offensive at another point in time. A good case in point can be found in the facts in *Ball v McIntyre* (1966) 9 FLR 237. With attitudes to both the British monarchy and the Vietnam War having changed markedly since the mid 1960s it is quite possible that such behaviour would be the subject of even less comment than that offered by Kerr J in this matter.

Similarly, language can change. The words "bloody" and "bugger" (meaning literally anal intercourse) are now in common usage. Query whether "fuck" is now that that point, or, if so, whether "cunt" can be similarly regarded. The prevalence of these words being used in both the electronic and print media is relevant. What is apparent is that the question of what is "reasonably contemporary" changes with time. In that regard, any precedent from the past is open to challenge on the basis that what was once "offensive" to the "reasonably contemporary" reasonable person at one point in time in the past, may no longer be offensive to the reasonably contemporary person of the present day.

Again, the decision of the Supreme Court of Victoria in *Pell v The Council of the National Gallery of Victoria* [1998] 2 VR 391**,** though not directly on point, assists**.** Harper J stated at 395:

> *"The question of whether this photograph [i.e. "Piss Christ"] is indecent or obscene is, given its religious context, and given that the court must have regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society is not easy…"*

This authority was cited with approval in *Nelson v Mathieson* (2003) 143 A Crim R 148 when consideration was given to notions of "contemporary standards" of the reasonable person for the purposes of "offensive".

It is of interest to note that as "contemporary standards" change with time, it is very much open to argument that precedents containing similar words or scenarios is of no assistance, and the Court is perhaps even in error to consider dated precedent in assessing what is "contemporary".

THE CIRCUMSTANCES SURROUNDING THE ALLEGED OFFENCE

It is clear from the case law that the test of offensive has to be applied in the context of the "surrounding circumstances". This proposition was adopted in *Conners v Craigie* NSW Supreme Court 5 July 1993 unreported. McInerney J held at p.7:

> *"What has to be considered is: what would be the attitude of a reasonably tolerant bystander be in the circumstances?"*

In cases concerning the old offence of Serious Alarm of Affront it was held that hypothetical reasonable person whose reactions are crucial are the reasonable persons who would be likely to be on the street at the time when the offence is allegedly committed. See *Connolly v Willis* [1984] 1 NSWLR 373 at 378. Also *White v Edwards* (1982) Petty Sessions Review 2418.

However, it is not necessary for the prosecution to prove that as part of the surrounding circumstances there were bystanders present at the time of the alleged offence. In *Connolly v Willis* [1984] 1 NSWLR 373 Wood J considered the issue in the context of the old Offences in Public Places Act 1979 (NSW) and the offence of causing Serious Alarm or Affront. He held at 384:

> *"While the evidence of bystanders or observers is relevant and admissible, it is not strictly essential to the prosecution because of the objective test posed, although a conviction may be difficult to secure in the circumstances."*

In *Stutsel v Reid* (1990) 20 NSWLR 661 the Supreme Court considered the issue of evidence of bystanders being required in the context of an Offensive Language matter under the Summary Offences Act 1988 (NSW). The facts in this matter were that Brian John Reid said in the presence of Sergeant Stutsel of Bourke police "Why don't you fuck off you dog arse cunts?". Loveday J held that it was not necessary to establish that there was a person present in the public place at the time the words were alleged to have been spoken (although the fact that there was nobody present was considered material on the question of penalty).

In *State of New South Wales v Beck* [2013] NSWCA 437 her Honour Ward JA stated at [165]-[171]:

> *"[165] In Inglis, Pape J had said that behaviour can be offensive "notwithstanding that no member of the public is present, or (if there be members of the public present) that nobody is offended, provided such behaviour occurred in a place where the presence of members of the public might reasonably have been anticipated; and in circumstances where such behaviour could be seen by any member of the public who happened to be present if he were looking" (at 611.25-30) (my emphasis).*

[166] It is submitted by Mr Neil that this is a reference to an "hypothetical person"; i.e., the hypothetical ordinary reasonable person. I agree.

[167] At [26], his Honour said:

> *On the facts here, (putting aside the contrary evidence of the police sergeants) it is clear that there was no person at all in the vicinity who was capable of seeing what the plaintiff was doing. It follows that, on the plaintiffs account, he had committed no offence. (my emphasis)*

[168] It is submitted by Mr Neil that it is implicit in the above that his Honour found that Mr Beck's version of events was not capable of amounting to an offence because there was no one there present (i.e., no one in Pelican or Oxford Street at the relevant time) who was capable of seeing what Mr Beck was doing and that it was because of this that there was no prima facie case against Mr Beck.

[169] Mr Neil does not suggest that his Honour did not state the correct test as to what was required for a contravention of s 4(1); rather, it is contended that his Honour failed to apply that test.

[170] The conclusion by his Honour, in the way expressed by him, does in my view incorrectly focus on whether there was anyone physically present in the street at the time who could reasonably have been offended at the conduct. As I understand Inglis and Spence, the relevant question would be whether, if there had been an ordinary reasonable person in the street at the relevant time (the hypothetical ordinary reasonable person), that person could have seen and been offended by Mr Beck's conduct. Mr Cleary submits that on Mr Beck's evidence the answer to this would be in the negative, since Mr Beck said that he had concealed his penis while urinating. But whether it was concealed or not the hypothetical ordinary reasonable person could reasonably have been offended by the act of urination in the street. The challenge to his Honour's reasons in this respect is that his Honour misapplied the hypothetical person test. I consider that criticism to be made out.

[171] Although nothing turns in practical terms on this challenge to his Honour's reasons, since the relevant issue is whether the decision of Superintendent Crandell was one that no reasonable decision-maker could have made, applying the Wednesbury test of unreasonableness as understood in the authorities referred to above, in my opinion, this ground is made out.

INTOXICATION

Very often defendants are under the influence of alcohol (or another substance) at the time they are alleged to commit the offence of offensive language or offensive conduct.

Part 11A of the Crimes Act 1900 (NSW) deals with intoxication. The law has changed significantly since this Part was introduced, becoming operative on 16

August 1996. Offensive manner and conduct are not crimes of specific intent, as recklessness is not explicitly excluded from the definition of offensive.

In light of the above, under s.428D evidence of self-induced intoxication cannot be considered in determining the mens rea for offensive. If the intoxication was not self-induced it may be taken into account. Similarly, the "reasonable person" in the definition of "offensive" is a reasonable person who is not intoxicated: see s.428F. It would appear that "reasonable excuse" does not include an assessment of intoxication. Though McInerney J in *Conners v Craigie* NSW Supreme Court 5 July 1993 unreported commented (obiter) that this may be relevant in the assessment of reasonable excuse, this decision pre-dates the operation of Part 11A.

REASONABLE EXCUSE

The cases disclose a number of grounds upon which a defence of reasonable excuse can be established. Both for offensive language and offensive conduct, the statute places the onus on the defendant to establish the issue on the balance of probabilities.

In *Conners v Craigie* (1994) 76 A Crim R 502 Dunford J held at p.507:

> *"In my opinion, reasonable excuse involves both subjective and objective considerations, but these considerations must be related to the immediately prevailing circumstances in which the offensive words etc. are sued, just as in self-defence or provocation the response must be related in some way to the actions of the victim and the particular circumstances against the background of the defendant's antecedents, prior experiences (both recent and less recent), and other related events, there must, in my view, always be something involved in the immediate particular circumstances before there can be reasonable excuse."*

In *Patterson v Alsleben* NSW Supreme Court 5 June 1990 unrep. Newman J it was held that participate in street brawl was prima facie offensive conduct. However, Newman J stated (obiter) at p.10:

> *" "Reasonable excuse" would contain within its bounds matters such as self defence or trying to break up a brawl."*

In *Karpik v Zisis* (1979) 5 Petty Sessions Review 2055 Pike SM discussed reasonable excuse. He stated at p.2057:

> *"The behaviour can occur quite obviously with a reasonable excuse, indeed words, actions could be said or done in circumstances where the person saying or doing the words or actions has a completely proper excuse, as for instance, a trite example, a heavy object falling on one's foot, suddenly being hurt or angered by a sudden outrageous outburst of provocation, this could all be reasonable excuse."*

In *Regina v Bacon [1977] 2 NSWLR 507* a question arose in relation to a matter of trespassing under the old Summary Offences Act 1970 (NSW) as to whether a person

had "reasonable cause" for trespassing. Street CJ found that a bona fide mistake of fact or law, based on reasonable grounds, could amount to "reasonable cause".

Featherstone v Fraser 1983 Petty Sessions Review 2962 Yeldham J concurred with the view taken by Street CJ in *Bacon*, finding as follows at p.2966:

> *"It is plain that the distinction between mistakes of fact or law, so often of importance in claims to recover money paid in civil actions, is of no relevance where a state of mind, based upon reasonable grounds, can constitute "reasonable excuse" or "reasonable cause".*
>
> *"Although it is the latter expression which was dealt with in Bacon's case, nonetheless I see no reason why a bona fide mistake of fact or law, based on reasonable grounds, may not amount to reasonable excuse as well as to reasonable cause."*

THE RIGHT TO PROTEST

The fact that one is engaging in political protest is not, of itself something that satisfies the definition of "offensive" for the purposes of offensive manner. In this regard the remarks of Kerr J in *Ball v McIntyre* (1966) 9 FLR 237 are instructive. The facts in that matter were that a student, in the course of protest against the Vietnam war, hung a placard upon and squatted on the pedestal of a statue erected as a memorial to King George V outside Parliament House Canberra. Written on the placard were the words "I will not fight in Vietnam". The student was charged with offensive behaviour. Kerr J remarked:

> *"People may be offended by such conduct, but it may well not be offensive within the meaning of the section. Some types of political conduct may offend against accepted views or opinions and may be hurtful even to those who hold accepted views or opinions. But such political conduct, even though not thought to be proper conduct by accepted standards, may not be offensive within the section. Conduct showing a refusal to accept commonly held attitudes of respect to institutions or objects held in high esteem by most may not produce offensive behaviour, although in some cases, of course it may.*
>
> *"This charge is not available to ensure punishment of those who differ from the majority. What has to be done in each case is to see whether the conduct is in truth offensive."*

In *Watson and Williams v Trenerry* [1998] NTSC 22 both Angel and Mildren JJ gave lengthy eloquent judgments in support of an implied right at common law to protest.

In *Hubbard v Pitt [1976] 1 QB 142* Lord Denning found a "right to demonstrate" and a "right to protest" (at pp.174, 178 and 179).

In *Mesler v Police* [1967] NZLR 437 McCarthy J also found such a right implied by common law.

Such rights were held not to exist by Zelling J in *Campbell v Samuels* (1980) 23 SASR 389 at 392.

I hope the above has been of some help. If you are a ***criminal defence practitioner*** then I am happy to answer any questions regarding the content of this paper, or briefs that are troubling you. I am best caught on my mobile **0408 277 374**. Please respect the "no fly zone" on my phone in the hour before the commencement of the Court day (I am just about to go into court too!!). Other than that you are fine to ring anytime including outside normal business hours. Alternatively, you may prefer to drop me an email. I will almost always respond within 24 hours. My email address remains:

dark dot menace @ forbeschambers.com.au

Please note that ***I do not provide answers to university assignments*** – stop being such a lazy cunt and harden the fuck up - do your own fucking homework :-b

I have endeavoured to state the law of New South Wales as at 12 March 2023.

Mark Dennis SC
Forbes Chambers

March 2023